Award No. 10679
Docket No. TE-9752

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

(Supplemental)

Preston J. Moore, Referee

PARTIES TO DISPUTE:

THE ORDER OF RAILROAD TELEGRAPHERS

THE INDIANAPOLIS UNION RAILWAY COMPANY

STATEMENT OF CLAIM: Claim of the General Committee of The Order of Railroad Telegraphers on the Indianapolis Union Railway that:

1. Carrier violated the agreement between the parties when it failed to properly compensate W. W. Sehr for work performed on a holiday, Wednesday, Decoration Day, May 30, 1956.

2. Carrier shall now compensate W. W. Sehr for 8 hours at the time and one-half rate in addition to the amount already received.

EMPLOYES' STATEMENT OF FACTS: The agreements between the parties are available to your Board and by this reference are made a part hereof.

At the time cause for this claim arose, Claimant W. W. Sehr was regularly assigned to the first trick Telephone Operator-Switchtender position at Cincinnati Junction. The assigned rest days of the position were Wednesdays and Thursdays of each week. On Wednesday, May 30, 1956, (Decoration Day) no relief employe or extra employe was available, Claimant Sehr was required to work his regular position on this holiday. He was paid eight hours at time and one-half under the provisions of Rule 11, Section 1, paragraph (m) for service on rest days. The Carrier failed and refused to pay him eight hours at the time and one-half rate under Rule 11, Section 2, for work performed on a holiday.

Claim was filed and handled in the usual manner up to and including the highest designated officer of the Carrier and has been denied.

POSITION OF EMPLOYES: It is the position of the Employes that the Carrier has failed to properly compensate the claimant for an additional eight hours at the time and one-half rate for work performed on the holiday, Wednesday May 30, 1956, in accordance with Rule 11, Section 2, of the agreement. This Rule is quoted below for easy reference.

under Rule 11 (m) and time and one-half for work done on a Holiday, under Rule 11, Section 2 — Holidays.

The Carrier allowed Mr. Sehr eight (8) hours at time and one-half, account of having worked his rest day. He worked only the period of eight (8) hours — one day — and was paid for the same at overtime rate. Apparently now the Organization would ignore Rule V of the Schedule, which plainly provides **"There shall be no overtime on overtime"**, and seek to have this man paid two days — overtime on overtime — for one day's work. This the Carrier holds to be in error, representing an unrealistic and absurd interpretation of contract provisions, which have previously caused no trouble in administering same.

The attention of the Board is called to the fact that, so far as the Carrier has knowledge, there has been only one similar claim progressed to the Third Division up to this time, a good indication that the Organizations, as well as the Carriers, have understood the application of the rule specifying that "there shall be no overtime on overtime."

It would appear that the practice in effect during the more than seven years since the inauguration of the 40-Hour Work Week, and to which no exception has been taken on the property up to now, would indicate that the Carrier and Organization were in complete agreement as to the interpretation and application of the rule specifying "there shall be no overtime on overtime."

Rule V, which bans "overtime on overtime", is a direct outgrowth of the revision of the Schedule in conformance with the so-called 40-Hour Work Week Agreement with the Non-Operating Employes, dated March 19, 1949.

The fourth paragraph of Rule V — OVERTIME — states specifically "there shall be no overtime on overtime". This provision, the Carrier feels, was included in the 40-Hour Work Week Agreement to avoid payment of just such claims as here and now before the Third Division.

Rule V — OVERTIME — contains language quoted directly from the 40-Hour Work Week Agreement. This provision clearly and unmistakenly intends that in the instant case the claimant is not entitled to eight (8) hours at overtime rate of pay under Rule 11 — HOLIDAY WORK — in addition to allowance already made of eight (8) hours at punitive rate, under Rule 11 (m) — Service on Rest Days.

The Carrier repeats that as previously set out, the claim is not now properly before the Board and further contends that the claimant has been fully and properly compensated for all service performed and therefore requests that the Board deny the claim as presented in its entirety.

(Exhibits not reproduced.)

OPINION OF BOARD: The Claimant is the regular occupant of a seven day position with assigned rest days of Wednesday and Thursday of each week. On Wednesday, May 30, 1956, Claimant was required to perform eight hours service within the hours of his regular week day assignment. Wednesday, May 30, was Memorial Day, a recognized holiday under the agreement. Claimant was paid for eight hours at time and one-half rate.

Petitioner contends that Claimant is entitled to compensation under Rule 11, Sections 1 and 2.

Rule 11, Section 1 (V) provides as follows:

"Service rendered by an employee on his assigned rest day or rest days filling an assignment which is required to be worked or paid eight (8) hours on such day will be paid for at the overtime rates with a minimum of eight (8) hours."

Rule 11, Section 2 provides:

"Time worked within the hours of the regular week day assignment on the following holidays: namely, New Year's Day, Washington's Birthday, Decoration Day, Fourth of July, Labor Day, Thanksgiving Day and Christmas, (provided when any of the above holidays fall on Sunday, the day observed by the State, Nation or by proclamation shall be considered the holiday) shall be paid on the following basis:

"On Seven Day Positions

"At the rate of time and one-half with a minimum of eight (8) hours."

