# Award No. 14921
# Docket No. CL-15793

## NATIONAL RAILROAD ADJUSTMENT BOARD

## THIRD DIVISION

**(Supplemental)**

**Nicholas H. Zumas, Referee**

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## PARTIES TO DISPUTE:

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

## THE LONG ISLAND RAIL ROAD COMPANY

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood (GL-5853) that:

1. The Carrier violated the understanding and provisions of the Clerks' Agreements, particularly, the National Mediation Agreement of November 20, 1964, Article II — Holidays, Rules 4-A-3, 9-A-1 and 9-A-2 among others, when it failed and refused to pay Clerk W. Leigh Jr., at the rate of time and one half for eight (8) hours for having worked his Birthday January 1, 1965 and instead only paid him time and one half for working the holiday (New Year's Day) January 1, 1965.

2. The Carrier shall pay Clerk W. Leigh, Jr., an additional day's pay (8 hours) at the rate of time and one half for January 1, 1965 for having worked a holiday which is also his Birthday and also a regular assigned work day.

EMPLOYES' STATEMENT OF FACTS: There is in effect Rules Agreements effective July 1, 1945 and a newly revised Agreement effective January 1, 1965, and National Holiday Agreements signed at Chicago, Ill., on August 21, 1954 and November 20, 1964, covering clerical, other office, station and storehouse employes between this Carrier and this Brotherhood. The Rules Agreements may be considered a part of this Statement of Facts. Various Rules and Memorandums therefore may be referred to from time to time without quoting in full.

This dispute involves the question of whether or not the Carrier complied with the meaning and intent of the Rules Agreement and the Birthday Holiday Agreement dated November 20, 1964, when it failed and refused to compensate Clerk Leigh Jr. at the rate of time and one half for eight (8) hours on account of working his Birthday-Holiday (January 1, 1965) in accordance with the Agreement and instead only paid him for working the New Year's Day Holiday also on January 1, 1965.

The claim was denied by the Manager of Stations on February 25, 1965. The Local Chairman and the Manager of Stations were unable to agree on a Joint Statement of Agreed-Upon Facts and, in accordance with the provisions of Memorandum of Understanding No. 4, they submitted their ex parte statements to the General Chairman and the Director of Personnel. Copies of these statements are attached hereto and made a part hereof, marked Carrier's Exhibit B-1 and Carrier's Exhibit B-2.

On March 22, 1965, the claim was discussed at conference between the Director of Personnel and the General Chairman. The claim was denied by the Director of Personnel on March 31, 1965. A copy of this decision is attached hereto and made a part hereof, marked Carrier's Exhibit C.

On November 2, 1965, the Secretary of the Third Division of the National Railroad Adjustment Board notified the Director of Personnel that he had received written notice of intention to file ex parte submission from Mr. C. L. Dennis, Grand President of the Brotherhood in this dispute. A copy of this letter is attached hereto and made a part hereof, marked Carrier's Exhibit D.

(Exhibits not reproduced.)

**OPINION OF BOARD:** Claimant, through the Organization, alleges that Carrier violated the Agreement by failing and refusing to pay him at the rate of time and one-half for 8 hours for having worked his birthday January 1, 1965 and also the rate of time and one-half for working January 1, 1965 account holiday.

The facts are not in dispute. Claimant was required to work on January 1, 1965 (New Year's Day), which is a holiday under the terms of the Agreement. January 1 also happened to be Claimant's birthday. Under the terms of the Agreement, a birthday is considered a holiday. For the work performed on January 1, 1965, Claimant, occupant of a monthly rated position, was paid for 8 hours at the rate of time and one-half.

In addition to being paid for the holiday, the Organization contends that "Claimant is entitled to an additional eight (8) hours' pay at the punitive rate account working on his birthday . . ." It asserts that there are two separate and distinct rules which govern (one rule for **legal-holidays** and another rule for **birthday-holidays**) and Claimant is entitled to recover separate payments under each, citing numerous awards by this Board upholding its assertion. (Award 10541 and others.)

