

Award No. 15000

Docket No. CL-15804

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

(Supplemental)

Nicholas H. Zumas, Referee

PARTIES TO DISPUTE:

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

THE CENTRAL RAILROAD COMPANY OF NEW JERSEY

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood (GL-5859) that:

(a) Carrier violated the Clerks' Agreement at Jersey City, N. J. Freight Yard when it failed to properly compensate Mr. V. Kelly for work performed on February 22, 1965, a regularly assigned rest day which was also a holiday.

(b) Carrier shall now compensate Mr. V. Kelley for eight (8) hours' pay at time and one-half rate in addition to that paid for service performed on February 22, 1965.

EMPLOYES' STATEMENT OF FACTS: There is in effect a Rules Agreement effective December 15, 1952 between the parties to this dispute which sets out rules pertinent to this claim. All agreements are on file with this Board and portions of these agreements may be referred to without quoting in full.

The claimant, Mr. V. Kelley, is the regular incumbent of Cycle position No. 42 with rest days of Monday and Tuesday.

On February 22, 1965 (claimant's rest day), Washington's Birthday, the incumbent of position titled Crew Dispatcher, hours 3:55 P. M. to 11:55 P. M. reported off due to illness and Mr. V. Kelley was requested to cover the vacancy. He reported for duty and covered the vacancy for the entire tour of duty.

After the claimant discovered that he was paid only one day's pay at the punitive rate, he submitted a time claim asking that he be properly allowed eight (8) hours at time and one-half for working on his relief day, also eight (8) hours for working on a legal holiday.

Superintendent of Terminals, J. H. Moore, denied the claim as follows:

"Your letter dated March 5, 1965 in reference to time claim for Mr. V. Kelly.

Mr. V. Kelly was paid punitive rate account working relief day. The second 8 hours of punitive rate is denied account it was not his working day. Therefore, he is only entitled to 8 hours at punitive rate, which he was paid."

The Superintendent of Terminals denial was appealed to Vice President and General Manager J. A. Craddock. His rejection of the claim in letter dated June 28, 1965 is attached as Exhibit No. 1.

(Exhibits not reproduced.)

CARRIER'S STATEMENT OF FACTS: Claimant V. Kelly, a regularly assigned crew dispatcher with a work week from Wednesday to Sunday, Monday and Tuesday being his assigned rest days, was called to protect crew dispatcher vacancy on Monday, February 22, 1965, one of the seven recognized holidays. In accordance with the provisions of Rule 22(b) — Rest Days and Holidays — quoted below, he was allowed eight (8) hours at punitive rate for work performed on the date in question:

"(b) Work performed on rest days and the following legal holidays, namely: New Year's Day, Washington's Birthday, Decoration Day, Fourth of July, Labor Day, Thanksgiving Day and Christmas, shall be paid for at the rate of time and one-half. When any of the above holidays fall on a Sunday, the day observed by the State, Nation, or by proclamation, shall be considered the holiday. When any of the above holidays falls on the second assigned rest day, other than Sunday, of an Employee's work week, the day following will be considered his holiday."

OPINION OF BOARD: Claimant is the regular incumbent of Cycle position No. 42 with rest days on Monday and Tuesday. February 22, 1965 was Washington's Birthday and also Claimant's rest day. On that day the incumbent of the Crew Dispatcher's position became ill and Claimant was requested to cover the vacancy.

For this service Carrier paid Claimant eight hours at the premium rate for working on his rest day and refused to allow an additional eight hours at the premium rate for working on Washington's Birthday (one of the seven designated holidays under the Agreement).

Claimant, through the Organization, contends that he is entitled to be compensated under two separate rules, one governing compensation for work performed on a rest day, and one for work performed on a designated holiday.

Carrier, on the other hand, asserts that Claimant was properly compensated under the applicable rule of the Agreement and that such rule does not provide for double payment for the coincidental happening of a rest day and a holiday.

The question to be determined by this Board is whether, under this Agreement, Claimant is entitled to be compensated for both a rest day and a holiday where they occur on the same day.

