Award No. 18953

Docket No. CL-19083

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Gene T. Ritter, Referee

PARTIES TO DISPUTE:

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

WESTERN MARYLAND RAILWAY COMPANY

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood (GL-6905) that:

1. Carrier violated the rules agreement when it failed to compensate Clerk C. E. Beard, for his Birthday-Holiday on August 17, 1968 and for Washington's Birthday on February 22, 1969 and that

2. Clerk C. E. Beard shall now be compensated at the rate of eight hours pay at the straight time rate for the dates of August 17, 1968 and February 22, 1969.

EMPLOYES' STATEMENT OF FACTS: Mr. C. E. Beard at the time of the violation, was a regularly assigned relief clerk in the office of the Superintendent of Transportation at Hagerstown, Maryland with a Monday-Friday work week. In that capacity he filled a daily rated position two (2) days, a monthly rated position two (2) days, and one open day where he was compensated at the rate of the position worked, which could have been either monthly or daily rated.

The claim covers a day's pay for holidays which fell on his rest day.

On the property, the claim for August 17, 1968 was identified as Case H-133 and the claim for February 22, 1969 was identified as Case H-149.

The Employes have attached Exhibits A through D which cover the handling of the claim in Case H-133 from the beginning up to and including the highest designated officer to receive grievances.

Employes' Exhibits E through H cover the handling of the claim in Case H-149 on the property.

The above two (2) grievance cases embodying the same issue, have been combined into one claim before your Honorable Board.

(Exhibits not reproduced.)

CARRIER'S STATEMENT OF FACTS: Mr. C. E. Beard is a regularly assigned relief Clerk in the office of the Superintendent Transportation at Hagerstown, Maryland. Attached as Carrier's Exhibit "A" is a copy of Bulletin No. 28 dated Mary 12, 1968 showing the manner in which the position was advertised. It will be noted that the occupant fills a daily rated position two days a week, a monthly rated position two days, with one open day where he is paid at the rate of the position worked. Normally on that day he works one-half day in the statistical department and one-half day on car record work and is compensated at a daily rate.

Claim is made for a day's pay for August 17, 1968 and February 22, 1969, holidays which occurred on a Saturday rest day of the position.

(Exhibits not reproduced.)

OPINION OF BOARD: Claimant, at the time of the alleged violation, was a regularly assigned Relief Clerk in the office of Superintendent Transportation at Hagerstown, Maryland. Claimant was the occupant of a daily rated position two days a week and was occupant at a monthly rated position two days, with one open day, where he was paid at the rate of the position worked. On this open date, Claimant normally worked one-half day in the Statistical Department and one-half day in the Car Record office and was compensated at a daily rate. Claim is made in this dispute for a day's pay for two holidays which fell on his rest day, Claimant's birthday on August 17 1968 and Washington's Birthday on February 22, 1969. The Organization relies on the holiday Agreement dated August 21, 1954; August 19, 1960; November 20, 1964 and December 28, 1967, which allows hourly and daily rated employes 8 hours pay at the pro rata rate for certain enumerated holidays, including employe's birthday and Washington's Birthday. The Organization further contends that since Claimant was a regularly assigned, daily rated employe, he is covered by the August 21, 1954 Agreement, as amended. Carrier contends that the National Agreement dated December 28, 1967, is not applicable to employes who are monthly rated for the reason that the equivalent of 8 hours for each of the holidays was added to the basic rate, and that Claimant works a relief position for both daily and monthly rated employes, which does not fit into either category (monthly and daily rated). Carrier further maintains that, in the absence of specific language, to include employes who occupy monthly rated positions, this Board is without jurisdiction to provide such language by an award.

