Award No. 9117
Docket No. TE-8296

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Thomas C. Begley, Referee

PARTIES TO DISPUTE:

THE ORDER OF RAILROAD TELEGRAPHERS

CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY

STATEMENT OF CLAIM: Claim of the General Committee of The Order of Railroad Telegraphers on the Chicago, Burlington and Quincy Railroad that:

1. The Carrier violated the agreement between the parties when it failed and refused to allow T. J. Littrell eight hours' pay at pro rata hourly rate of the position to which assigned at Geneva, Nebraska, for each of the following enumerated holidays:

May 31, 1954 (Decoration Day)

July 5, 1954 (Fourth of July)

November 25, 1954 (Thanksgiving Day)

2. The Carrier shall compensate Mr. Littrell for each of these days, in compliance with Article II of the Agreement dated August 21, 1954.

EMPLOYES' STATEMENT OF FACTS: This claim, as may be noted, involves instances where the Carrier has failed and refused to properly compensate an extra employe who was "regularly assigned" to a position during periods when holidays occurred. The dispute directly involves an agreement between the parties entered into at Chicago, Illinois, August 21, 1954. The agreement, among other things, contains the following:

"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

The Carrier affirmatively asserts that all data herein and herewith submitted has previously been submitted to the employes.

* * * * *

(Exhibits not reproduced.)

OPINION OF BOARD: Prior to April 21, 1954, the claimant was regularly assigned to and was the permanent incumbent of the position of agent at St. Mary's, Nebraska. On April 21, 1954, this position was abolished. The claimant at that time had a right to exercise his seniority to displace one of the five junior employes in the district or go to the extra list. He exercised his right by choosing the extra list for the express purpose of working the position of agent operator at Geneva, Nebraska. The regularly assigned agent operator at Geneva, Nebraska was H. B. Hadsell, who was on leave of absence for the purpose of serving the Telegraphers' Committee as its General Secretary and Treasurer.

From the facts disclosed in the submission and briefs, it is apparent that the claimant exercised his right to the extra list for the express purpose of working the temporary vacancy of agent operator at Geneva, Nebraska knowing that it would be vacant for a considerable length of time. The Employes rely upon Award 2173 of the Second Division and Award 8108 of the Third Division. The claimant in the docket that resulted in Award 2173 was working a temporary vacancy on the position of the regularly assigned welder due to his sickness. The claimant worked this temporary vacancy for a period of seven months. He claimed pay for the holiday of Labor Day. The Carrier failed to bulletin the position as a temporary vacancy under Rule 17. The Board found that under the circumstances in that docket that the claimant was a regularly assigned employe within the intent and meaning of Sec. 1 of Article II of the August 21, 1954 Agreement and therefore eligible to receive the payment for the Labor Day holiday.

The facts that resulted in Award 8108 were essentially the same as those involved in Second Division Award 2173. The claimant, an Extra Telegrapher, held a temporary vacancy for a period of five months. The Carrier had failed to bulletin this temporary vacancy under Article 15(c) and for this reason the claim was sustained, the Board following the reasoning outlined in Award 2173.

In the claim before this Board, the claimant was an extra employe who held a temporary vacancy for a period of ten months, a longer period than the claimants held in the claims that resulted in Awards 2173 and 8108, therefore the Employes state that his claim should be allowed. However, the claims that resulted in Awards 2173 and 8108 were not allowed because the claimants had worked a temporary assignment for a period of five months and seven months but because the Carrier had failed to follow the bulletin rule of their agreements we do not have that contention made by the Employes in this docket. The employes in this docket claim the claimant should be paid for the holidays of Decoration Day, Fourth of July and Thanksgiving Day because he worked the temporary vacancy for ten months and by virtue of Rule 23(j) which states that "an Extra Employe will receive the same rate of pay as the employe he relieves." Rule 23(j) does not give to an extra employe the benefits of holiday pay as Article II, Sec. 1, of the August 21, 1954 Agreement states that holiday pay shall be received by a regularly assigned hourly and daily rated employe. This claimant was not a regularly assigned employe but was an extra employe filling a temporary vacancy for a period of ten

months therefore he was not entitled to holiday pay under Article II, Sec. 1, of the August 21, 1954 Agreement nor under Rule 23(j) of the applicable agreement.

