NATIONAL RAILROAD ADJUSTMENT BOARD

Award Number 21007
THIRD DIVISION Docket Number CL-21126

Frederick R. Blackwell, Referee

PARTIES TO DISPUTE: (Brotherhood of Railway, Airline 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-7836) that:

1. The Carrier violated the provisions of the Agreement between the parties when it failed and refused to pay Claimant, A. F. Wilcox, in accordance with Rules of the Agreement and the National Agreement of August 21, 1954, for the holiday of February 18, 1974.

2. The Carrier shall now be required to pay Claimant, in addition to allowances heretofore made on such holiday, the difference between such allowance and the rate of the position to which assigned and actually worked on the holiday.

OPINION OF BOARD: The Claimant, a regularly assigned Mail Handler, worked for one day, Washington's Birthday, in the higher rated position of dispatcher. For this service he was paid one day at time and one-half at the Dispatcher's rate and one day pro rata at the rate of his regular assignment, Mail Handler. The pro rata pay is in issue.

The Employes contend that the one day pro rata pay should have been at the Dispatcher's rate instead of the Mail Handler's rate, on the ground that such pay should be at the rate of the position to which the Claimant was assigned on the holiday. The Carrier contends that the one day pro rata pay was properly paid at the rate of the Mail Handler's position, on the ground that such pay should be at the position to which Claimant was regularly assigned, Both of these basic positions center on Section l(a) of the National Holiday Agreement which provides that:

> "Holiday pay for regularly assigned employes shall be at the pro rata rats of the position to which assigned." (Comparable text in Rule 43(cl) of the Parties' Agreement.)

The Employes assert that the term in the above text stating "the position to which assigned" refers to the position to which assigned on the holiday. The Carrier's view is that the term refers to the regularly assigned position, which in this case is the position of Mail Handler.

In support of their basic position the Employes assert: (1) that the Carrier has interpreted and applied the Agreement in the manner and by the payment method urged herein by the Employes for eighteen years prior to 1972; (2) that the Claimant was "assigned" on the holiday to the higher rated position under the provisions of the Bulletin and Assignment Rule (Rule 6) currently in effect; and (3) that the claim is supported by Third Division Awards No. 15328 (1967), and Award No. 36, SBA 174 (1969). The Carrier's defensive arguments are: (1) that prior payments, if any, which accord with the method urged by the Employes were in error and hence would not establish a precedent; (2) that the Claimant's temporary move-up to a higher rated position for one day cannot be construed to mean the same as bidding and being assigned to vacancies in accordance with bulletin and assignment rules; and (3) that denial of the claim is supported by Second Division Awards Nos. 2169 (1956), 2350 (1956), and 2437 (1957).

The Employes' first contention was in effect denied by the Carrier's assertion of error respecting prior payments, if any, of the kind claimed here. In the face of this denial the Employes offered no evidence to support their contention and it is therefore concluded that the Employes' first contention is not supported by the record.

In discussing whether the one day move-up was or not pursuant to the Bulletin and Assignment Rule, the parties' Submissions refer to Rule 6 of the Agreement and the "guaranteed Extra Board Agreement of January 31, 1967." The pertinent portions of the Rule and Agreement now follow.

"RULE 6 - BULLETINS

(a) Except as provided in paragraph (d) of this Rule 6, new positions created or vacancies occurring will be promptly bulletined in agreed upon places accessible to all employes affected for a period of five (5) days in all seniority departments, per sample forms, bulletin to show location, title, brief description of duties, assigned hours of service, rest days and rate of pay. Employes desiring such positions will file their applications with the designated official within that time and an assignment will be made within five (5) days thereafter; the name of the successful applicant will immediately thereafter be posted for a period of five (5) days where the position was bulletined. Except as specifically provided in Rules 13, 14 and 16, nothing in this Agreement shall be construed as permitting senior employes to displace regularly assigned employes.

. . . . . .

All short vacancies occurring in the Mail and Baggage Department positions other than Mail and Baggage Handlers will be bulletined and posted each day at least 15 minutes prior to the starting time of the shift where it occurs. bulletin to show name of incumbent. and title of position." (underline added)

Guaranteed Extra Board Agreement. Section L(i) and Section 2(b)

"Section 1
(i) In filling short vacancies the employe assigned shall take all the conditions of the relieved position as to starting time, meal period and work assignment.

"Section 2
(b) Mail and Baggage Handlers in the regular force may not exercise seniority to short vacancies occurring in the regular force of Mail and Baggage Handlers having fixed and relief assignments. However, the incumbents may exercise seniority rights to short vacancies on a daily basis occurring in all higher rated positions and positions of Railroad Mail Handler. Mail and Baggage Handlers promoting to short vacancies in higher rated positions and Railroad Mail Handler short vacancies shall retain their own rest days and shall exercise their seniority to such short vacancies daily at least 15 minutes before the starting time of the shift on which the short vacancy occurs."

