

Award No. 14978
Docket No. CL-15837

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 EMPLOYES**

KANSAS CITY TERMINAL RAILWAY COMPANY

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood (GL-5827) that:

(a) Carrier violated the Clerks' Agreement when it failed to properly compensate Mail Handlers Wayne Mushaney and Vincent Piranio, Foreman H. O'Daniels and Machine Dispatcher (Coder) H. E. Alexander for work performed on December 25, 1964, a regularly assigned rest day which was also a holiday.

(b) Carrier shall now be required to compensate the employees named in paragraph (a) above for an additional 8 hours at time and one-half rate of their respective positions for December 25, 1964.

EMPLOYEES' STATEMENT OF FACTS: Claimants named above are incumbents of regular positions having Friday as one of their rest days. Early in December of each year employees in the Mail and Baggage Department are notified by posted Bulletin that they may work their rest days until further notice because of the heavy movement of Christmas Mail. Christmas Day in 1964 occurred on Friday and the claimants worked. They were paid 8 hours at time and one-half the rates of their respective positions for performing service on their rest days.

Claims were filed timely with Mail Agent, V. F. Juel, by Local Chairman Lewis D. Graham February 2, 1965, as per attached Employees' Exhibit No. 1. Mr. Juel declined the claim March 16, 1965, as per attached copy of his letter marked Employees' Exhibit No. 2. The decision was appealed to Manager of Personnel, U. B. Llewellyn, April 28, 1965, by General Chairman, C. A. Schutty, copy of appeal letter attached as Employees' Exhibit No. 3. Mr. Llewellyn rendered his decision on the appeal June 9, 1965, declining the claims as per Employees' Exhibit No. 4.

Conferences were held March 12, 1965, with Mr. Juel and June 8, 1965, with Mr. Llewellyn.

A dispute exists which has been handled timely by correspondence and in conference up to and including the highest Carrier officer designated to handle such matters and is submitted ex parte by the Employees to the Third Division, National Railroad Adjustment Board, for determination under the provisions of the Railway Labor Act, amended.

(Exhibits not reproduced.)

CARRIER'S STATEMENT OF FACTS: Wayne Mushaney was employed as a regular assigned Mail Handler with assigned hours 12:01 A. M. to 8:30 A. M. and with Friday and Saturday as his rest days.

On Friday December 25, 1964, one of his assigned rest days Mushaney performed 8-hours' service as a Mail Handler for which he was paid 8 hours at time and one-half.

Vincent Piranio was employed as a regular assigned Mail Handler with assigned hours 12:01 A. M. to 8:30 A. M. and with Thursday and Friday as his rest days.

On Friday, December 25, 1964, one of his assigned rest days, Piranio performed 8 hours' service as a Mail Handler for which he was paid 8 hours at time and one-half.

H. O'Daniels was regularly assigned as a Mail Handler with assigned hours 12:01 A. M. to 8:30 A. M. and with Friday and Saturday as his rest days.

On Friday, December 25, 1964, one of his assigned rest days, O'Daniels performed 8 hours' service as a Mail Foreman for which he was paid 8 hours at time and one-half.

H. E. Alexander was regularly assigned as a Coder with assigned hours 8:00 A. M. to 4:00 P. M. and with Thursday and Friday as his rest days.

On Friday, December 25, 1964, one of his assigned rest days, Alexander performed 8 hours' service as a Coder for which he was paid 8 hours at time and one-half.

On behalf of Claimants, the Clerks' Organization filed time claims for an additional day at time and one-half account working on a rest day, December 25, 1964, which was also a Legal Holiday.

The claims were denied on the basis that payment allowed was proper under agreement rules and past practice.

An Agreement between the Carrier and the employees represented by the Clerks' Organization bearing an effective date of October 1, 1942, reprinted and revised on June 1, 1961, is on file with your Board and by this reference is made a part hereof.

(Exhibits not reproduced.)

OPINION OF BOARD: Claimants are incumbents of regular positions having Friday as one of their rest days. Carrier notified employees in Claimants' department by bulletin posted early in December that they may work on their rest days until further notice because of heavy movement of Christmas

mail. Christmas Day, 1964, occurred on Friday and Claimants worked that day. Claimants were paid 8 hours at time and one-half rate for that day's service. Claimants now claim compensation for an additional 8 hours at the time and one-half rate for working on 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 the 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 Awards 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.

The fact of the matter is that the Author of Award 14240 placed entirely too much reliance on the work "and," and ignored not only other rules but the fact that "and" is commonly construed as "or" especially under circumstances as here where in 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

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