Carrier's position, briefly summarized, is as follows: (1) Claimant, occupying a monthly rated position, received (by reason of adjustments under the August 21, 1954 and November 20, 1964 Agreements) two 8 hour pro rata payments for holiday and birthday, as well as 8 hours at time and one-half for working the holiday. (2) The Agreement makes specific provision for birthdays falling on holidays, and in such instances the employe may exercise his option, after reasonable notice to Carrier, to celebrate his birthday on another day. Claimant failed to exercise the option. (3) There is nothing in the Agreement which calls for separate payments when an employe works on a day which happens to be his birthday and a legal holiday as well.

Rule 4-A-3(a) of the Clerks' Agreement provides:

"4-A-3 (a). Work performed on the following legal holidays, namely — New Year's Day, Washington's Birthday, Decoration Day,

Fourth of July, Labor Day, Thanksgiving 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 at the rate of time and one-half."

Article II, Section 6 of the National Agreement dated November 20, 1964 provides, in part:

"(e) In addition to the wage adjustments provided for in Article I of this Agreement effective January 1, 1965, the monthly rates of monthly rated employes shall be adjusted by adding the equivalent of 8 pro rata hours to their annual compensation (the monthly rate multiplied by 12) and this sum shall be divided by 12 in order to establish a new monthly rate."

"(f) * * * If an employe's birthday falls on one of the seven holidays named in Article III of August 19, 1960, he may by giving reasonable notice to his supervisor, have the following day or the day immediately preceding the first day during which he is not scheduled to work following such holiday considered as his birthday for the purposes of this Section."

"(g) Existing rules and practices hereunder governing whether an employe works on a holiday and the payment for work performed on holidays shall apply on his birthday."

Under the terms of the November 20, 1964 Agreement, the claim cannot be sustained. It is clear that the parties signatory to that Agreement anticipated such situations, and made provision for their resolution in clear and unambiguous terms. If an employe's birthday falls on one of the seven holidays, he may, after reasonable notice, elect to celebrate his birthday on another day as set forth in Paragraph (f) of the National Agreement. If subsequently he is called upon to work the day which he has chosen to celebrate his birthday, he is entitled, under the terms of Paragraph (g) of the National Agreement, to payment at the premium rate. Paragraph (g) does not entitle him to more.

The long list of awards cited by the Organization as authority for its position are clearly distinguishable. For the purposes of this award, it is sufficient to say that the claims in each of those awards arose prior to the November 20, 1964 National 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 not violated.

## AWARD

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 4th day of November 1966.

## LABOR MEMBER'S DISSENT TO AWARD 14921, DOCKET CL-15793

The Emergency Board Report which led to negotiating the November 20, 1964 Agreement, wherein the employe's Birthday was to be considered a holiday, reads in part:

> "The Board concludes that more than 7 paid holidays is now or will soon become the prevailing industry practice; however, it is not able to conclude that the prevailing practice will rise to 9 holidays within the span of the agreement to be negotiated by the parties. One additional paid holiday, making a total of 8, should place non-operating employes at no disadvantage with respect to employes in industry generally over the next several years. The Board recommends that the parties agree to one additional paid holiday, effective January 1, 1965; it leaves to the parties the determination of which holiday that shall be."

Thereafter the Agreement of November 20, 1964 was entered into and, with respect to the "holiday," Section 6 thereof reads in part:

> "Section 6. Subject to the qualifying requirements set forth below, effective with the calendar year 1965 each hourly, daily and weekly rated employe shall receive one additional day off with pay, or an additional day's pay, on each such employe's birthday, as hereinafter provided.
>
> (a) For regularly assigned employes, if an employe's birthday falls on a work day of the work week of the individual employe he shall be given the day off with pay; if an employe's birthday falls on other than a work day of the work week of the individual employe, he shall receive eight hours' pay at the pro rata rate of the position to which assigned, in addition to any other pay to which he is otherwise entitled for that day, if any.
>
> * * * * *
>
> (f) If an employe's birthday falls on one of the seven holidays named in Article III of the Agreement of August 19, 1960, he may, by giving reasonable notice to his super-

visor, have the following day or the day immediately preceding the first day during which he is not scheduled to work following such holiday considered as his birthday for the purposes of this Section.