The Employes assert that the position involved in the Dispatcher vacancy was bulletined and posted on the holiday, and that the Claimant bid on and was assigned to such position in accord with the underlined text of Rule 6. However, the Carrier submits that such text was added to Rule 6 on July 2, 1970 for the sole purpose of establishing a written record of an employe exercising seniority to a higher rated position for one day; and that, since both the amendment to Rule 6 and Section 2 of the Guaranteed Extra Board Agreement would accomplish the same purpose, the Rule 6 amendment has nothing to do with bidding and being assigned. The Employes' position on this facet of the dispute is supported by the record. Nothing in the text of the Rule 6 amendment suggests that its purpose is limited to recordkeeping. It plainly and unambiguously requires that certain short vacancies shall be "bulletined and posted each day at least 15 minutes prior to the starting time" of the vacancy. Obviously, the text concerns the subject of bulletins, bids, and assignment and it is therefore concluded that the Claimant was assigned to the one-day Dispatcher vacancy through the exercise of his seniority under the

bulletin and bid procedure provided by Rule 6. The fact that the same result or purpose could be achieved under the Extra Board Agreement does not alter this conclusion because that fact, at most, merely demonstrates that the taking of the position for one day could have occurred by the concurrent effect of both Rule 6 and the Extra Board Agreement. Also, there is nothing in the latter Agreement which makes it paramount to Rule 6.

The Authorities cited by the parties dealt with disputes concerning a regularly assigned employe who filled a vacancy for longer than one day, including a holiday, as contrasted with the herein one-day situation. However, the authorities make it clear that a Claimant's status on the day of the holiday is the determining factor in a dispute of this kind and there is thus no significance in the length of an employe's service in a vacancy. It is also clear that the cited authorities have reached opposite conclusions on the same issues and that the Employes' authorities support the claim while the Carrier's authorities support the denial of the claim, except for Second Division Award No. 2437 which is not germane because the Claimant in that Award worked his regular assignment. The Opinion in Third Division Award No. 15329 is as follows:

> "Claimant was a regularly assigned employe and as of the holidays involved he had been, in accordance with agreement rules, filling vacancy on a higher rated position. By way of paid holiday payments under Article II, Section 1 of August 21, 1954 National Agreement for the holidays involved Carrier paid Claimant at the rate of his regular position. The claim here is for the difference in rates, it being claimed that Claimant was to be paid at the rate of the position he was filling as of those holidays.
>
> Having been assigned? in accordance wiih agreement rules, to fill vacancy on higher rated position Section 1 of Article II fixes the rate of the paid holiday payment, viz, the 'rate of the position to which assigned.' The Claim is meritorious and will be sustained."

In ruling that holiday pay was payable at the rate of the position to which an employe was assigned on the day the holiday fell, Award No. 36 SBA No. 174 stated that-

> "the Holiday Rule uses the words 'assigned' and not 'regularly' assigned."

and that-

> "Claimant was not performing the work of his regularly assigned position and also some work of a higher rated position each day as in Second Division Award 2350. He was no longer filling his own regular assigned position

> on the day the holiday fell; and he was 'assigned' the Cashier position that day within the meaning of Article II,, Section 1 of the Holiday Agreement.
>
> "Second. The purpose of the Holiday Rule is to make the employe whole for loss of earnings in weeks during which holidays fall; and this purpose is not served by paying Claimant the rate of his regular assigned position which he was not working on the holiday (SBA No. 239 Award 1)."

In Second Division Award 2169, the Opinion denied a claim similar to the herein claim with the following explanation:

> "The Board /Emergency Board No. 106/ concludes that whenever one of the seven enumerated holidays should fall on a workday of the workweek of a regularly assigned hourly rated employe, he should receive the pro rata rate of his position in order that his usual take home pay would be maintained, and so recommended. It was on the basis of this recommendation that Section 1 of Article II of the August 21, 1954, Agreement was based. We think the language used, both in the Board's recommendation and in the agreement of the parties adopted pursuant thereto, was intended and does clearly apply to the employe who is regularly assigned to and on a position and not to the position or job itself. Consequently an employe who is only temporarily filling such regular position would not be eligible to receive the benefits thereof. We find the claim should be denied."

A like finding was made in Second Division Award 2350 with the following statement:

> "The record shows that claimant performed some passenger repair work each day and was paid the higher rate of that class of work. If claimant was improperly assigned it may constitute a violation of the agreement that may be corrected in accordance with agreement provisions. But so Long as claimant is assigned as a car inspector, his holiday pay is eight hours at the pro rata rate of his assigned position, In other words, the holiday pay rate is fixed by the agreement of August 21, 1954."

In examining the foregoing authorities it is apparent that Award 36, SBA 174, considered but declined to follow Second Division Award 2350. More important, it is also apparent that a clear ruling on the herein issue was made by Third Division Award 15329, as well as that this Award is the most recent of the cited authorities on such issue. Further, Award 15329 cannot be said to be

in palpable error and thus the conflict between the Third and Second Division authorities will be resolved by treating Third Division Award 15329 as a prior precedent for the instant case, which also arises on the Third Division. Consequently, based on such Third Division Award, and upon the previously noted finding that the Claimant took the Dispatcher vacancy under Rule 6 of the Agreement, the claim will be sustained.

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.

A W A R D

Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: N. W. Pauley
Executive Secretary

Dated at Chicago, Illinois, this 31st day of March 1976.