

Award No. 16845
Docket No. CL-17239

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

John H. Dorsey, Referee

PARTIES TO DISPUTE:

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

CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood (GL-6375) that:

(1) The Carrier violated the Rules Agreement, effective January 1, 1961, particularly Rule 45, when work was required by the Carrier on a holiday for which the employee was not compensated in accordance with the agreement.

(2) The Carrier shall be required to compensate Mr. H. E. Kehm for eight (8) hours at the time and one-half rate of Position T-1465 for October 9, 1966, in addition to any other pay to which he is otherwise entitled for that day.

EMPLOYEES' STATEMENT OF FACTS: This violation occurred in the Operating Department at Lincoln, Nebraska, when Claimant H. E. Kehm, occupant of Bill Clerk Position No. T-1465, with rest days Saturday and Sunday, was required to work eight (8) hours on his birthday, Sunday, October 9, 1966, to fill a vacancy on the Bill Clerk Position No. T-1465.

On Sunday, October 9, 1966 a vacancy occurred on Bill Clerk Position No. T-1465, a seven-day position with Saturday and Sunday as rest days. On June 22, 1966 under Notice No. V-36 the position of Relief Clerk No. 29 was advertised for bid. This covered the Bill Clerk Position No. T-1465 Saturday and Sunday assignment, but there were no bidders for the position. As it was necessary that the position be filled seven days per week, and as there were no qualified extra employees available, the Carrier was using Mr. Kehm on his rest days to fill the vacancy, beginning with September 3, 1966 through October 16, 1966. On October 22, 1966 the Saturday and Sunday rest days assigned to Job No. T-1465 became a part of the assignment of Relief Clerk No. 32.

Mr. Kehm was the senior qualified employee on his rest day at the facility on October 9, 1966 and he was notified to work the Bill Clerk Position No. T-1465 on that date. For this service he was compensated under the provisions of Rule

37, i.e., the rate of Bill Clerk Position No. T-1465 with a minimum of eight (8) hours at rate of time and one-half.

Sunday, October 9, 1966, was also Mr. Kehm's birthday for which the Carrier allowed him an additional day's pay at pro rata rate of the position of Bill Clerk T-1465, but disallowed his claim for eight (8) hours' pay at time and one-half rate for the work performed on his birthday holiday, in addition to the other compensation for which he was entitled to on this date.

CARRIER'S STATEMENT OF FACTS: Claimant H. E. Kehm was regularly assigned to Bill Clerk Position T-1465, Lincoln, Nebraska, 4:00 P. M. to 12 Midnight with Saturday and Sunday rest days. The claim date, Sunday, October 9, 1966, was not only his rest day, but also his birthday. However, since there were no other extra or qualified employees available and this position could not be blanked, it was necessary to work Claimant Kehm and he was currently paid eight hours at time and one-half his rate of \$22.25 per day for working his rest day in addition to eight hours at pro rata rate for his birthday-holiday pay, or a total of \$55.63. In addition to this payment of two and one-half days' pay for eight hours' work, the Organization is claiming an additional eight hours at the overtime rate, or another \$33.38 for a total of \$89.01 for eight hours of service.

The Schedule of Rules Agreement between the parties to this dispute effective January 1, 1961, is on file with the Board and by this reference is made a part of this submission.

OPINION OF BOARD: Claimant's regular assignment was 4:00 P. M. to 12:00 Midnight with Saturday and Sunday rest days. On Sunday, October 9, 1966, which was coincidentally his rest day and birthday-holiday, he was required to work. Carrier paid him for 8 hours at the pro rata rate for his birthday-holiday plus 8 hours at time and one-half for working on his birthday-holiday and rest day. The Claim is that Carrier was contractually obligated to pay him, in addition to the 8 hours at pro rata rate: 8 hours at time and one-half for working on his birthday-holiday; and, 8 hours at time and one-half for working on his rest day. The same issue, involving the parties herein and the same Agreements, was decided in favor of the Clerks in our Award No. 15398 (House). The instant issue is whether Award No. 15398 is palpably wrong.

There is no dispute that under the rules of the Schedule Agreement, effective January 1, 1961, Claimant, had he worked his position on a holiday, would have been entitled to 8 hours' pro rata holiday pay, which he would have received had he not worked, plus time and one-half for the hours worked on that day. And, it is not disputed that if Claimant had worked on one of his rest days he, under the Schedule Agreement, would have been paid for 8 hours at the time and one-half rate.

On November 20, 1964, the parties herein were parties to a National Agreement which, *inter alia*, provided:

"ARTICLE VII.