At the outset it should be stated that there is a long list of awards beginning with Award 10541 which have consistently held that the Carrier has an obligation to pay for such service under two separate rules. The

rationale of these awards is that where there are two separate rules and no qualifying exceptions, two separate payments are called for.

The pertinent provisions of this Agreement are set forth as follows:

"Rule 19(k) Service rendered by Employees on their assigned rest days shall be paid for under the Call rule unless relieving an Employee assigned to such day in which case they will be paid for eight (8) hours at the rate of the position occupied or their regular rate, whichever is higher. Regular assigned rest days shall not be changed except after 36 hours advance notice to the Employee as is required under Rule 21."

"Rule 22(b) Rest Days And Holidays. Work performed on rest days and the following legal holidays, namely: New Year's Day, Washington's Birthday, Decoration Day, Fourth of July, Labor Day, Thanksgiving Day and Christmas, shall be paid for at the rate of time and one-half. When any of the above holidays fall on a Sunday, the day observed by the State, Nation, or by proclamation, shall be considered the holiday. When any of the above holidays falls on the second assigned rest day, other than Sunday, of any Employee's work week, the day following will be considered his holiday."

"Rule 23(a) Employees notified or called to perform work either before, or after, but not continuous with their regularly assigned work day, shall be allowed a minimum of two (2) hours at rate of time and one-half for two (2) hours or less, and if held on duty in excess of two (2) hours, time and one-half will be allowed on the minute basis.

(b) Except as provided in paragraph (c) of this rule, regularly assigned Employees, notified or called to perform work on their rest days or holidays specified in Rule 22(b), shall be allowed a minimum of three (3) hours at time and one-half rate for three (3) hours work or less, and at time and one-half on a minute basis up to four (4) hours. Employees worked in excess of four (4) hours will be allowed a minimum of eight (8) hours at the rate of time and one-half.

(c) Regularly assigned Employees notified or called to perform work on their rest days or the holidays specified in Rule 22(b), which is a day for which coverage is provided for six or seven days under Rule 19(c) and (d), will be paid eight (8) hours at time and one-half for eight (8) hours work or less."

Claimant contends that he is entitled to payment under the rest day rule (19k) as well as under the holiday rule (22b).

Carrier's position may be summarized as follows: (1) Rule 22(b) is the only applicable rule because it covers situations where the rest day and holiday coincide (the language reads "rest days and holidays") and only one payment is called for under the rule; (2) Claimant cannot avail himself of the call provisions of Rule 23 (which read "rest days or holidays") because

he was relieving an employee assigned to such day; and (3) Even if the rules are vague, the past practice of this Carrier has been to make a single payment.

In support of its position, Carrier relies on Award 14240 in which a similar claim was denied. That award, it should be noted, involved a Clerks' agreement where as the awards cited by Claimant were concerned with Telegraphers' agreements.

While considerable attention is devoted to a determination that the word "and" is a conjunction, and to a comparative study of the differences in the language of the agreements of the two crafts, the finding in Award 14240 is ultimately based on past practice on the property because the Agreement's language was held to be ambiguous and unclear. We are bound neither by its dicta nor its holding.

A cursory reading of Rule 22(b) would seem to indicate that the Rule provides for a single payment where the rest day and the specified holiday coincided, i.e.

"Work performed on rest days and the following legal holidays . . . shall be paid for at the rate of time and one-half."

However, a closer examination of the Rule reveals that the parties, despite the use of the conjunction "and," intended "rest day" and "holiday" to be considered separately. This finding is based on the following: (1) Rule 22(b) is the only provision in the Agreement relating to legal holidays. To construe it strictly would compel the conclusion that **only** where a holiday coincides with a rest day is the premium rate to be paid. (2) Rule 23 makes provision when work is performed "on their rest days **or** holidays **specified in Rule 22(b).**" (Emphasis ours.)