(g) Existing rules and practices thereunder governing whether an employe works on a birthday and the payment for work performed on holidays shall apply on his birthday."

Thus there is no doubt but that, as stipulated in paragraph (g) of Section 6, the payment for work performed on holidays applies to work performed on an employe's birthday.

The Organization's position in the case covered by Award 14921 is that the Claimant was entitled to payment under the circumstances therein as follows:

| | |
|---|---|
| 8 hours at pro rata rate as birthday pay | 8 |
| 8 hours at 1½ time rate for work on birthday | 12 |
| 8 hours at pro rata as holiday pay | 8 |
| 8 hours at 1½ time rate for working holiday | 12 |
| Total | 40 |

Claimant was paid:

| | |
|---|---|
| 8 hours at pro rata rate as birthday pay | 8 |
| 8 hours at pro rata rate as holiday pay | 8 |
| 8 hours at 1½ rate for working holiday | 12 |
| Total | 28 |

Claim was filed for:

| | |
|---|---|
| 8 hours at 1½ rate for working birthday | 12 |
| Total | 12 |

As support for the claim on the basic proposition, i.e., that where payment for service performed is covered by separate and distinct rules the employe is entitled to comepnsation pursuant to the terms of those separate rules, the Awards of this Board which previously considered that proposition were urged as precedent. Those Awards and comments thereon are:

In ORT v. New York Central Railroad — Southern District — Award 10541 (Sheridan) adopted April 25, 1962 involved 2 Claimants: Each had been required to perform service on Labor Day, September 3, 1956, which was also their rest day. They were paid eight hours at time and one-half under Article 22 reading in part:

"ARTICLE 22.

SERVICE ON REST DAYS

II — Employes required to perform service on their assigned rest days shall be paid . . . at the rate of time and one-half . . ."

and claimed an additional eight hours at time and one-half under Article 23 reading in part:

"ARTICLE 23. HOLIDAY WORK

I — Time worked on . . . Labor Day . . . shall be paid for . . . at the rate of time and one half . . ."

Carrier defended on the ground that Article 7 prohibited such claims, i.e., "There shall be no overtime on overtime." That there had been no similar claims progressed; that none of the organizations party to the 40-Hour Week Agreement had taken such a position etc.

The Referee held that:

"* * * The Employes are not seeking overtime on overtime. They are seeking compensation pursuant to the provision of Article 22 which provides for overtime on their rest day, and for overtime which is provided by the terms of Article 23 i.e. worked [sic] performed on a holiday.

It is coincidental that the rest day and holiday occurred on the same day, but there are no exceptions to these articles, the payment for such work is provided in the Agreement.

The Claimants herein were seeking compensation pursuant to the terms of two specific articles, relative to two specific employment situations."

The Carrier Members dissented thereto and declared the Award to be palpably in error.

On July 18, 1962 Award 10679 (Moore) involving the ORT and The Indianapolis Union Railway Company was adopted. In that case Claimant performed work on Decoration Day, May 30, 1956, and he was paid eight hours at time and one-half under the provisions of Rule 11, Section 1, paragraph (m) reading in part:

"(m) — Service on Rest Days.

II — Employes required to perform service on their assigned rest days shall be paid . . . at the rate of time and one-half . . ."

He claimed an additional payment of eight hours at time and one-half under Rule 11, Section 2, reading in part:

"SECTION 2. HOLIDAY WORK

Time worked within the hours of the regular week day assignment on the following holidays: namely, . . . Decoration Day, . . . shall be paid . . . at the rate of time and one-half . . ."

and the Referee, after disposing of some alleged procedural arguments, held in part as follows:

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

We are firmly committed to the doctrine of 'stare decisis.' The Board is not prepared to allege PALPABLE error in the above award.

* * * * *

Claim sustained."

Carrier Members' dissented thereto incorporating the dissent to Award 19541 declaring that Award to be in palpable error.

On May 27, 1963 Award 11454 (Miller) involving the ORT and the Lehigh Valley Railroad Company was adopted. In that case rules similar to those in prior Awards 10541 and 10679 were involved and Carrier there defended on the basis that:

"There shall be no overtime on overtime . . ."