It is the opinion of this Board that the Claimant in this instance is qualified for holiday pay both under Sections 1 and 6(e) under the Clerks' National Holiday Agreement of August 21, 1954, as amended by National Agreements of August 19, 1960, November 20, 1964 and December 28, 1967. For this Board to deny this Claimant his rights under the National Holiday Agreement because part of his tour of duty is performed as a monthly rated employe, would be dealing the employe an injustice. To allow this Claimant the full rights under Section 1 of the Holiday Agreement, even though he performs a substantial portion of his duties as a monthly rated employe, would be dealing an injustice to the Carrier. Therefore, it is the opinion of this Board that the computation of this claim should be prorated in accordance with the time Claimant performs his duties as a monthly rated employe and the time he performs his duties as a daily rated employe. Under the facts disclosed in this case, Claimant performs his duties as a daily rated employe on 3 of the 5 working days of the week. Therefore, this Claimant is entitled to 3/5th of the holiday pay claimed in this dispute. 3/5th of 8hours equals

4.8 hours. This award will be sustained in the amount of 4.8 hours for Claimant's birthday holiday on August 17, 1968 and in the amount of 4.8 hours for Washington's Birthday on February 22, 1969, or the total amount of 9.6 hours.

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.

AWARD

Claim sustained in the amount of 9.6 hours.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: E. A. Killeen
Executive Secretary

Dated at Chicago, Illinois, this 14th day of January 1972.

LABOR MEMBER'S DISSENT TO AWARD 18953 (DOCKET CL-19083) (Referee Ritter)

The Majority in Award 18953 (Docket CL-19083) has adopted an Award sustaining a claim in the total amount of 9.6 hours to compensate Clerk C. E. Beard for his Birthday-Holiday on August 17, 1968, and for Washington's Birthday on February 22, 1969. The Majority, consisting of Referee Gene T. Ritter and Carrier Members R. E. Black (the Mover of the Award), P. C. Carter, C. M. Crawford, G. L. Naylor and W. J. Swartz, has committed palpable error and has exceeded its authority under the Railway Labor Act, the Rules and Procedures of the Third Division, Circular No. 1 of the National Railroad Adjustment Board, and all well-defined principles of adjudicative grievance arbitration, in adopting an Award **for which there is absolutely no foundation in the controlling Agreement** -- the Non-Ops Holiday Pay Agreement. Under the clear and precise language of the agreements involved, and the uncontested facts of record, the Claimant involved in Award 18953 is entitled to be paid eight (8) hours' Holiday pay for each of the two (2) Holidays involved. To pay him less is to cheat him out of the benefits of an Agreement negotiated on his behalf. There is no basis in the Holiday Agreement, or the working agreement, upon which an Award can be made that would pay him only three-fifths of a day's pay for each of the Holidays involved.

The FINDINGS in Award 18953 clearly and emphatically state:

"That the Agreement was violated."

If this is correct, and the record clearly establishes that the FINDINGS are correct, then this Board has the obligation to sustain the Claim as presented. This it did not do. In view of the serious error committed, careful analysis of the Opinion of Board is required.

The second sentence of the OPINION reads:

> "Claimant was the occupant of a daily rated position two days a week and was occupant at (sic) a monthly rated position two days, with one open day, where he was paid at the rate of the position worked."

From the way the above sentence is constructed, the normal inference drawn is that the open day is the only day that Claimant Beard is paid at the rate of the position worked. The facts of the case are that all five (5) days of Claimant's bulletined relief assignment are paid at the rate of the position worked, and all five (5) days are paid on a daily-rated basis. On the two (2) days per week that Claimant Beard relieves the occupant of a monthly-rated position he is paid on a daily-rated basis as provided under the provisions of Rule 47 of the working Agreement. The Carrier stated in their rebuttal submission that:

> "His pay for those days is pro rated by dividing the monthly rate by 174 to determine an hourly rate and multiplying the hourly rate by eight (Rule 47 of the working agreement)."

This sentence alone supports the fact that Claimant Beard is a daily-rated employe on the two (2) days per week he relieved the occupant of a monthly-rated position. This statement alone, made by the Carrier, is sufficient to require sustaining the claim in full.