EFFECT OF THIS AGREEMENT

This Agreement is in settlement of the disputes growing out of the provisions of notices served on or about May 31, 1963, by the organiza-

tions signatory hereto on the Carriers listed in Exhibits A, B and C, relating to wages, holidays, vacations and hospital, surgical and medical benefits and group life insurance, and the provisions of notices served by the Carriers on their employes represented by such organizations on or about June 17, 1963, relating to wages and fringe benefits, and shall be construed as a separate agreement by and on behalf of each of said Carriers and its said employees." (Emphasis ours.)

Further, it provides:

"ARTICLE II. HOLIDAYS

Article II of the Agreement of August 21, 1954, as amended by the Agreement of August 19, 1960, insofar as applicable to the employes covered by this Agreement, other than employes represented by the Hotel and Restaurant Employes and Bartenders International Union, is hereby further amended by the addition of the following Section 6:

Section 6. Subject to the qualifying requirements set forth below, effective with the calendar year 1965 each hourly, daily and weekly rated employe shall receive one additional day off with pay, or an additional day's pay, on each such employe's birthday, as hereinafter provided.

(a) For regularly assigned employes, if an employe's birthday falls on a work day of the work week of the individual employe he shall be given the day off with pay, if an employe's birthday falls on other than a work day of the work week of the individual employe, he shall receive eight hours' pay at the pro rata rate of the position to which assigned, in addition to any other pay to which he is otherwise entitled for that day, if any. (Emphasis ours.)

* * * * *

(g) Existing rules and practices thereunder governing whether an employe works on a holiday and the payment for work performed on holidays shall apply on his birthday."

Carrier's attack on Award No. 15398 is addressed to the interpretation and application of these provisions and Rule 36(j) of the Schedule Agreement which reads:

"(j) There shall be no overtime on overtime; neither shall overtime hours paid for, other than hours not in excess of eight paid for at overtime rates on holidays or for changing shifts, be utilized in computing the 40 hours per week, nor shall time paid for in nature of arbitraries or special allowances such as attending court, dead-heading, travel time, etc. be utilized for this purpose, except when such payments apply during assigned working hours in lieu of pay for such hours, or where such time is now included under existing rules in computations leading to overtime." (Emphasis ours.)

Carrier says that the "practices" on the property prior to the November 20, 1964, was to pay an employe who worked on a holiday which also was his rest day 8 hours at pro rata and 8 hours at time and one-half; and, Rule 36(j) was applied as enjoining the pyramiding of overtime pay on the coincidence of a holiday-rest day.

The logic of Award No. 15398 is: (1) Claimant under the Schedule Agreement was entitled to 8 hours' pay at time and one-half for working on his rest day; (2) Rule 45(a) — Holiday Work — of the Schedule Agreement, read in conjunction with Article II 6(a) of the November 20, 1964 Agreement, prescribes that "in addition" Claimant was entitled to 8 hours' holiday pay and 8 hours at time and one-half for working his birthday-holiday; and (3) past practice relative to coincidence of holiday rest day is irrelevant.

The confronting Agreements viewed in the light of their collective bargaining history can be interpreted, reasonably, either to support the logic of Award No. 15398 or the arguments advanced herein by Carrier. Consequently, we cannot find that Award No. 15398 is palpably wrong and must, therefore, honor that Award as binding precedent to fulfill the objective of the Railway Labor Act "to provide for prompt and orderly settlement of all disputes growing out of . . . interpretation or application of agreements covering rates of pay, rules, or working conditions." (Title I, Section 2(5).)

We will sustain the Claim.

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 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 by the Carrier.

AWARD

Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 19th day of December 1968.

**CARRIER MEMBERS' DISSENT TO AWARDS 16845, 16846
(DOCKETS CL-17239, CL-17240) (Referee Dorsey)**

The question involved in this case was correctly decided by this Board in Award 15564 (Lynch) and that award should have been followed here.

We dissent.

G. L. Naylor
R. E. Black
W. B. Jones
P. C. Carter
G. C. White

**LABOR MEMBER'S ANSWER TO CARRIER MEMBERS'
DISSENT TO AWARDS 16845 and 16846
(Dockets CL-17239, CL-17240) (Referee Dorsey)**

The Dissenters contend that the decision in Award 15564 (Lynch), adopted by this Division on May 12, 1967, should have been followed in Awards 16845 and 16846. They ignore the fact that Award 15564 has been overturned on this property on not only one, but two, occasions, i.e.: Award 15800 (Referee House), adopted September 19, 1967 and Award No. 20 of Public Law Board No. 17 (Referee Bailer), adopted March 8, 1968.

Many disputes on the same issue have been decided by all Divisions of this Board, but we are not aware of any award which follows the erroneous decision rendered in Award 15564, either on this property or any other property where the same or similar basic rules were involved, unless it was decided by the author of that award, resting on his own authority.

Awards 16845 and 16846 correctly interpreted the Agreement and properly followed the long line of prior decisions on the issue.

C. E. Kief
Labor Member
1-8-69