Award No. 10681
Docket No. CL-10761

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

(Supplemental)

Preston J. Moore, Referee

PARTIES TO DISPUTE:

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

THE ERIE RAILROAD COMPANY

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood that the Carrier violated the rules of the Clerks' Agreement dated August 1, 1955 in the Office of Auditor of Revenues, Cleveland, Ohio, when it failed to compensate employes D. J. Spillane, E. T. McNamara and M. Reinecke, monthly-rated employes, for the holiday, Labor Day, September 2, 1957. and

That Carrier shall now compensate employe Spillane, McNamara and Reinecke for one day's pay erroneously deducted from their September, 1957 salaries.

JOINT STATEMENT OF FACTS: Employes D. J. Spillane, E. T. McNamara and M. Reinecke are monthly-rated employes whose monthly salaries comprehends 1/12th of their annual salary, including seven (7) paid holidays.

The above-named employes were absent during the period shown below and for the reason indicated:

D. J. Spillane, Off August 26th through Sept. 6, 1957 — Sickness
E. T. McNamara, Off August 26th through Sept. 11, 1957 — Sickness
M. Reinecke, Off August 26th through Sept. 6, 1957 — Leave of Absence

The Carrier deducted from earnings of each of the above-named employes as follows:

D. J. Spillane — 10 days without pay including Labor Day, a holiday
E. T. McNamara — 13 days without pay including Labor Day, a holiday
M. Reinecke — 10 days without pay including Labor Day, a holiday

The above deductions included a full day's pay for the holiday Labor Day, September 2, 1957.

6. There is nothing in the Agreement which requires the Carrier to fill temporary vacancies occurring in monthly rated positions. Rule 33 spells out the fact that such vacancies need not be filled. The terms are permissive, not mandatory.

7. In the Reinecke claim, the Carrier has shown that the employe who filled Claimant's position was paid for September 2, 1957 in accordance with Rule 33 (c) and the agreed on application thereof. There is no Agreement rule which requires the Carrier to pay two days' pay for September 2 or any other day, as suggested by the claim herein. This also applies to the claims in behalf of Spillane and McNamara. The mere fact that the Carrier did not find it necessary to fill their positions during their absence, cannot operate to set aside the clear terms of Rule 33.

8. The Carrier has shown that the Claimants herein have been properly compensated under the Agreement. Therefore, the claims herein should be denied.

9. In order to enter a sustaining Award, it would be necessary for the Board to read into the Agreement that which is not there, and by so doing it would be substituting an expression for the Agreement itself. The Board, of course, has no authority to amend, alter, or strike down Agreement rules either directly or indirectly or by way of interpretation.

All data contained herein have been presented to or are known to the Employes involved or to their duly authorized Representatives.

OPINION OF BOARD: In conformity with the Agreement, a Joint Statement of Facts and Position of Employes and Carrier is submitted.

Three employes, Spillane, McNamara, and Reinecke were monthly rated employes. Their monthly salaries comprehend 1/12 of their annual salary. This includes 7 paid holidays. Claimants were absent from work immediately preceding and succeeding Labor Day, September 2, 1957. Two were absent because of sick leave and the other because of leave of absence.

Claimants contend that Carrier should not have deducted for Labor Day — Carrier contends that the holiday was a work day for pay purposes and therefore the deduction was proper.

The issue is whether a monthly employe must work to become entitled to pay for a holiday or whether he must occupy the position. We are of the opinion that he is only required to occupy the position.

Let us examine Rule 33 to see if Carrier is entitled to deduct a day's pay for a holiday not worked.

"Rule 33 — Basis of Pay

"(a) Except as otherwise agreed to, the present basis of pay (monthly, daily or hourly) will continue in effect. The conversion of monthly, daily or hourly rates to a different basis shall not operate to establish a rate of pay either more or less favorable than is now in effect.

(b) Where monthly rates are in effect, multiply the monthly rate by 12 and divide by 261 to arrive at daily rate and by 2088 to arrive at hourly rate. Where daily rates are in effect divide daily rates by 8 to arrive at hourly rate.

(c) The daily basis of pay as provided in paragraph (b) above shall be used for the purpose of overtime, time off without pay or basis of pay of employe filling position, if filled, of an employe off without pay. In all other instances the proportional basis of monthly rate will be paid."

There is nothing in the Rule which authorizes the Carrier to deduct a day's pay for a holiday not worked. This is not time off without pay.