Another sentence of the OPINION that is not entirely correct is:

> "Carrier contends that the National Agreement dated December 28, 1967, is not applicable to employes who are monthly rated for the reason that the equivalent of 8 hours for each of the holidays was added to the basic rate, and that Claimant works a relief position for both daily and monthly rated employes, which does not fit into either category (monthly and daily rated)."

With respect to the first part of the sentence, Carrier never contended that the National Holiday Agreement dated December 8, 1967 was inapplicable to monthly-rated employes, but only that Section 1 was inapplicable. Nowhere in Carrier's submission is it stated that the National Holiday Agreement dated December 28, 1967 is not applicable to employes who are monthly-rated.

The next sentence that is in error reads:

> "It is the opinion of this Board that the Claimant in this instance is qualified for holiday pay both under Sections 1 and 6(e) under the Clerks' National Holiday Agreement of August 21, 1954, as amended by National Agreements of August 19, 1960, November 20, 1964 and December 28, 1967."

This sentence illustrates a gross lack of understanding of the construction of the Holiday Pay Agreement. Section 1 contains provisions for quali-

fication for Holiday pay. **Section 6(e) does not.** For instance, the very first phrase of Section 1 provides: "Subject to the qualifying requirements contained in Section 3." Section 1 obviously deals with hourly- and daily-rated employes. Specific qualifications are set forth for their Holiday pay entitlement. Section 2 deals with monthly-rated employes. Not one word of qualification is contained in Section 2. Section 6 deals with qualifying requirements for the Birthday-Holiday of hourly-, daily- and weekly-rated employes. Section 6(e) deals with monthly-rated employes, but like Section 2, is unqualified. The above-quoted sentence from the OPINION is in error because Section 6(e) does not establish qualifications for Holiday pay for monthly-rated employes. However, the sentence does state that Claimant Beard was qualified for Holiday pay under Section 1. If he was qualified for Holiday pay under Section 1, then he should be paid 8 hours' (not 4.8 hours) holiday pay for the Section 1 Holiday involved — Washington's Birthday, February 22, 1969.

The following sentence provides:

> "For this Board to deny this Claimant his rights under the National Holiday Agreement because part of his tour of duty is performed as a monthly rated employe, would be dealing the employe an injustice."

It is true that to deny Holiday pay to Claimant would be dealing him an injustice. The defect, though, is the consideration that a part of his tour of duty is performed as a monthly-rated employe. This is incorrect. A part of Claimant's tour of duty is performed relieving monthly-rated employes **for which he is properly paid on a daily-rated basis under the Rules.**

The next sentence, likewise, is defective:

> "To allow this Claimant the full rights under Section 1 of the Holiday Agreement, even though he performs a substantial portion of his duties as a monthly rated employe, would be dealing an injustice to the Carrier."

The obvious question is: Why would denial of **"full rights"** to Claimant do an injustice to the Carrier? This Board does not establish the value of "full rights." The negotiators of the Agreement have this function; they are the ones that deal in equities. Inasmuch as we found an agreement violation, we must grant "full rights" to the Claimant. It is well established that this Board cannot indulge in establishing equities or imposing its ideas concerning the value of equities in a given agreement.

Were we permitted to deal in equities in the instant dispute the matter would be the same, as the Carrier cannot prove that Claimant received one cent of Holiday pay on the days that he relieved monthly-rated employes. Below, it will be shown mathematically that on the two (2) days per week Claimant relieved monthly-rated employes **not one cent of Holiday Agreement** Sections 3 or 6(e) **compensation adjustments is included in his daily rate.**

