Award No. 10816
Docket No. TE-10008

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

(Supplemental)

Preston J. Moore, Referee

PARTIES TO DISPUTE:

THE ORDER OF RAILROAD TELEGRAPHERS

SAN DIEGO & ARIZONA EASTERN RAILWAY COMPANY

STATEMENT OF CLAIM: Claim of the General Committee of The Order of Railroad Telegraphers on the San Diego and Arizona Eastern Railway, that:

1. Carrier violates and continues to violate the Agreement between the parties when it fails to properly pro-rate the compensation when two or more employes occupy the same position during a calendar month in which a holiday occurs.

2. Carrier shall be required to make proper adjustment in the compensation of all employes so affected commencing with the calendar month of July, 1956.

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

All positions covered by the agreement between the parties to this dispute are monthly rated; there are no hourly or daily rated positions. The wage scale of the agreement bears this out. It is provided for in Rule 4(a) of the agreement which reads:

RULE 4

BASIS OF PAY

"(a) Employes herein specified will be paid on a monthly basis, such monthly basis covering the working days of each month, the working days being arrived at by eliminating all rest days and the holidays specified in Rule 6. Positions designated by a cross (†) are exempt from hours of service, overtime, and call rules, except on assigned rest days and holidays, but agents at such stations will not be required to perform service in excess of an average of eight (8) hours per working day

rated position during a month in which a holiday occurs, nor does the current agreement contain any such provision. The manner employed by carrier in computing time in such circumstances is entirely proper and in all instances equitable.

CONCLUSION

Carrier asserts that the claim in this docket is entirely lacking in either merit or agreement support and therefore requests that if not dismissed because of its vague and indefinite nature, said claim be denied.

All data herein submitted have been presented to the duly authorized representative of the employes and are made a part of the particular question in dispute.

The carrier reserves the right, if and when it is furnished with the submission which has been or will be filed ex parte by the petitioner in this case, to make such further answer as may be necessary in relation to all allegations and claims as may be advanced by the petitioner in such submission, which cannot be forecast by the carrier at this time and have not been answered in this, the carrier's initial submission.

(Exhibits not reproduced.)

OPINION OF BOARD: This is a dispute between The Order of Railroad Telegraphers and The San Diego and Arizona Eastern Railway Company.

The Petitioner contends that the Carrier fails to properly compensate Employes, when two or more occupy the same position during a calendar month in which a holiday occurs. For an example they use an instance where Mr. C. R. Sartain worked July 2, 3, 5 and 6. The fourth was a holiday. Mr. Knight worked the remaining 17 working days of the month. The Petitioner contends that July 4th is not a working day; therefore Sartain should be paid 4/21 of the monthly rate and Knight 17/21. The Carrier contends that July 4th is a working day for pay purposes; therefore Sartain is entitled to 5/22 and Knight to 17/22.

"Rule 4

"BASIS OF PAY

"(a). Employes herein specified will be paid on a monthly basis, such monthly basis covering the working days of each month, the working days being arrived at by eliminating all rest days and the holidays specified in Rule 6. Positions designated by a cross (†) are exempt from hours of service, overtime, and call rules, except on assigned rest days and holidays, but agents at such stations will not be required to perform service in excess of an average of eight (8) hours per working day or 169 1/3 hours in any one month which, however, does not restrict such agents from attending meetings, etc., in connection with their official duties outside of working hours."

"Rule 6.

"HOLIDAY WORK

"Section (a). Time worked on the following holidays:

"New Year's Day

Washington's Birthday

Decoration Day

Fourth of July

Labor Day

Thanksgiving Day

Christmas

"shall be paid for at the overtime rate when the entire number of hours constituting the regular weekday assignment are assigned and worked.

"Section (d). No obligation exists to use any employe nor to compensate any employe not used on any of the holidays specified in Section (a) of this rule; provided, however, that if the position of a regular assigned employe is worked on any of such holidays, such regular assigned employe shall, if available, be used to perform such work."