The Opinion of Board in that case was:

"The issues arising from the claim have been resolved and settled by our recent Awards 10541 and 10679 — which are precisely in point.

We do not believe that said Awards, which allow the type of claim made herein, are palpably erroneous."

Again the Carrier Members' dissented citing their dissent to Award 10541 and the Labor Member replied.

On November 20, 1963 Award 11899 (Hall) involving the ORT and The New York, Chicago and St. Louis Railroad Company was adopted. In that case Claimant had, as had the ones in the earlier cases, worked on his rest day which was also a holiday and was paid only one day at the rate of time and one-half under the "Service on Rest Day" rule and claimed an additional day at time and one-half under the "Service on Holidays" rule. Carrier defended on the ground such payment as claimed would be the equivalent of "overtime on overtime" which was barred by the Agreement. The Opinion of Board reads in part that:

"It is urged by the Petitioner that each of these rules is a self completing rule; that the pay provisions of one rule does not offset the pay provisions of the other and that the agreement must be interpreted in toto applying the rules to the facts.

It is the Carrier's position that the single allowance of the time and one-half rate to the Claimant satisfied the penalty provisions of both Rules 8 and 9, that no other nor additional payment was intended by the agreement and if paid would result in the payment of overtime on overtime.

Carrier has bound itself by the Agreement to pay compensation under two separate rules of the Agreement. Where similar agreements were involved, that this does not constitute the payment of overtime on overtime has been resolved by prior awards of this Board, cited herein. We are not here to determine whether or not the provisions of this agreement resulted in an unequitable distribution; if there are inequities, that can be corrected by negotiation. The ques-

tions presented here have been considered and determined in three prior awards of this Board — Award 10541 (Sheridan); Award 10679 (Moore) and Award 11454 (Miller). We do not believe these awards are palpably erroneous."

Again the Carrier Members' dissented incorporating their dissent to Award 10541 and declaring Award 11899 palpably erroneous.

On April 23, 1964 Award 12453 (Sempliner) involving the ORT and the Chicago, Rock Island and Pacific Railroad Company was adopted. The issues and arguments were essentially the same as in the previous Awards but an additional payment account "relief service" was also claimed and denied. The Opinion reads in part as follows:

"Previous awards cited have held that service on a holiday, at the same time as a rest day will yield in excess of the time and one-half here provided. Thus that part of Rule 17 Section (d) does not limit the combination of rest day and holiday service. It does by the language limit the combination of holiday and relief service to a single payment of time and one-half for the holiday service. Claim 1(a) must be sustained. Claim 1(c) must be sustained as to holiday pay but denied for additional pay because of relief service. The rule itself spells out the combined pay for holiday and relief service, and specifies the same to be at the time and one-half rate."

Again the Carrier Members' dissented citing their dissent to Award 10541.

On April 30, 1964 Award 12471 (Kane) involving the ORT and the Rock Island was adopted. The issues and arguments are summarized in the Opinion of Board reading as follows:

"The Claimant was the occupant of the position of Agent-Telegrapher at Albright, Nebraska. On January 1, 1958 the Claimant was required to fill the position on his rest day, which was also a paid holiday. Thus the Claimant seeks compensation at the rate of time and one-half for holiday pay under Rule 16, Section 2 of the current agreement in addition to compensation received at the rate of time and one-half under Rule 16, Section 1(m) Service on Rest Days.

The contention of the Carrier was that under Rule 13, and 16, the overtime Rules the Claimant is entitled to one penalty payment not both. Furthermore, Rule 13, expressly provides that there shall be no overtime on overtime. Thus as the Claimant received compensation at the overtime rate of time and one-half for service on his rest day no further compensation need be paid.

The issues arising from this claim have been resolved in Awards 10541, 10679 of this Division which sustain the position of the Claimant."

and again the Carrier Members' dissented adopting their dissent to Award 10541.