The Carrier contends that the holiday becomes a work day for pay purposes. With this we cannot agree. In the Synopsis of Vacation Agreements, the parties felt it necessary to expressly state that a holiday falling on an assigned work day would be considered a work day.

"(9) When, during an employe's vacation period, any of the seven recognized holidays (New Year's Day, Washington's Birthday, Decoration Day, Fourth of July, Labor Day, Thanksgiving Day and Christmas) or any day which by agreement has been substituted or is observed in place of any of the seven holidays enumerated above falls on what would be a work day of an employe's regularly assigned work week, such day shall be considered as a work day of the period for which the employe is entitled to vacation."

If the parties intended that the holiday under the present circumstances be considered a work day, they should have so stated.

According to the Agreement the Claimants are paid for this day and not required to work. The only requirement is that they occupy a monthly rated position. There are no further requirements such as those for hourly and daily rated employes.

For the hourly and daily rated employes, it was spelled out that, in order to qualify for the day's pay, the employe must work the day before and the day after the holiday. This was not done in the instance of monthly rated employes.

For the foregoing reasons, we believe there was a violation of the Agreement.

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.

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 10681, DOCKET CL-10761

This award is fallacious and should be so treated.

Essentially, the Carrier's position in this case was that a holiday is considered a work day for pay purposes and therefore, when Claimants were absent during the period in question, the Carrier deducted 1/261 of the annual salary for each day absent. The Organization's argument was that an employe was entitled to the holiday pay whether he was off sick or working during the period when a holiday occurred. In this case, Claimants were off either for sickness or for personal reasons from August 26 through September 6 (two Claimants) and through September 11 (one Claimant). In other words, they were either sick or on leave-of-absence for a week before the holiday and several days after the holiday. During these periods, one of the positions was filled by the Carrier, the other two were blanked. For the position that was filled, the Carrier paid 1/261 of the annual compensation for each day including 1/261 for the holiday although the position itself was not worked on the holiday. The majority, in its haste to sustain the claim, failed to recite these pertinent facts.

The majority also neglected to mention that only one award was cited by either side covering the particular issue here and that award sustained the Carrier's position.

The Award in question is **10081**, Referee Begley, and there we said:

"Holiday compensation for a monthly-rated Employe is provided by prorating straight time compensation for 56 hours, that is, the 7 holidays by 8 hours each, over a 12 month period so that each month such an employe is receiving 4 2/3 hours of holiday compensation regardless of whether or not a holiday actually occurs in that month. The hourly factor of 169 1/3 upon which the hourly rate of a monthly-rated employe had been predicated prior to August 21, 1954 is raised to 174 by Section 2(a) to avoid any increase in the hourly rate. Monthly-rated Employes receive their holiday pay over a period of 12 months. They receive holiday pay each month whether or not a holiday occurs in that month.

"The Board finds that under Article II, Section 2(a) of the National Agreement of August 21, 1954, the Carrier properly paid the claimant for the days he worked in the month of May, 1955, as a holiday may be counted as a work day for the purposes of prorating a monthly rate between two employes. Therefore, this claim will be denied."

It is not clear why the majority chose to ignore this award or why it failed to make any reference to it since the same majority quickly accepted and adopted a prior decision in another case even though Carrier proved it was palpably erroneous. (**Award 10679**) Needless to say, the majority's actions have been more than a little inconsistent. If the majority felt that **Award 10081** was distinguishable or was palpably erroneous they, at the very least, had a responsibility and an obligation to come forward and tell the Carrier why it was erroneous or why it was distinguishable. The conclusion one is left with is that they were unable to distinguish the previous award and could not rightfully prove that it was palpably erroneous. That being so, it should have been followed.

On page 2 of the present award, this statement will be found:

> "The Carrier contends that the holiday becomes a work day for pay purposes. With this we cannot agree. * * *"

In support of their rejection of Carrier's argument, the majority then refers to the Vacation Agreement, pointing out that such Agreement expressly stated that a holiday falling in a vacation week would be considered a work day, and asking why wasn't the same thing done here.

If the majority sincerely felt that such a requirement was "expressly stated" in the Vacation Agreement, one might wonder why the Organizations themselves did not feel that way and accept it as a fact instead of progressing claims to this Board grounded on the contention that a holiday should not be considered a vacation day. See **Awards 9919, 9758, 9640, 9641, 7422** and many others. It is apparent it only became "expressly" stated after a series of awards found the Organization's position to be untenable.