Rule 34 of the applicable agreement refers to the notification to employes without delay if their claims are denied. This claimant was not denied his claims for holiday pay. He was paid in error, under the retroactive provision of the August 21, 1954 Agreement; as a regularly assigned employe which he was not, for Decoration Day and the Fourth of July. He was paid in error by the Carrier for the Thanksgiving Day holiday. There is no rule in this applicable agreement, as there is in some agreements, denying the Carrier the right to deduct the payments made to the claimant in error for the holidays.

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 Employe involved in this dispute are respectively carrier and employe 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 Carrier did not violate the Agreement.

AWARD

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 11th day of December, 1959.

DISSENT TO AWARD 9117, DOCKET TE-8296

This Award is in error in at least two important respects.

First, it rejects Second Division Award 2173 and Third Division Award 8108 as precedents for a sustaining award. In those two cases a "furloughed" and "extra" employe, respectively, held temporary vacancies in regular assignments for a considerable period of time, and their claims for the holiday pay provided for "regular assigned" employes by the August 21, 1954 Agreement were sustained on findings that they were "regularly assigned" for the purposes of that rule. In both cases note was taken of the fact that the carriers had not bulletined the temporary vacancies as prescribed by the parties' schedule agreements. Nothing is said of the significance of such fact or how it could affect the holiday pay provisions of the national agreement.

The only difference here is that the schedule agreement does not require the bulletining of temporary vacancies.

The Referee seized upon this difference as a reason for denying the present claim, holding that the reason for sustaining awards in the earlier cases was the fact that the carriers had not complied with a wholly unrelated schedule provision that temporary vacancies be bulletined. In other words, our present Referee would have us believe that Referees Wenke and Guthrie punished the carriers there involved for not complying with a schedule rule by ordering them to pay the claimants holiday pay.

Obviously no referee of the experience of Judge Wenke and Dr. Guthrie would think of such an illogical act, much less attempt to so punish a carrier for an offense which was not a part of, nor related to the claim. We think Referee Begley seriously erred when he said that the earlier claims were sustained, "not . . . because the claimants had worked a temporary assignment for a period of five months and seven months but because the Carrier had failed to follow the bulletin rule of their agreements . . .". We think the claims were sustained solely because the claimants' occupancy of the positions for such long periods of time made them "regular assigned" employes within the meaning of the holiday rule. The claimant in our present case occupied his position for at least ten months—probably longer—and had never worked "extra" a single day during the entire period. His claim should have been sustained for this reason alone.

Second, the Referee's decision in favor of the Carrier on the question of recovering money previously paid an employe is nothing short of capricious.

The Carrier paid this employe for the three holidays involved, the first two sometime after the August 21, 1954 Agreement was signed, and the other, Thanksgiving Day, in the regular manner for the pay period including that holiday. Then, three or four months later, it deducted from the wages earned by claimant during the month of February, 1955, the sum of $48.21—three days' pay—contending, when asked a reason for the deduction, that payment for the three holidays had been made in error.

Quite aside from the intent of Rule 34, this action of the Carrier was improper. And the Referee's action of permitting the impropriety to stand is a challenge to free men and their right to be secure in person and property that cannot go unchallenged.

In effect the Carrier reached into the pocket of this employe and took the wages he had earned for three days of work. Its avowed purpose was to reimburse itself for a "mistake" it contended it had made several months earlier. What would have happened to this employe if he had taken the Carrier's money from its cash drawer to reimburse himself for a "mistake" he had made some time in the past? Or what would happen to anyone who takes another's money on such a contention?

The fundamental law of our great nation guarantees everyone, even the most humble citizen, even a station agent, that he shall not be deprived of property without due process of law. But apparently that grand charter of freedom was forgotten by this great railroad in its eagerness to retrieve $48.21 from one of its faithful employes without first determining whether a "mistake" had in fact been made.

When a man is thus forced to give up his honestly earned wages, he is in my opinion being robbed, not of money merely, but of the dignity that goes with a man's ability to earn a livelihood for himself and his family. Such action by a railroad is reprehensible in my sight, and an award which

supports such an act is even worse. I shall resist all such efforts with all the honorable means at my command, for as long as I have the privilege of representing this nation's station, tower and telegraph employes.

For these reasons I believe Award 9117 to be erroneous, and I heartily dissent from its findings.

J. W. Whitehouse,

Labor Member.