On February 8, 1966 Award 14138 (Rohman) involving the ORT and the Florida East Coast Railway was adopted. The issues and arguments are set out in the Opinion which reads in part as follows:

"The nature of the instant Claims has been the subject of previous contention before this Board. The issue before us now is whether an employe who is required to work his assigned position on a rest day, which incidentally is also a holiday, shall be entitled to be compensated at premium rates for both the rest day and the holiday.

This question was answered in the affirmative, beginning with Award 10541, adopted April 25, 1962. Since then, Awards 10679, 11454, 11899, 12453 and 12471, have all reaffirmed the conclusion reached in Award 10541, without a single contrary Award on this particular issue.

It is noteworthy, that in Award 10541, the Carrier Members filed a well-documented dissent. They have adhered to their position in each of the above-mentioned subsequent Awards, via the medium of a dissent.

In the instant dispute, we are again requested to review our position and deny this Claim, despite the established precedents. In this respect, we are referred to a 'Memorandum To Accompany Award 1680,' where the respected Referee (Garrison) was confronted with a similar request. In a reasoned discourse on this subject he voiced the opinion that, '(c) All semblance of predictability and uniformity of treatment in the interpretation and application of the rules would disappear.' Although we are reluctant to perpetuate a condition which **prima facie** appears to run counter to the norm, nevertheless, the effective agreement between the parties does not prohibit such payment, nor is it unconscionable.

It appears to us that in the present posture of these precedent Awards, the proper forum is the bargaining table."

Again, bargaining was suggested.

On March 11, 1966 Award 14240 (Perelson) involving a similar case between the Brotherhood of Railway Clerks and the Grand Trunk Western Railroad was adopted. That case involved essentially the same issues but the Referee there found the rules distinguishable in that there was but one rule stipulating payment for work performed on both "rest days **and** holidays" and denied the claim.

On June 2, 1966 Award 14489 (Wolf) involving the Brotherhood of Railway Clerks and The Western Pacific Railroad was adopted and the Opinion sets out the issues and the pertinency of Award 14240 and reads in part as follows:

"The Claimant also relies on a series of seven awards, issued within the past four years, all of which sustained similar claims and urges that the principle of stare decisis should prevail so as to keep uniform the principle firmly established by the said awards. See Awards 10541, 10679, 11454, 11899, 12453, 12471 and 14138.

Carrier argues that all seven awards interpreted the Telegraphers' Agreement, whereas this case involves the Clerks' Agreement. It urges, instead, that Award 14240 (Perelson) which also involved the

Clerks' Agreement, be followed. In that award we denied the claim after a full analysis in which the Telegraphers' awards were held distinguishable.

The principle of stare decisis is a most commendable one. It puts an end to controversy where a provision of an Agreement permits more than one interpretation and ends the parade of disputes seeking to upset the established view. In following stare decisis we do not say that we would necessarily have held the same way if we were presented the issue as a matter of first impression. We merely hold that unless the precedent view is palpably wrong we must not upset it. Award 12240.

In our case the problem is compounded by two conflicting sets of precedents. One is a well-established series of seven cases by seven distinguished referees. The other is a single case which holds differently because of variations in the agreements which otherwise are essentially the same. Unless similar variations in the agreement can be found in our case, the principle of stare decisis compels us to follow the older, established precedents.

In Award 14240, two essential differences were noted: The Clerks' Agreement did not contain a clause like Rule 7 — Section 1 of the Telegraphers' Agreement, and the Clerks' Agreement had a 'Notified or Called' Rule which provided:

'RULE 44.

NOTIFIED OR CALLED

> 'Except as provided in Rule 46, employes notified or called to perform . . . on their assigned rest day **and** specified holidays, shall be allowed a minimum of three hours for two hours of work or less and if held on duty in excess of two hours, time and one-half will be allowed on the minute basis. (Emphasis ours.)

A careful examination of the seven telegrapher awards discloses that Rule 7 — Section 1 was never considered by the Board in the telegrapher cases. Those decisions rested on the obligation of Carrier to pay for service under two separate rules.

In Award 14240, while we found that the Clerks' Agreement did not contain similar language, the main thrust of the Opinion was based upon the language of Rule 44, particularly the juxtaposition of the phrases 'assigned rest day' and 'specified holidays' combined by the conjunction 'and.'

