



Award No. 14977

Docket No. CL-15749

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

(Supplemental)

Gene. T. Ritter, Referee

PARTIES TO DISPUTE:

**BROTHERHOOD OF RAILWAY AND STEAMSHIP CLERKS,
FREIGHT HANDLERS, EXPRESS AND STATION EMPLOYEES**

KANSAS CITY TERMINAL RAILWAY COMPANY

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood (GL-5804) that:

(a) Carrier violated the Clerks' Agreement when it failed to properly compensate R. E. Shanklin for work performed on February 22, 1965, a regularly assigned rest day which was also a holiday;

(b) Carrier shall now be required to compensate R. E. Shanklin for eight hours at time and one-half rate in addition to that paid for service performed on February 22, 1965.

EMPLOYEES' STATEMENT OF FACTS: Claimant R. E. Shanklin's regular assignment is that of Coach Yard Yardmaster's Clerk, 4:00 P.M. to 12:00 midnight, with Monday and Tuesday as rest days. Claimant and his position is relieved on his rest days by Relief Clerk F. T. Burkett. On Monday, February 22, 1965, Washington's Birthday, and Tuesday, February 23, 1965, Relief Clerk Burkett was on vacation and Shanklin was assigned to work his rest days on the assignment or position he worked on his work days.

The Carrier paid claimant for one day at rate of time and one-half for working his rest day, February 22, 1965. Shanklin filed time claim for an additional eight hours at time and one-half for working the holiday, as presented to the Carrier by Local Chairman Bob Lynch in letter addressed to Trainmaster J. P. Maher under date of March 25, 1965, copy attached as Employees' Exhibit No. 1.

Trainmaster Maher declined the claim March 26, 1965, and appeal was taken to Manager of Personnel Llewellyn April 2, 1965, resulting in the claim also being denied by Mr. Llewellyn. Correspondence in support is attached as Employees' Exhibits 2, 3 and 4.

Conference was held with Manager of Personnel Llewellyn May 27, 1965, but the claim was not composed. The dispute has been handled timely up to and including the highest Carrier officer designated to pass upon the claim

and the claim denied and is submitted ex parte to the Third Division, National Railroad Adjustment Board, by the Employees for consideration and award under the provisions of the Railway Labor Act, amended.

(Exhibits not reproduced.)

CARRIER'S STATEMENT OF FACTS: Claimant R. E. Shanklin held a regular Yard Clerk assignment with assigned hours 4:00 P. M. to 12:00 Mid-night and with Monday and Tuesday as rest days.

On Monday, February 22, 1965, Washington's Birthday, and Tuesday, February 23, 1965, no relief was available, and Claimant Shanklin worked those two days. For service performed on Monday, February 22, Shanklin was paid 8 hours at time and one-half.

Claimant filed a time claim for an additional day at time and one-half account working on a rest day February 22, 1965, which was also a Legal Holiday.

The claim was denied on the basis that payment allowed was proper under agreement rules.

(Exhibits not reproduced.)

OPINION OF BOARD: Claimant's assignment of Coach Yardmaster's Clerk was Wednesday through Sunday, 4:00 P. M. to 12:00 Midnight, with Monday and Tuesday as rest days. He was relieved on rest days by Relief Clerk Burkett. On Monday, February 22, 1965, Washington's Birthday, and Tuesday, February 23, 1965, Relief Clerk Burkett was on vacation and Claimant was assigned to work his rest days. Carrier paid Claimant for one day at rate of time and one-half for working his rest day, February 22, 1965. Claimant filed time claim for an additional eight hours at time and one-half for working the holiday.

The issue in this dispute has been resolved in Awards 10541 (Sheridan), 10679 (Moore), 14138 (Rohman), 11454 (Miller), 11899 (Hall), 14489 (Wolf), 12453 (Sempliner) and 12471 (Kane), all of which sustain the position of Claimant. As stated in Award 11899 (Hall), "... We are not here to determine whether or not the provisions of this agreement resulted in an inequitable distribution; if there are inequities, that can be corrected by negotiation . . ."

FINDINGS: The Third Division of the Adjustment Board, upon the whole record and all the evidence, finds and holds:

That the parties waived oral hearing;

That the Carrier and the Employees involved in this dispute are respectively Carrier and Employees 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 30th day of November 1966.

DISSENT TO AWARDS 14977 (Docket CL-15749) AND
14978 (Docket CL-15837) (Referee Ritter)

The cavalier treatment given these cases is indicated by the playing of the game of numbers without regard to the rules involved and how they had been applied over the years.

