Award No. 16431
Docket No. MW-16791

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

(Supplemental)

Milton Friedman, Referee

PARTIES TO DISPUTE:

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES

TERMINAL RAILROAD ASSOCIATION OF ST. LOUIS

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood that:

(1) The Carrier did not fully and properly compensate Foreman Ancel Dobbs, Truck Driver M. L. Smith, Track Laborers Homer Hutton and Chester Williams for services performed on December 25, 1965 (Carrier's File 013-293-19)

(2) Each of the above-named employes be allowed, in addition to payment received, an additional six (6) hours of pay at their respective time and one-half rates.

(3) The Carrier did not fully and properly compensate Foreman Ancel Dobbs, Track Laborers Chester Williams, Martin Hayes and Chester Freant for services performed on January 1, 1966.

(4) Each employe named in Part (3) of this claim be allowed, in addition to payment received, additional pay at their respective time and one-half rates as follows:

Ancel Dobbs	5 hours
Chester Williams	5 hours
Martin Hayes	5½ hours
Chester Freant	4 hours

EMPLOYES' STATEMENT OF FACTS: Each of the claimants were regularly assigned to work Monday through Friday of each week. Saturdays and Sundays were assigned rest days. Saturday, December 25, 1965, was the Christmas Holiday, and Saturday, January 1, 1966, was the New Year's Holiday.

On December 25, 1965, the Carrier called and used Foreman Ancel Dobbs, Truck Driver M. L. Smith and Track Laborers Homer Hutton and Chester Williams to perform track repair work. Each of these employes worked six (6) hours.

OPINION OF BOARD: Each Claimant worked on his rest day, which was also a holiday, and each seeks separate payment of time and one-half, or, in other words, of triple time for the work performed.

An almost unbroken series of Awards of this Division, since 10541, has upheld such claims. In those cases, however, the awards were based either on the presence in the Agreements of separate holiday and rest-day rules, or on **stare decisis**, or both. In the case before us, the Agreement contains a single rule on the subject:

"RULE 29A.

(a) Except as otherwise provided, work performed by employes on their assigned 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 (provided that when any of the above holidays fall on a Sunday, the following day shall be considered the holiday), shall be paid for at the rate of time and one-half with a minimum of two (2) hours and forty (40) minutes as per Rule 32."

Stare decisis should not be slavishly applied merely because a case involves the same issue as its predecessors. It must also have the same relevant contract provisions and the same facts. To follow precedent blindly and undiscriminatingly, without a searching analysis of the specific circumstances, does a disservice not only to the parties involved, but to the very concept of **stare decisis.**

Therefore, since the Rule here does differ from those involved in prior cases, the issue cannot be decided merely by reference to this Board's precedents. It is necessary to determine the intent of Rule 29A.

Intent may be gauged in part by conduct. Carrier stated on the property that it has never made dual payments for work on a rest-day holiday, although a Rule like 29A has been in Agreements since 1946. Carrier stated, "Past practice, therefore, makes it quite evident how the parties intended that the rule be applied."

In its ex parte submission, the Organization argued that Carrier had not produced proof of the alleged practice, and cited a host of awards which held that "unsupported assertions do **not** constitute proof." However, where an assertion is made on the property that something has never occurred, and evidence to the contrary could have been produced if it existed, failure to rebut the assertion demonstrates its accuracy. If Carrier's statement had been challenged on the property even by a general denial of its veracity, Carrier would have had the obligation to present specific proof if the assertion were to be credited. No such denial was entered. Carrier, therefore, was not obliged to give dates and names in the discussion on the property, for it had been lulled by the Organization's silence into a belief that its assertion was accepted.

Carrier's notice under Section 6 of the Railway Labor Act, proposing a prohibition on claims of this kind, was cited by the Organization as evidence that Carrier knew it was obliged to make these payments. Otherwise, it was said, Carrier would not try "to obtain what it already has."

In the context of Award No. 10541, and the ensuing obeisance to it, it is hardly surprising that Carrier would seek to clarify the Agreement. A present liability is not established by an effort to clarify an ambiguity, and Rule 29A is plainly not explicit on the subject. While Carrier's notice is evidence that Rule 29A does not specifically support its position, such a notice in itself does not concede the Organization's interpretation. Efforts to clarify do not deprive a party of whatever rights it possesses. If they did, no one would ever suggest clarification of an ambiguity.

Since the rule is not explicit on the subject, reference to past practice is appropriate to establish intent. Since the Rule is a combined one, it cannot in any event be the basis for finding, as occurred in other cases, that separate rest-day and holiday rules require separate payments. Finally, since the Agreement is unlike those in prior cases, the principle of **stare decisis** is inapplicable.

We concur with Award No. 15749, involving the same Organization and an essentially similar rule, which denied a similar claim based upon that Agreement's intent. The intent of the Agreement before us also is to preclude dual payments.

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 by the Carrier.

AWARD

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 19th day of June 1968.

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