Award No. 8859
Docket No. TE-8407

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Norris C. Bakke, Referee

PARTIES TO DISPUTE:

THE ORDER OF RAILROAD TELEGRAPHERS

THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY

STATEMENT OF CLAIM: Claim of the General Committee of The Order of Railroad Telegraphers on the New York, New Haven and Hartford Railroad Company, that

1. The Carrier shall pay V. M. Nuggent eight hours at the time and one-half rate for the holiday, December 25, 1954.

2. The Carrier shall pay J. T. Gunther for eight hours at the time and one-half rate for the holiday, January 1, 1955.

EMPLOYES' STATEMENT OF FACTS: Claim No. 1 in behalf of V. M. Nugent.

This employe was assigned to work as follows:

Saturday 7:55 A. M. to 3:55 P. M.
Sunday 7:55 A. M. to 3:55 P.M.
Monday 3:55 P. M. to 11:55 P. M.
Tuesday 3:55 P. M. to 11:55 P. M.
Wednesday 11:55 P. M. to 7:55 A. M.
Thursday—Rest day
Friday—Rest day

The positions occupied by claimant were seven day positions.

Although the claimant was ready for service on December 25, the Carrier refused to use him on that day.

The positions occupied by claimant were regularly filled seven days each week.

Claim No. 2 in behalf of J. T. Gunther.

(c) The rule itself contemplates that there will be employes "not used" at all, or used "less than eight (8) hours."

Nothing in the above rule, or in any other rule of the schedule, requires that a regularly assigned telegrapher actually work on a holiday. The only guarantee is of compensation. In the two instances submitted payment as required has been made.

The national agreement of August 21, 1954 extended holiday pay to non-operating employes generally. There is nothing contained therein compelling the performance of work or coverage of assignments on holidays. The avowed purpose of the organizations in serving their proposals and progressing the case was entirely different. It was to protect the earnings of employes in holiday weeks. This was confirmed by the Emergency Board which recommended the holiday rule, now Article II of the August 21, 1954 contract: ". . . to maintain normal take-home pay in a week in which a holiday occurred.

The organizations have gone further. As stated in Award 312:

> "Discouragement and restriction of Sunday and holiday work by employes who work regularly on other days is a recognized and accepted item of public policy. **It is an avowed policy of organized labor.**" (Emphasis supplied.)

The Telegraphers and other non-operating brotherhoods have followed that policy. In the proposals that culminated in the August 21, 1954 agreement they proposed that pay for those employes required to work on a holiday be at double the straight time rate, in addition to straight time for the holiday as such, a total of triple time. Employes' President, Mr. G. E. Leighty, testified in support of this proposal that it was designed as a penalty for requiring such work and with the expectation that it would result in the elimination of much work on holidays which had been required of employes under the then existing rules. (Record, pp. 134, 135, 148.)

At the insistence of the brotherhoods work on holidays is generally paid at the premium rate. The purpose is identical with overtime rates geinerally, that is to minimize the amount that will be required by imposing a penalty if it is required. A familiar example in the legislative field is the Fair Labor Standards Act.

The language of the rule relied on does not either expressly or by implication require that any assignment be worked on a holiday. Affirmatively it recognizes that service may be omitted in whole or in part, imposing in such circumstances only an obligation to pay regularly assigned employes. Even were there ambiguity, of which Carrier perceives none, the established purpose of the non-operating unions to discourage holiday work is persuasive that any doubt should be resolved against an interpretation requiring holiday work.

The claim should be denied.

All data contained herein have been presented to petitioners.

OPINION OF BOARD: The facts in this case are not in dispute. Claimants occupy seven day positions, described in Article 3 infra as "necessary to be regularly represented for eight hours a day, seven days a week * * *".

They qualified for the holiday pay provided by the August 21, 1954 Agreement and were paid a pro rata day's pay accordingly, but they were not allowed to work on the holidays mentioned in the claims and were not paid in lieu of working.

Therefore the issue here is "Does the payment of a day's pay at pro rata rate under the provisions of Article II August 21, 1954 National Agreement, preclude payment of the additional compensation called for in Article 3?"

Article 3 reads as follows:

"ARTICLE 3 GUARANTEE

"Regular assigned employes shall receive one day's pay within each twenty-four (24) hours, according to location occupied or to which entitled, if ready for service and not used, or if required on duty less than eight (8) hours as per location, except on assigned rest days on positions which it is necessary to be regularly represented for eight hours a day, seven days a week, or on rest days and holidays on other positions.

