Award No. 14625
Docket No. MW-12715

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

(Supplemental)

Nathan Engelstein, Referee

PARTIES TO DISPUTE:

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES

THE DENVER AND RIO GRANDE WESTERN RAILROAD COMPANY

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood that:

(1) The Carrier violated the effective Agreement when it failed and refused to allow the following named Equipment Operators holiday pay for Labor Day, September 5, 1960:

E. M. Ross	G. A. Rich
J. L. Wiswell	F. A. Rich
Boyd Phillips, Jr.	N. F. Roush
J. C. Ramey	T. E. Hill
E. W. Gilbert	H. O. Chappell, Jr.
R. T. Ruckman	J. R. Carlson
R. C. Phillips	D. L. Drake

(2) Each of the above-named claimants be allowed eight hours' straight time pay account of the violation referred to in Part (1) of this claim.

EMPLOYES' STATEMENT OF FACTS: Each of the Claimant employes has established and holds seniority as Equipment Operator in excess of sixty calendar days in accordance with the Agreement rules. Each was regularly assigned as such, working Monday through Friday, with Saturdays and Sundays as designated rest days.

Effective with the close of the work period on Friday, September 2, 1960, each claimant was furloughed in force reduction.

Claimants E. M. Ross, J. L. Wiswell, Boyd Phillips, Jr., and R. T. Ruckman were returned to service on Wednesday, September 7, 1960; Claimants N. F. Roush and J. R. Carlson on Monday, September 12, 1960; and Claimant J. C. Ramey on Tuesday, September 13, 1960.

Except for Claimants J. C. Ramey, E. W. Gilbert, G. A. Rich, H. O. Chappell, Jr., and D. L. Drake, the other claimants (9 in number) received holiday pay for Labor Day, Monday, September 5, 1960, but the Carrier subsequently deducted such pay from said nine claimants' respective pay checks.

The Employes have contended that the Carrier's failure and refusal to allow each claimant eight hours' straight time pay for the September 5, 1960 Labor Day holiday is a violation of the effective Agreement.

The claim was declined.

The Agreement in effect between the two parties to this dispute dated February 1, 1941, together with supplements, amendments and interpretations thereto is by reference made a part of this Statement of Facts.

CARRIER'S STATEMENT OF FACTS: The claimants were regularly assigned equipment operators on Friday, September 2, 1960, on which date their assignments were abolished, and they were furloughed and did not work on Tuesday, September 6, 1960, the day following Labor Day Holiday, September 5, 1960. Claims for holiday pay were denied.

OPINION OF BOARD: On Friday, September 2, 1960, Claimants, who were regularly assigned equipment operators, were furloughed by force reduction and did not work on Tuesday, September 6, 1960, the day following the Labor Day holiday. Each of these Claimants holds seniority for more than 60 calendar days prior to the holiday, and each performed compensated service on 11 or more days during the 30 calendar days immediately preceding the Labor Day holiday.

They claim that Carrier's failure to pay them for the Labor Day holiday, September 5, 1960 is a violation of Sections 1 and 3 of Article II of the August, 1954 Agreement, as amended by Article III of the August, 1960 Agreement. Having satisfied the conditions set forth in the aforesaid Agreement, namely, having performed service for compensation on 11 or more days during the 30 calendar days preceding Labor Day, 1960, and having been available for service on the workday Tuesday, September 6, following the holiday, Claimants maintain they are entitled to compensation for the Labor Day holiday.

Carrier takes the position that on the workday following the holiday Claimants were not regularly or otherwise assigned, but were on furlough. It asserts Section 1 of Article III did not apply to furloughed employes and, therefore, they are not entitled to holiday pay under Section 3. A furloughed employe falls in the category of "other than a regularly-assigned employe" who under Section 3 must meet either of two conditions set forth in Subsections (i) and (ii) of Section 3, in order to receive holiday pay. Because they were not compensated for service on the workday following the holiday, they did not meet the requirement of Subsection (i). Claimants also failed to satisfy the requirements of availability for service under Subsection (ii). Since none of the Claimants had asked for extra or relief work under the rules, and did not lay off of their own accord because they did not have jobs, they could not be available pursuant to the rules of the applicable agreement, which in this instance is Article IV of the 1954 Agreement. Section 2 of Article IV states that furloughed employes desiring to be considered

available for work are to notify the proper officer of Carrier in writing that they will be available to perform extra and relief work. Since none of the Claimants followed this procedure, Carrier concludes they were not available under the rules of the applicable Agreement and they were only subject to be recalled to work in their regular seniority order under the provisions of Rule 7 as revised August 1, 1959.