In addition, to accept Carrier's premise would, under Rule 19(k), allow payments under the two rules where the Employee was not relieving (Rule 23, the Call rule would be applicable), and would not allow such payments where he was relieving (Rule 22(b) would be applicable).

Based on the foregoing, this Board finds that there are two separate rules under which Claimant is entitled to payment, and consistent with the prior awards of this Board (Award 10541, et al.) the claim is sustained.

The Board's attention has been directed to Award No. 23 of Special Board of Adjustment No. 564, involving an interpretation of the Clerks' agreement on the Missouri Pacific Railroad.

The question in that dispute was identical to the one before this Board, viz. The compensation to which an employee is entitled for having worked a rest day which was also a legal holiday.

After a general evaluation of the prior awards of this Division (Awards 10541, 10679, 11454, 11899, 12471, and 14138) none of which involved the Missouri Pacific Railroad, the Special Board proceeded to consider whether payment for a rest day and for a holiday was "overtime on overtime."

The Board stated:

"Premium pay for work on a holiday may or may not be 'overtime' depending on the intent of the parties. That intent must be ascertained from the clear, unambiguous contract language or, if the language is ambiguous, from the practice on the property. Since 'overtime' is not in itself clear and meaningful, and since the parties have had occasion to administer the application of Rules 26(a) and 26(b), it is necessary and proper to ascertain the meaning and intent from such application." (Emphasis ours.)

The Board consequently found that there was a period of 17 years of past practice on the property during which Carrier had paid only the single time and one-half rate.

Past practice on that property, therefore, was the real basis for the Board's award.

Even if the rules were ambiguous in the instant dispute, we should state in passing, that past practice was merely alleged in Carrier's submission and such allegations can be given no probative effect.

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 Employees involved in this dispute are respectively Carrier and Employees 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

The Claim is sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 2nd day of December 1966.

CARRIER MEMBERS' DISSENT TO AWARD 15000, DOCKET CL-15804 (Referee Zumas)

The Carrier Members' dissents in earlier cases involving similar issues, and particularly the dissent to Award 14489, are adopted as dissent in this case.

C. H. Manoogian
R. A. DeRossett
W. B. Jones
J. R. Mathieu
W. M. Roberts

**LABOR MEMBER'S ANSWER TO CARRIER MEMBERS'
DISSENT TO AWARD 15000, DOCKET CL-15804**

Award 15000, Docket CL-15804, correctly followed sound precedent Awards 10541, 10679, 11454, 11899, 12453, 12471, 14138, 14489, 14528, 14977 and 14978, and quite properly rejected Third Division Award 14240 and Award 23 of Special Board of Adjustment No. 564, which were ill conceived, and I concur in the decision to sustain the claim and the finding that the rules, as set forth in the Award, are not ambiguous.

The authors of Awards 14240 and 23 of Special Board of Adjustment No. 564 were in error because "past practice," no matter how long continued, cannot change agreement language and, of course, reliance on past practice can only properly come into play if the rules are ambiguous. A comparison of the unambiguous rules involved in Award 15000 with those involved in Awards 14240 and 23 of 564 clearly indicates error on the part of the Referees in the latter two Awards. Award 15000 properly decided that this Board was not bound by any holding, under such rules, that was based on "past practice."

Moreover, Awards 10541, 10679, 11899, 12453, 12471 and others all properly rejected any "past practice" and relied strictly on the rules. In addition, subsequent Award No. 15052 not only rejected past practice but very clearly refused to follow Award 14240 and Award 23 of Special Board of Adjustment No. 564. Thus, the two ill conceived awards have not been followed by the Board — and properly so, and, for all intents and purposes those two Awards have been overturned, leaving only sound precedent Awards 10541, 10679, 11454, 11899, 12453, 12471, 14138, 14489, 14528, 14977, 14978, 15000 and 15052, as the weight of authority to be followed.

See my answer to dissent to Awards 14977 and 14978, pointing out the fact that the matter is, and should be, left to negotiations.

D. E. Watkins
Labor Member
1-4-67