While we consider all the awards cited to be in palpable error, the instant cases were indistinguishable from Award 14240 which in turn distinguished the rules there involved from those involved in awards cited save Award 14489.

The reliance on Award 14489 makes the subject awards all the more confusing. Award 14489 is distinguished from the instant cases for the same reason Award 14240 was therein distinguished, viz.:

"In Award 14240, while we found that the Clerks' Agreement did not contain similar language, the main thrust of the Opinion was based upon the language of Rule 44, particularly the juxtaposition of the phrases 'assigned rest day' and 'specified holidays' combined by the conjunction 'and.'

In the instant case Rule 21 is the equivalent of Rule 44. In Rule 21 there is no reference to work on 'assigned rest day' in conjunction with a holiday. Thus, what was deemed a significant difference in Award 14240 is not present in our case.

Since the agreement before us does not have the distinguishing feature of the agreement in Award 14240, we must follow the established precedents. No other course would honor the principle of stare decisis."

It is also significant that Award 14528 was not cited. This award paralleled Award 14489, but what is interesting about Award 14528 is the Labor Member's answer to the Carrier Members' dissent. The Labor Member said:

"Award 14528, Docket CL-15495 is quite correct.

In asserting in the Dissent that:

'Award 14240 involving the same craft and indistinguishable agreements was a sound award and should have been followed.'

The Dissentor apparently chose to overlook the fact that in Award 14240 the same Referee as here found that the rule there was clearly distinguishable from those involved in the Awards cited in support of the claim.

It is quite clear that what was there found was that the conjunction 'and' coupled rest days and holidays in one rule which distinguished that case from those wherein the rules were separate. In this Award 14528 as in Award 14240 the distinction was correctly made. Furthermore, Award 14489 correctly pointed out the distinction between the many precedent Awards and Award 14240.

Award 14528 is correct in all respects and the dissent does not detract at all from the soundness thereof."

and it is quite obvious therefrom that he did not consider Award 14240 to be wrong!

For these and other reasons, Award 14977 and 14978 are in palpable error and we dissent.

J. R. Mathieu
R. A. DeRossett
C. H. Manoogian
W. M. Roberts
W. B. Jones

**LABOR MEMBER'S ANSWER TO CARRIER MEMBERS' DISSENT
TO AWARDS 14977 (Docket CL-15749) AND 14978 (Docket CL-15837)**

Notwithstanding the fact that it obviously took the Labor Member longer to see the error of Award 14240 than it did the author thereof, or subsequent Referees, Awards 14977 (Docket CL-15749) and 14978 (Docket CL-15837) are quite correct.

It is especially heartening and noteworthy that the advice given in Award 11899 (Hall), "... We are not here to determine whether or not the provisions of this agreement resulted in an inequitable distribution; if there are inequities, that can be corrected by negotiations . . . ," was used to "close out" these Awards because Carriers were well aware of the precedent value of Awards 10541, 10679, 11454 and, upon receipt of Award 11899, considered it evident that, under the doctrine of "stare decisis," like cases would be sustained. Awards 12453, 12471, 14138, 14489 and 14528 were sustained as expected and the Carriers following the advice of Award 11899 and others, requested that:

"Under no circumstances will an employe be allowed more than one time and one-half payment for service performed by him on any day which is a holiday."

and, at the time Awards 14977, 14978, 15000 and 15052 were issued following the precedent Awards the proposed rule change of the Carriers was being considered in negotiations. That, of course, is the proper forum.

That fact of the matter is that the Author of Award 14240 placed entirely too much reliance on the word "and," and ignored not only other rules but the fact that "and" is commonly construed as "or" especially under circumstances as here wherein the pay provisions are not conditioned upon the coincidental happening of a Rest Day and a Holiday falling on the same date but operate independently, i.e., one receives payment of time and one-half for work on his rest day and, one receives payment of time and one-half for working on a holiday whether rest day and holidays coincide or not. (See Award 15000.)

Insofar as not mentioning Awards 14528 and 14240 it is to be noted that the Author of Award 14528 did not mention his earlier Award 14240, or Award 14489, but was well aware that he was "overturning" his earlier decision. That, of course, is understandable, because no one, including a Labor Member, wishes to acknowledge that they were wrong and it is most certainly not a practice here for any Referee to "go out of his way" to prove another Referee wrong.

Awards 14977 and 14978 are quite correct in following not only the sound precedent Awards but in weighing the facts against the controlling Agreement and following what is clearly the weight of authority at this Board and leaving rules changes to be worked out in negotiations.

Neither the dissent nor my answer to the dissent to Award 14528 detract from the soundness of Awards 14977 and 14978.

D. E. Watkins
Labor Member
12-21-66