Section 1 of the amended National Holiday Agreement provides that daily-rated employes shall receive Holiday pay equalling eight (8) hours' pay at pro rata rates for each Holiday specified therein. Section 2 of the amended National Holiday Agreement provides that monthly-rated employes shall have an amount equal to one-twelfth of the annual equivalent of their

total yearly Holiday pay added to their monthly rates so as to include the equivalent of Holiday pay within their basic monthly rate. This difference between Section 1 and Section 2 establishing Holiday pay creates two distinct methods of payment. For instance, if a Holiday occurs on the work day of a daily-rated employe, he is entitled to receive the day off and he is paid eight (8) hours' pro rata Holiday pay for that day. When the Holiday occurs on the work day of a monthly-rated employe, he is entitled to receive the day off, but his monthly rate remains the same inasmuch as Holiday pay has, by the language of the Agreement, been included in his monthly rate. Additionally, when a Holiday occurs on a rest day of a daily-rated employe, he receives an additional eight (8) hours' pay for that Holiday. In such workweeks, the daily-rated employe is entitled to receive forty-eight (48) hours' straight time pay. On the other hand, if a Holiday occurs on the rest day of a monthly-rated employe, no additional compensation is allowed inasmuch as sufficient hours representing the annual Holiday pay are, by the language of the Agreement, already reflected in such employe's monthly rate. Here, we are confronted with a case where the Carrier argues that the employe is both monthly rated and daily-rated. The Carrier overlooks the fact that an employe relieving a monthly-rated employe, one, two, or even five days in a workweek, does not, by and of itself, make such an employe a monthly-rated employe when the specific rules of the working Agreement clearly provide otherwise. **In other words, you cannot deem a relief employe to be monthly-rated employe merely because he is relieving a monthly-rated employe, if in the final analysis he is, by the language of the rules agreement, paid on an hourly or daily basis.**

In the instant case, one need only look at the schedule agreement to determine how Claimant was normally paid on the two days per week, Tuesdays and Wednesdays, that he relieved a monthly-rated employe. Claimant Beard was paid as a daily-rated employe under the provisions of Rule 47 reading:

> "(a) To determine the straight time hourly rate, divide the monthly rate by 174. To determine the daily rate multiply the straight time hourly rate by eight. (See Appendix No. 4).
>
> (b) Nothing in this agreement shall be construed to permit the reduction of working days for regularly assigned employes below five per week, except this number may be reduced in a week in which one of the holidays specified in Appendix No. 3 occurs within the five days constituting the work week, to the extent of such holiday."

Under the provisions of Rule 47, to determine Beard's daily rate, the monthly rate of $607.63 is divided by 174 hours to establish the hourly factor of 3.49. This hourly factor of 3.49 is multipled by eight resulting in a daily rate of $27.93. **This daily rate does not include any Holiday pay whatsoever.** Mathematically, it cannot, because the monthly rate is being divided by the number of hours comprehended in the monthly rate. The number of hours comprehended in the monthly rate includes the number of hours added to the monthly rate by the provisions of the August 21, 1954 National Agreement to reflect the amount of Holiday pay granted by that Agreement to monthly-rated employes. For instance, by the terms and provisions of the August 21, 1954 National Agreement, the number of hours comprehended in existing monthly-rated 5-day positions were increased from 169⅓ to 174; thus, the inclusion of Holiday pay hours in monthly rates. Therefore, if the dividing factor used to determine what Beard would normally be paid on the two days

per week that he relieved a monthly-rated employe was 169⅓, the result would be different. On each of the days that he worked relieving monthly-rated employes he would be receiving a fraction of his Holiday pay. For instance, dividing Beard's monthly rate by 169⅓ would produce a daily rate of $28.70. The difference between $28.70 and $27.93 is 77¢. If the hourly factor used was 169⅓, **and I emphasize it was not, it was 174,** then each day that Beard worked relieving a monthly-rated position he would be receiving 77¢ toward his Holiday pay. He was not receiving this 77¢ because the factor used to determine his pay on Tuesdays and Wednesdays was, in accordance with Rule 47, 174 hours.

From the foregoing, it is abundantly clear that for pay purposes Claimant Beard was a daily-rated employe on the two (2) days per week he relieved monthly-rated employes, and he did not receive one penny of Holiday pay on either of those two days. Therefore, the claim should have been sustained in full.

The Majority in Award 18953 has clearly exceeded its authority and the Award is palpably in error.

A vigorous Dissent is required.

J. C. Fletcher
J. C. Fletcher, Labor Member
February 8, 1972

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