In the instant case Rule 21 is the equivalent of Rule 44. In Rule 21 there is no reference to work on 'assigned rest day' in conjunction with a holiday. Thus, what was deemed a significant difference in Award 14240 is not present in our case.

Since the agreement before us does not have the distinguishing feature of the agreement in Award 14240, we must follow the estab-

lished precedents. No other course would honor the principle of stare decisis."

On June 17, 1966, Award 14528 (Perelson) the author of Award 14240, in a dispute involving the Brotherhood of Railway Clerks and the Denver and Rio Grande Western Railroad. There separate rules were involved and the Opinion of Board reads in part as follows:

"The Carrier in opposing the claim states as follows:

'In their efforts to collect this claim the Employes would have your Board be guided by these awards involving contracts on other property with other than Clerk's Organization where contract rules providing for payment for service performed on rest day and on holiday **were separate and distinct rules.** Such is not the case on this property **where one rule only**; i.e. Rule 38 provides for payment for services performed on rest day-legal holiday. (Emphasis ours.)

. . . The Carrier by contract, agreed to pay time and one-half for services performed on a rest day . . . The Carrier agreed to pay time and one-half for a holiday when worked . . . However, this Carrier did not agree to make duplicate payment when the days coincidently fall on the same date. In fact Rule 38 specifically provides for the one time and one-half payment for rest day-holiday service.'

We agree with the Carrier that where the Agreement between the parties, as in the instant case, contains rules providing for payment for services performed on rest day and on a holiday by separate and distinct rules, that the employes are entitled to be compensated pursuant to the provisions of those rules.

We do not agree with the Carrier that Rule 38 and Rule 38 alone provides for the payment for the services rendered by the Claimants in this dispute. Such contention disregards Rule 42.

Under the specific terms of the Agreement, the Carrier agreed and bound itself to pay compensation under two separate rules, to wit, Rule 38 and Rule 42.

This Board has held in many prior awards, where similar provisions were contained in agreements, that this does not constitute the payment of overtime on overtime."

Such Awards were considered by the Referee to be inapplicable because the claims therein arose prior to adoption of the Noevmber 20, 1964 National Agreement involved in the instant case.

However, rather than "weakening" the effect of such precedent Awards, such precedents should have strengthened the claim herein. To find otherwise seems to run counter to that said in Award 10239 (Gray):

"This Board must be bound by the clear language of an Agreement. We cannot read into Article * * * anything except what it sets

out in unmistakable clarity. It is not a question as to whether we agree or disagree with the language.

This Board cannot rewrite or attempt to revise an Agreement

entered into in good faith and with full knowledge of its full impact."

for, in view of the precedent Awards cited above, it surely is wrong to conclude that the parties did not know that, unless specifically spelled out, the position taken in those prior Awards would also be taken with respect to the November 20, 1964 Agreement. Both parties were aware of such precedent Awards but did not treat with them in the Agreement of November 20, 1964.

Carriers, in general, were well aware of such precedents and, in the current (1966) negotiations, propose a prohibition against multiple time and one-half payments on holidays, such as:

> "Under no circumstances will an employe be allowed more than one time and one-half payment for service performed by him on any day which is a holiday."

which, of course, is the forum suggested in some of the earlier Awards.

Moreover, although it is true that certain provisions allow employes to observe their birthday on some alternate date and thus, in most instances, avoid the coincidental occurrence of having to work on a day which is both one of the 7 recognized holidays and also the employe's birthday, the "penalty" provided by this Award 14921 **is not spelled out with equal clarity.**

In other words, the parties did not, at any place in the November 20, 1964 Agreement, suggest that **if an employe did not choose an alternate date,** his compensation, if required to work, would be lessened. Yet that is the result of this Award.

The above cited Awards should have been followed and the claim herein sustained. I therefore dissent to this erroneous award which obviously reads into the Agreement that which is not there and that which is the subject of current negotiations.

**D. E. Watkins**
D. E. Watkins,
Labor Member
11-30-66

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