We do not believe that August 21, 1954 Agreement modified Rule 4(a). Of course, it did modify Rule 6. It could be urged that the holiday was included with rest days in Rule 4 (a) because it was not paid for. We cannot reach that conclusion. Rule 4 (a) specifically excludes a holiday being counted as a work day for pay purposes. Award 10682 likewise had a similar rule which excluded a holiday as a work day for pay purposes. Award 10681 had a rule which specifically determined the method of arriving at the daily rate. These cases may be distinguished from 10681 which apparently had no such rule.

Part 1 of the claim is in effect asking this Board to interpret the Agreement. Part 2 is as follows:

"Carrier shall be required to make proper adjustment in the compensation of all employes so affected commencing with the calendar month of July, 1956."

Herein the Petitioner is requesting that we take away from some and give to others. This, we cannot do. There is no named Claimant that complies with Article V, Section 1 (a). They certainly have no common and undivided interest for we would be taking away from half and giving to the other half. We believe that the Claimants must be specifically identified.

For the foregoing reasons we find the Agreement was violated.

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

Part 1 sustained. Part 2 dismissed.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 28th day of September 1962.

CARRIER MEMBERS' DISSENT TO AWARD 10816, DOCKET TE-10008

This award perpetuates the error committed by the Majority (including this same Referee) in **Awards 10681 and 10682.** The dissent filed to those awards by the Carrier Members is incorporated herein as part of the dissent in this case.

In this case for the first time, the Referee deals with our decision in **Award 10081.** He purports to distinguish it on this basis:

> "* * * Rule 4 (a) specifically excludes a holiday being counted as a work day for pay purposes. Award 10682 likewise had a similar rule which excluded a holiday as a work day for pay purposes. Award 10681 had a rule which specifically determined the method of arriving at the daily rate. These cases may be distinguished from 10681 which apparently had no such rule."

The Majority's basis for distinction was that **Award 10081** "apparently had no such rule." It would not appear to be too much to ask that the Majority know definitely and with certainty whether the case covered by **Award 10081** did or did not contain a rule comparable to Rule 4 (a) even if that fact were significant. It should not surprise the Majority to know that there was such a rule involved in that case, because **this fact was pointed out to the Referee at the time of the hearing.** Under the "Position of Employes" in Docket MW-8893 (**Award 10081**), the Organization said:

> "Prior to the consummation of the August 21, 1954 Agreement the hourly rates of monthly rated positions, such as an

Assistant Water Service Foreman were based upon 169 1/3 hours per month, which excluded holidays and rest days.

"In this connection, we invite attention to Rule 53 reading:

'To compute the hourly rate of monthly rated positions, divide the monthly salary by 169 1/3. In determining hourly rates, fractions less than one-half (1/2) of one cent (1¢) shall be dropped, fractions one-half cent (1/2)¢ or over to be counted as one cent (1¢).' "

It is clear that the Organization was in perfect agreement with the Carrier that there was a rule in that contract which excluded holidays as a work day for pay purposes prior to the August 21, 1954 Agreement. In the face of these admissions, how can the Majority possibly hold **Award 10081** "apparently had no such rule" which excluded a holiday as a work day for pay purposes.

The burning question in that case just as it was in all of these recent cases cited by the Majority (the decisions in the last three cases being made by the same referee) was whether the August 21, 1954 Agreement, specifically Article II Section 2(a), changed the rule so that **thereafter a holiday would be treated as a work day for pay purposes.** The Board in **Award 10081** held, without reservation and without dissent, that under the August 21, 1954 Agreement a holiday may be counted as a work day for pay purposes.

It is apparent that the Referee who authorized the last three awards on this question sustaining the Organization's contentions, could only do so by overruling our decision in **Award 10081,** and for reasons best known to himself he did not do that, nor has he competently supported his conclusion for distinguishing that award. Thus, **Award 10081 should have been followed** and the claim denied.

Much more could be said on the errors committed by the Majority in this case, but you cannot further invalidate an already invalid award merely by citing more error.

For the reasons stated above, we dissent.

/s/ W. F. Euker
W. F. Euker

/s/ R. E. Black
R. E. Black

/s/ R. A. DeRossett
R. A. DeRossett

/s/ G. L. Naylor
G. L. Naylor

/s/ O. B. Sayers
O. B. Sayers