In our case we have already found the Organization's position to be untenable in **Award 10081**, but notwithstanding this, it would appear the majority cannot find this is tantamount to an "express" statement that "a holiday may be counted as a work day for the purposes of prorating a monthly rate between two employes."

Even without **Award 10081**, it should have been apparent to the majority that a holiday was considered a work day for pay purposes under the contract for the simple reason that the parties by their conduct in revising Rule 33(b) following the August 21, 1954 Agreement, changed the basis for computing the daily rate by increasing the divisor from 254 to 261 (adding seven holidays) so that thereafter you obtained the daily rate of the position by dividing the annual rate by 261. Thus, for every day an employe was off of a monthly rated position or for every day an employe was filling a monthly rated position, 1/261 was either deducted or allowed and this 1/261 applied to holidays as well as work days because the figure 261 included **both holidays** and **work days**. If the parties did not intend that holidays would be considered work days for pay purposes, there would have been no point in increasing the divisor from 254 to 261. The majority's construction of the contract implies the parties did a useless thing when they revised their Agreement coincident with the adoption of the August 21, 1954 Agreement.

If the majority seriously desired to accept clear and undeniable evidence that a holiday was to be considered a work day for pay purposes, it might have carefully evaluated the reasons for the change from 254 days to 261 days as the divisor in Rule 33, and then examined the record to see what explanation was offered by the Organization for this change in the Agreement.

The truth of the matter is the Organization did not offer any explanation; moreover, they did not challenge the Carrier's explanation of the change. Finally, the very fact that 261 replaces 254 under the "Basis of Pay" rule (Rule 33), clearly signifies that the types of days which the 261 figure represents, holidays and workdays, were to be considered the same for pay purposes. They were coupled by the parties. It was the obvious intent they be treated the same by the parties. All the majority had to do was to weigh these facts and the only articulate conclusion they could have reached would have been a denial of the claim.

For the reasons stated above, we dissent.

/s/ W. F. Euker

/s/ R. E. Black

/s/ R. A. DeRossett

/s/ G. L. Naylor

/s/ O. B. Sayers

LABOR MEMBER'S REPLY TO CARRIER MEMBERS' DISSENT TO AWARD 10681, DOCKET CL-10761

Award 10681 quite properly holds that Carrier has no right to deduct a day's pay from the wages of a monthly rated employe for a holiday which is not worked. Carrier Member's dissatisfaction with the decision of the Board in Award 10681 does not detract from that decision.

Primarily the dispute here centered on application of Rule 30-2(c), which rule was derived from Article II, Section 2(a) of the August 21, 1954 National Agreement and reads as follows:

> "(c) Effective May 1, 1954, monthly rates, the hourly rates of which are predicated upon 169-1/3 hours, shall be adjusted by adding the equivalent of 56 pro rata hours to the annual compensation (the monthly rate multiplied by 12) and this sum shall be divided by 12 in order to establish a new monthly rate. The hourly factor will thereafter be 174 and overtime rates will be computed accordingly."

The foregoing rule contemplated adjustment in monthly rates of pay, the hourly rates of which were predicated upon 169-1/3 hours, by the addition of the equivalent of 56 pro rata hours holiday pay to the annual compensation. The hourly factor of 169-1/3 was adjusted to 174. Monthly rated employes were not deprived of established holidays by reason of this adjustment. Holidays were not to be considered as time off without pay. On the contrary, monthly rated employes were expected to continue working 254 days per year in order to receive the annual wages which were being increased by the equivalent of 56 pro rata hours to be paid throughout the 12 months of the year. Monthly rated employes were not called upon to work 56 additional hours in order to receive that pay.

The parties made no provision in their agreement permitting Carrier to treat a holiday as a work day for pay purposes; neither did the parties attach conditions to the specific requirement that the equivalent of 56 pro rata hours holiday pay be added to the annual compensation of monthly rated employes. Obviously, Carrier has not complied with the requirement of

adding 56 pro rata hours holiday pay to the annual compensation of monthly rated employes in circumstances where it unilaterally deducts eight hours' pay for a holiday not worked.

A holiday is not time off without pay and it is not a work day for pay purposes. Instead, a holiday is a day for which payment must be made to monthly rated employes as prescribed in Rule 30-2(c).

/s/ C. E. Kief
C. E. Kief, Labor Member

October 2, 1962