The Carrier contends that the instant case was not filed within 60 days as required by Article V, (a), of the August 21, 1954 Agreement. They contend further violation of the rule by filing with the highest officer on the property instead of filing it with the Trainmaster, and that for these reasons is not properly before the Board.

In the panel hearing Carrier Member by brief and argument contends that Article V, Section 1 (c) was violated when Petitioner failed to institute proper proceedings before this Board. Carrier contends that Carrier's highest officer decision was rendered July 30, 1956.

We agree that this question may be raised at this time. (See Award 9189, Weston.) Therein it was stated that the Carrier may raise this jurisdictional point at any stage in the proceedings. Therein also the time limit objection was not raised on the property or in the record. Consequently, we must consider this issue.

On July 17, the General Chairman wrote a letter of inquiry to C. L. Golay, Trainmaster. On July 23, he filed a claim with McGrath, as Trainmaster and another claim to McGrath, as Superintendent. McGrath on July 30, 1956, in response to all three letters responded and denied the claim on the basis that under Article I of Section II Claimant did not qualify.

This is not the Rule in question as pointed out by the General Chairman in his letter dated August 22, 1956. A conference was duly held on the proper issues and on October 3, 1956, Mr. McGrath denied the claim and properly set out the reasons therefor. Consequently, it is the opinion of the Board that the Nine Months did not start to run until October 3, 1956. Therefore, the instant case was filed in time since it was filed on June 11, 1957.

Now let us apply ourselves to the other contentions of the Carrier that it was not presented to the Trainmaster as it should have been and that it was not presented within 60 days.

On July 23, the General Chairman filed a claim with Mr. L. F. McGrath, Trainmaster and another with L. F. McGrath, Superintendent. Mr. McGrath responded as Superintendent and denied the claim.

We are of the opinion that it was filed in time. McGrath was the highest officer and did not deny the claim because it was not presented to the proper party. It was denied on its merits and consequently can be distinguished from Awards (9684 — Elkouri and 10548 — Daly) which were both denied because of failure to file with proper party.

Also there is nothing in the record to show that McGrath was not Trainmaster on July 23, 1956.

Consequently, we are of the opinion that, if it was not filed with the proper parties, that Carrier is estopped from pleading improper parties at this time.

This now allows us to consider the merits of the case.

Petitioner cites award 10541, Sheridan which is on all fours with the instant case.

We are firmly committed to the doctrine of "stare decsis". The Board is not prepared to allege palpable error in the above award.

For the foregoing reasons there has been a violation of the Agreement.

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 the Agreement was violated.

AWARD

Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 18th day of July 1962.

CARRIER MEMBERS' DISSENT TO AWARD 10679, DOCKET TE-9752

This decision has no more validity than the Award upon which it was predicated, namely, **Award 10541,** and the dissent filed by the minority in that case is herewith incorporated by reference as a portion of the dissent to this Award.

In addition to their lamentable errors as shown in our previous dissent, the majority strained and twisted the present contract to reach their conclusion that the time limit period did not start to run until October 3, 1956. This is clearly evident from the decision itself without examining the record. It is stated in the decision that Superintendent McGrath, the highest officer designated to handle disputes on this property "denied the claim on the basis that under Article I of Section II, Claimant did not qualify" to receive holiday pay. This denial was made on July 30, 1956. The claim was filed with the Board on June 11, 1957 and would have clearly exceeded the nine-month period. However, the majority says further "this is not the Rule in question . . ." as pointed out by the General Chairman in a subsequent letter and "A conference was duly held on the **proper issues and on October 3, 1956, Mr. McGrath denied the claim and properly set out the reasons therefor.**" (Emphasis supplied)

Here the majority purports to tell the parties to the contract the claim must not only be denied and with reasons, but in order for the time limit rules to run, such reasons must be proper. Now, who is going to determine when a reason is a proper one? Will the Organization be permitted to sit back with impunity and ignore the time limit rules when they feel a claim has not been denied with the proper reasons? There is absolutely nothing in the August 21, 1954 Agreement which holds the reason must be proper, or valid or sound in order to start the time limit rule running. In fact, we have recognized the time limit rule was running even in the case where **no reason was given** or an alleged improper reason was given. In **Award 9615,** Referee Rose, we said:

> "Article V of the August 21, 1954 Agreement does not prescribe the words or language which must be used to give notice of the disallowance of a claim."

In the dissent filed by the Labor Member to that decision, he conceded this was a fact. In **Award 10416,** Referee Sheridan, we said:

> "* * * There is no specific requirement in Article 22 [Article V, 1954 Agreement] setting forth the nature of the language or expressions that one may utilize in denying a claim."

Our function at this Board is to resolve controversy, not breed it. We have no right to insert words into a rule by interpretation. Here the majority attempts to foist upon the Carrier the obligation of giving a "proper" reason when the parties themselves never agreed upon such language. They did not agree because they were keenly aware that it would be next to impossible to set up a formula to determine when and if a reason was proper. The majority however, not being faced with the task of administering the contract, feels safe and secure in adding new and impossible conditions to it.

