NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Award Number 20585
Docket Number CL-20535

Irwin M. Lieberman, Referee

PARTIES TO DISPUTE: (Brotherhood of Railway, Airline and Steamship Clerks, Freight Handlers, Express and Station Employes (Formerly Transportation-Communication, Div., BRAC)
(Norfolk and Western Railway Company (Lake Region)

STATEMENT OF CLAIM: Claim of G. E. Semones for eight hours pay at the Car Clerk's rate, Conneaut, Ohio, for February 15, 1971, a Holiday, under the Holiday Rules and other related rules of the agreement.

OPINION OF BOARD: Claimant, a regularly assigned Car Clerk included under Petitioner's Agreement, was assigned in accordance with his seniority as a train dispatcher to fill a vacancy on the second trick "B" District train dispatcher position from February 3, 1971 through March 2, 1971. He then filled a vacancy on the third trick "C" District train dispatcher position on March 3rd and returned to his regular Car Clerk's position on March 5th. February 15, 1971 was a holiday and train dispatchers do not receive any pay for holidays as such; holiday pay is factored into the monthly rated dispatcher compensation. Petitioner, noting that he worked both on the holiday and the days preceding and following the holiday as a dispatcher, claimed eight hours holiday pay under the Holiday Rules of the Telegraphers' Agreement.

Claimant's position is based on Article II of the Telegrapher's National Agreement (as amended February 25, 1971), which provides in pertinent part:

> "Section 1. Subject to the qualifying requirements contained in Section 3 hereof, and to the conditions hereinafter provided, each hourly and daily rated employees shall receive eight hours' pay at the pro rata hourly rate for each of the following enumerated holidays:
>
> * * * * * * * *
>
> (a) Holiday pay for regularly assigned employees shall be at the pro rata rate of the position to which assigned."

"Section 3. A regularly assigned employee shall qualify for the holiday pay provided in Section 1 hereof if compensation paid him by the carrier is credited to the workdays immediately preceding and following such holiday or if the employee is not assigned to work but is available for service on such days. If the holiday falls on the last day of a regularly assigned employee's workweek, the first workday following his rest days shall be considered the workday immediately following. If the holiday falls on the first workday of his workweek, the last workday of the preceding workweek shall be considered the workday immediately preceding the holiday.

Except as provided in the following paragraph, all others for whom holiday pay is provided in Section 1 hereof shall qualify for such holiday pay if on the day preceding and the day following the holiday they satisfy one or the other of the following conditions:

(i) Compensation for service paid by the carrier is credited; or

(ii) Such employee is available for service.

Note: 'Available' as used in subsection (ii) above is interpreted by the parties to mean that an employee is available unless he lays off of his own accord or does not respond to a call, pursuant to the rules of the applicable agreement, for service.

For the purposes of Section 1, other than regularly assigned employees who are relieving regularly assigned employees on the same assignment on both the work day preceding and the work day following the holiday will have the workweek of the incumbent of the assigned position and will be subject to the same qualifying requirements respecting service and availability on the work days preceding and following the holiday as apply to the employee whom he is relieving.

Compensation paid under sick-leave rules or practices will not be considered as compensation for purposes of this rule."

Petitioner contends that Claimant was allowed payment for ten previous dates under similar circumstances when he worked as a dispatcher during previous holiday periods: The Organization argues that under the clear and unambiguous language of the Agreement in Section 3, the Claim must be sustained under the compensation test, which only excludes sick leave pay. It is argued further that Claimant was being paid on a daily basis while working as a temporarily assigned dispatcher under a different agreement. A number of Awards are cited by Petitioner which will be discussed hereinafter.

Carrier states that the ten incidents of previous payments cited by Petitioner are of no precedential value since the payments were handled by a local timekeeper without the knowledge or concurrence of any Carrier officer with responsibility to interpret the rules. Although Carrier's position is well taken, it is apparent that Claimant may well have relied on the past practice in accepting the assignment involved herein.

Carrier argues that Claimant was a train dispatcher during the period in question and came under the provisions of the American Train Dispatchers Association Agreement; that Agreement provides for monthly compensation which includes holiday pay. Claimant was properly compensated under that Agreement. Carrier also cites a series of Awards supporting its position. Carrier additionally urges that Claimant was not used on a day-to-day basis, but served as a monthly employe while functioning as a dispatcher during the period involved in this dispute.

Since the National Holiday Pay Agreement's inception in 1954 a number of disputes have arisen which have involved situations wherein individuals have had regular assignments under one Agreement and who also performed service under a different Agreement. Some of these disputes have involved different types of compensation under the two agreements, as herein. In both types of cases the Board has issued sharply differing and indeed conflicting Awards. One of the leading Awards in a situation analagous to that in this dispute was Award No. 82 of Special Board of Adjustment No. 192, which provided in part as follows:

> "We think it is clear from the above quoted language that the framers of the Agreement recognized that it is not unusual for regularly assigned employes under non-operating agreements to hold dual seniority. We can read no intent in that language to disqualify a regularly assigned employe under the Clerk's Agreement for holiday pay because he may have worked under some other agreement either on the day before or on the day after or on the holiday. As a matter of fact the language of the Agreement appears to have been carefully drawn so as to preclude such a result."

This position was reaffirmed in a series of following awards, some with slightly varied factual circumstances: Awards 11317, 11551, 14501 and Award 37 of Special Board of Adjustment No. 122. In discussing these Awards, the Board in Award 18261 stated:

> "The effect of these decisions is that the rule makes no qualification with respect to the source of the compensation paid by the Carrier and credited to the employes' regular work days immediately preceding and following the holiday. And since only one exception - that with respect to sick leave payments - is expressed, no other or further exceptions may be implied. Such decisions cannot be characterized as palpably erroneous; therefore, they provide valid precedent."

In Awards 18953 and 19756 the Board partially sustained Claims based in large part on equity rather than the language of the agreements. Contrary to those Awards, we do not believe the Board has the power to modify the Holiday Agreement by proportioning compensation under circumstances such as that in the instant dispute.

The Carrier relies in part on the language of Award 16457 to support its conclusions. We do not agree with a fundamental assumption in that Award: that an employe may hold two regular assignments simultaneously; we know of no rule support for this conclusion although a regular telegrapher may, for example, perform extra assignments as a train dispatcher. The rationale of Award 16457 was followed by the Board in Award 19632, which we cannot support. Carrier also cites certain Second Division Awards; these Awards involved significantly different factual backgrounds as well as unique Shop Craft Rules (see for example Award 3806).

It seems clear that Claimant herein while working as a dispatcher was paid on a daily basis compensation derived from the dispatcher's monthly rate. Hence, he meets the test of Section 1 of the Holiday Agreement which states: "....each hourly and daily rated employees shall receive eight hours' pay at the pro rata hourly rate for each of the following enumerated holidays...." Finally, he qualified for holiday pay by the compensation paid him by Carrier in accordance with Section 3 quoted above, which excepts only sick leave pay for the purposes of the rule. Therefore, we reaffirm the reasoning expressed in Award No. 82 of Special Board of Adjustment No. 192 and must sustain the Claim.

We do not intend by this Award to establish a precedent encouraging a totally open-ended interpretation of Section 3 of the Holiday Rules; for this reason we are confining this decision to the temporal circumstances existing in this case.

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.

A W A R D

Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: A. W. Paulos
Executive Secretary

Dated at Chicago, Illinois, this 17th day of January 1975.