The record is clear that Claimants were regularly assigned employes who were furloughed on September 2, 1960. They also held seniority for at least 60 calendar days, and performed service on 11 or more days during the 30 calendar days immediately preceding the Labor Day holiday. Therefore, they are classified as "other than regularly assigned employes" designated in Article III, Section 1, which reads:

> "Subject to the qualifying requirements applicable to other than regularly assigned employes contained in Section 3 hereof, [those] who have been employed on hourly or daily rated positions shall receive eight hours' pay at the pro rata hourly rate of the position on which compensation last accrued to him for each of the above-identified holidays if the holiday falls on a work day of the work week as defined in Section 3 hereof, . . ."

The central issue, then, is whether or not these employes were available for service within the meaning of Subsection (ii) of Section 3. "Available" is defined in a "Note" under Subsection (ii) to mean "that an employe is available unless he lays off of his own accord or does not respond to a call, pursuant to the rules of the applicable agreement, for service", but the parties to this dispute sharply disagree as to which are the "rules of the applicable agreement." The facts do not support Carrier's contention that Claimants layed off of their own accord. It has not been stated that Claimants were called for service. Carrier's position is that Claimants made themselves unavailable to be called by not following procedures prescribed by Article IV for workers on furlough.

Although Carrier contends that Article IV is the applicable rule, neither the "Note" nor any other portion of the Holiday Agreement specifies that Article IV is the only rule which is applicable. Article IV, in fact, was optional from the start, and Carrier actually has followed Rule 7 in recalling workers who were on furlough for extra or relief work.

We hold, therefore, that Claimants fulfilled the requirement of availability for service in addition to the other requirements for holiday pay for Labor Day, 1960. The claim is allowed.

FINDINGS: The Third Division of the Adjustment Board, after giving the parties to this dispute due notice of hearing thereon, and upon the whole record and all the evidence, finds and holds:

That the Carrier and the Employes involved in this dispute are respectively Carrier and Employes within the meaning of the Railway Labor Act, as approved June 21, 1934;

That this Division of the Adjustment Board has jurisdiction over the dispute involved herein; and

That the Agreement was violated.

AWARD

Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 29th day of June 1966.

CARRIER MEMBERS' DISSENT TO AWARD 14625,
DOCKET MW-12715 (Referee Engelstein)

In the record the Employes state their position with reference to the availability requirement that must be met by furloughed men under Article III of the Agreement of August 19, 1960, as follows:

> ". . . **The definition of availability doesn't stipulate that they must be available for call;** it simply states they are available unless they fail to respond to a call issued to them pursuant to the rules of the applicable Agreement. . . ."

Award 14625 properly rejects that proposition and recognizes that an employe must make himself available for a call under the applicable rules in order to qualify for holiday pay; but, it sustains the claim on the basis of a ruling that Carrier had treated the procedure set up in Article IV of the Agreement of August 21, 1954 and the procedure set up in MW Agreement Rule 7 as optional procedures, either of which could be followed by a furloughed man in making himself available for a call, and each claimant had thus made himself available under Rule 7. This ruling on optional procedures is consistent with the arguments of the Labor Member in panel, but it is not supported by anything in the record, and we dissent thereto. See Circular No. 1; Section 3, First (i) of the Railway Labor Act; and our numerous awards recognizing that a claimant has the burden of proving every essential element of his claim.

That there are no rules in the controlling Agreement optional to Article IV of the August 21, 1954 Agreement is evident from the last paragraph of Article IV which reads:

> "This rule shall become effective November 1, 1954, except on such Carriers as may elect to preserve existing rules or practices and so notify the authorized employe representative or representatives on or before October 1, 1954."

The Employes do not assert that Carrier notified them of an election to retain any existing rule or practice.

The record in this docket contains nothing to support the conclusion that Carrier ever deviated from a consistent application of Article IV. It contains no evidence that Carrier has treated Rule 7 as providing an optional procedure by which employes could make themselves available for a call; and the finding to the contrary, which is the basis of this sustaining award, is patently wrong.

G. L. Naylor
R. A. DeRossett
H. K. Hagerman
C. H. Manoogian
W. M. Roberts

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