The majority's conclusion is made even more absurd when it is noted the Carrier's decision **was responsive** to the claim submitted, which the

majority failed to tell us was amended **after** the Superintendent's decision. The claim submitted on July 23, was on account of a rest day violation. The claim submitted on September 15 was on account of a holiday violation. The reader can best judge this for himself by a review of the letters referred to by the majority plus the Superintendent's denial. The first letter of July 17 was addressed to Trainmaster Golay, and reads:

"I understand that Operator Wm Sehr was used on Memorial Day, which also was one of his rest days, and was paid at the time and one half rate for this service.

"Will you kindly advise under what rule he was paid?"

The second letter of July 23 was addressed to Trainmaster McGrath, and reads:

"Below is claim Favor of W. W. Sehr for Wednesday May 30, 1956.

1: Claim of The General Committee on The Indianapolis Union Railway, that the Carrier violated the agreement, when on Wednesday May 31, 1956 it instructed regularly assigned Telephone Operator (whose work week was Friday thru Tuesday) to work on the Holiday (Decoration day) which was also his regular assigned Rest day on Wednesday May 31 1956 and for this service paid him 8 hours at the time and one half rate.

2: That said W. W. Sehr shall be paid an additional eight hours at the time and one half rate as a result of this violative act of the Carrier.

Will you kindly advise when I may discuss this case with you."

The third letter of July 23 was addressed to **Superintendent** McGrath (the first amendment of the claim), and reads:

"Below is claim in favor of W. W. Sehr for Wednesday May 30, 1956.

Claim of The General Committee on The Indianapolis Union Railway Co that The Carrier Violated the Agreement between the Parties when:

"1: On Wednesday May 30, 1956, it instructed regularly assigned Telephone Operator., W. W. Sehr, (Whose work week was Friday thru Tuesday, with two consecutive rest days of Wednesday and Thursday) to work on the Holiday (Decoration-Day) which was also his regularly assigned rest day, and for this service paid him eight (8) hours at the time and one-half rate.

2: That Said W. W. Sehr shall be paid an additional eight (8) hours at the time and one-half rate because it was the employees rest day.

Will you kindly advise when I may discuss this case with you."

The Carrier's reply to these letters which the majority holds improper, reads:

* * *

"Mr. Sehr is an hourly rated employee who was regularly assigned as Telephone Operator Friday through Tuesday with rest days of Wednesday and Thursday.

"On Wednesday, May 30th, which was Decoration Day, a recognized Holiday and one of the rest days of the Claimant, he was required to work. The Claimant was paid for working on May 30th at the rate of time and one-half for eight (8) hours. Section I of Article II — Holidays, of the Agreement of August 21, 1954, specifically provides that each regularly assigned hourly rated employee shall receive eight (8) hours pay at the pro rata hourly rate of pay on the position to which assigned for each of the Holidays enumerated, when such Holiday falls on a work day of the work-week of the individual employee. Since May 30, 1956 was one of Mr. Sehr's rest days, it was not a work day of his work-week and he is, therefore, not entitled to the payment provided for in Section I of Article II — Holidays, of the Agreement of August 21, 1954. **Since he did not qualify for the payment of eight (8) hours at the pro rata rate of pay under Section I of Article II — Holidays, he is certainly not entitled to the payment of eight (8) hours at time and one-half which he claims in addition to the eight (8) hours at time and one-half which has already been paid to him.** Mr. Sehr has been properly compensated by the payment of eight (8) hours at time and one-half for the work performed on May 30, 1956, and the claim quoted above is denied." (Emphasis ours)

You will observe the Carrier is saying that because the holiday did not fall on a work day in Claimant's work week he was not entitled to a pro rate holiday pay, and then the Carrier, reasoning by analogy, held that since he did not qualify for straight time holiday pay, he **had no right to pay at time and one-half for a holiday on which he worked which did not fall in his work week.** This latter theory was the basis for the decision, **not Article I, Section II.**

Whether the majority considered this a meritorious reason is, of course, quite beside the point. The fact remains it was responsive to the claims presented up to that time. Moreover, the Organization never referred to or identified any rules allegedly involved until the subject was discussed at the **September** meeting. It was not until **after** this meeting that the Organization finally set forth the rule or rules they felt were involved and that is when they amended the basis for their claim requesting time and one-half for the holiday in lieu of time and one-half for the rest day. The Organization sat on the fence until the claim was finally denied, then indignantly charged that Carrier failed to read their mind and failed to anticipate and give a proper denial to the ultimate claim which, at that time had not yet been presented, and the majority gives aid and succor to this "circle within a circle logic".

We do agree that the Claimant was not entitled to interest on wages withheld, and while the Award does not reflect that such a request for interest was made and denied, this is, nevertheless, a fact.

For the reasons outlined above, we dissent.

/s/ W. F. Euker

/s/ R. E. Black

/s/ R. A. DeRossett

/s/ G. L. Naylor

/s/ O. B. Sayers