"This rule shall not apply in cases of reduction in forces nor where traffic is interrupted or suspended by conditions not within the control of the carrier."

The carrier sought below to bring itself within the exception set out in the last paragraph, but here, apparently it abandoned that as a defense and is embracing our recent Award 8539 as being controlling in this dispute.

It will be noted that Award 8539 adopted Awards 22 and 51 of the New York Central Board of Adjustment No. 137. Award No. 51 is the later in point of time and we repeat here the quote therefrom as appears in Award 8539:

" 'The Holiday Rule was to secure holidays without work for the employes but to pay time and one-half when they were required to work the holiday. The Holiday Rule did not change any of the other rules in the agreement, and employes on positions blanked on holidays are only rightfully entitled to straight time pay on such occasions.' "

Here it will be noted "The Holiday rule did not change any of the other rules of the agreement" followed by the assumption that presumes to decide the very issue there and here, with no attempted explanation of the obvious non-sequitor.

Article II referred to supra reads as follows:

"ARTICLE II — HOLIDAYS

"**Section 1.** Effective May 1, 1954, each regularly assigned hourly and daily rated employe shall receive eight hours' pay at the pro rata hourly rate of the position to which assigned for each of the following enumerated holidays when such holiday falls on a workday of the workweek of the individual employe:

New Year's Day
Washington's Birthday
Decoration Day
Fourth of July
Labor Day
Thanksgiving Day
Christmas

"**Note:** This rule does not disturb agreements or practices now in effect under which any other day is substituted or observed in place of any of the above-enumerated holidays."

This rule says nothing about changing Article III supra in any way.

Both sides concede Rule III deals with compensation, and not work, and since it has not been changed in any way and, the fact, that under it the carrier has to pay a premium under it, does not per se, render it nugatory. We just do not believe it was the intention of the parties to strike from Article 3, the Guarantee rule, the words "except on assigned rest days on positions which it is necessary to be regularly represented for eight hours a day, seven days a week, or on rest days and holidays on other positions". If it was the intention, there must be more proof of it than we have in this docket.

We believe claimants have made out their case and both claims should be sustained, the Carrier violated the Agreement in denying payment.

FINDINGS: The Third Division of the Adjustment Board, after giving the parties to this dispute due notice of hearing thereon, and upon the whole record and all the evidence, finds and holds:

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 Carrier violated the agreement.

AWARD

Claims sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: A. Ivan Tummon
Executive Secretary

Dated at Chicago, Illinois, this 25th day of June, 1959.

DISSENT TO AWARD NO. 8859, DOCKET NO. TE-8407

Award 8859 is in serious error. It is based upon the majority's confused and inexplicable conception that Article 3 provides for payment of "additional compensation" or "premium" pay whereas that Rule, in clear and unambiguous language, simply provides:

"Regularly assigned employes shall receive one day's pay within each twenty-four (24) hours, * * *"

Accordingly, instead of as stated by the majority herein, the simple and elementary question at issue in this case was:

"Does the payment of one day's pay under the provisions of Article II of the August 21, 1954 National Agreement, fulfill the requirements of Article 3?"

A proper statement of the question at issue supplies its own answer; each claimant's admittedly having been paid one day's pay under Article II, supra, for the respective holidays involved herein, the requirements of Article 3 for payment of one day's pay within each twenty-four hours thereof obviously were fulfilled and the claim should have been denied in its entirety.

Three precedent Awards involving identical issues and comparable rules as herein were cited as requiring a denial award in the instant case, viz., Awards 22 and 51 of Special Board of Adjustment No. 137 and Third Division Award 8539.

In Award 22, supra, the Board held:

"Carrier was within its rights in blanking the position and paying the claimant 8 hours pay account not required to work on their regularly assigned day, and paid claimant 8 hours at straight time pro rata rate."

Award 51, supra, followed Award 22, and Third Division Award 8539 held, in part, as follows:

"These decisions are in point and considered dispositive of the issue. We, therefore, find and hold under the facts of record here presented that incumbents of 7-day positions not required to perform work on holidays are entitled to payment of eight hours at the pro rata rate. The claim must, therefore, be denied."

No precedent contrary thereto was or could be cited.

The majority also was confused concerning the involvement of rest days in this dispute.

For the foregoing reasons, among others, we dissent.

/s/ W. H. Castle

/s/ J. F. Mullen

/s/ R. M. Butler

/s/ C. P. Dugan

/s/ J. E. Kemp