NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Award Number 23589
Docket Number CL-23499

Herbert L. Marx, Jr., Referee

PARTIES TO DISPUTE: (Brotherhood of Railway, Airline and Steamship Clerks, (Freight Handlers, Express and Station Employes ((Chesapeake and Ohio Railway Company

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood (GL-9021) that:

(a) The Carrier violated the Clerical Agreement when they did not apply the provisions of the General Agreement and Memorandum Agreement dated September 1, 1949 and arrange to allow M. E. Hein 1 day in excess of 252 Annual Work Days in 1974.

(b) The Carrier should now recompute M. E. Hein's pay for the year 1974 and allow him $60.25 for 1 days pay due to working 1 day in excess of the 252 Annual Work Days in 1974.

OPINION OF BOARD: This claim concerns the interpretation of the Memorandum of Agreement effective September 1, 1949 (hereinafter referred as the "1949 Agreement") in the light of subsequent changes in the method of allowing holiday pay and the number of holidays. The essence of the dispute is whether the Section 2 reference to pay "for each such day in excess of 254" should be followed as written, which the Carrier contends; or whether, in view of Section 7, the number should be interpreted as 252 working days at the time of this claim (and numerous other claims simultaneously to the Board.)

The 1949 Agreement reads in pertinent part as follows:

"2 - In years having more than 254 working days, employes covered by this memorandum of agreement will be paid an additional day's pay at straight time rate on the basis provided by Rule 48, Section (e), for each such day in excess of 254, such payment to be made as follows:

A - For employes with assigned rest days Saturday and Sunday, payment to be made in each month in which one of the holidays specified in Rule 39, Section (b), falls on Saturday.

B - For employes with assigned rest days other than Saturday and Sunday, payment to be made in the month in which one of the holidays specified in Rule 39, Section (b), falls on either of the assigned rest days.

C - In a Leap Year each employe covered by this Agreement to be paid an additional day's pay at straight time rate on the basis as provided by Rule 43, Section (e), in the pay period for the last half of December.

3 - The monthly rate of an employe will be compensation for eight hours or less per day (as assigned by bulletin) for the number of working days in a month. A month shall be the number of days therein less rest days and the holidays specified in Rule 39(b) of the days to be observed as holidays in lieu of holidays.

4 - Regularly assigned employes hereunder will receive for each semi-monthly pay period the fractional part of the working days in the particular calendar month. For example, in a calendar month containing 21 working days an employe would receive 10/21 of the monthly rate for the pay period having ten working days, and 11/21 of the monthly rate for the pay period having eleven working days.

5 - The employes covered by this agreement have a basic work month of 169-1/3 hours. To determine the straight time hourly rate, divide the monthly rate by 169-1/3; to determine the daily rate, multiply the straight time hourly rate by 8. The hourly overtime rate is to be not less than 1 and 1/2 times the straight time hourly rate. All fractions in the final computation will be carried to the next highest cent.

6 - Any employe temporarily relieving on a position hereunder will be paid as though the position were being paid on a daily rate basis as provided in Section (e) of Rule 43 of Agreement No. 7, as revised effective September 1, 1949.

7 - It is not the intent of this agreement that an employe will receive any less compensation during the course of a year by reason of this agreement than he would have received had he been paid on a daily basis as provided in the rules of the General Agreement and no less favorable consideration shall result therefrom. ..."

In Award No. 22699 (Edgett), the Board sustained an identical claim (except that it was for two days' pay rather than one day's pay). In that Award, the Board addressed itself to the same 1949 Agreement language involving the same Carrier and the same Organization. The Carrier accepted the final and binding nature of Award No. 22699 as to the particular claimant but, accompanied by extensive argument in support of its position, did not apply the findings in that award to this and other identical claims.

The Board reasserts here the principle which has consistently guided the Board in the past -- namely, that the rational and orderly dispute resolution process, as directed by law and agreement, is strengthened and made far more reliable if previous awards are accepted as determinative of new disputes which involve identical agreement provisions and fact circumstances (not to mention, as here, the same parties).

As expressed in Award No. 21806 (Sickles):

> "Much has been written concerning the wisdom of adhering to prior Awards between the same parties, when the same issues are involved. Quite candidly, we are compelled to note that Award No. 20556 may have, to some extent, understated the complexities of the issues involved in this type of a case. While we do not necessarily assert that the final result would be the same or different had we considered the dispute in the first instance - unaided by extrinsic assistance - nonetheless, we cannot conclude that Award 20556 is palpably erroneous."

The usual exception is taken where the Board, upon reconsideration, finds a previous award "palpably erroneous". In this instance, the Board has reviewed Award No. 22699 and, despite the Carrier's arguments to the contrary, does not find it erroneous. There is no evidence that the facts and agreement provisions set before the Board in Award No. 22699 differed in any perceptible way from those now before the Board in this claim.

The Board will, nevertheless, take the opportunity to express its own rationale for its conclusions that the claim should be sustained.

The Carrier raises a question of timeliness in that the claim was not filed until more than 60 days following the issuance of a Carrier memorandum making a determination as to how to pay the Claimant for the year 1974. This was, however, an internal memorandum. It is clear that the claim was filed within 60 days after the Claimant failed to receive the pay he considered appropriate. The claim is a timely one.

The Carrier's argument as to past practice is also without merit. The Carrier points out that the Organization accepted the continuance of the use of 254 days in Section 2 without objection ever since the effective date of the 1949 Agreement up to the current dispute. This, however, is not meaningful. The question of the appropriateness of 254 days only became pertinent in 1972 (when a variable birthday holiday was added to the seven in existence) and in 1973 (when a ninth holiday was added).

The Board accepts that the 254 days in Section 2 was originally derived by taking 365 days a year and subtracting 104 rest days and the seven holidays then in existence. Multiplying 254 days by eight hours and dividing by 12 months brought an average of 169-1/3 hours as monthly pay. A change in reference to holiday pay in 1954 added 56 hours annually (seven times eight hours) to employes' pay. This was accomplished for monthly employes by adding

4-2/3 days' pay per month for employes paid on a monthly basis, raising the monthly pay hours to 174. When the eighth and ninth holidays were added, this monthly pay level became 175-1/3 hours.

On this there is no dispute. It is clear that by these changes monthly paid employes gained in equivalent amount the same additional pay received by employes paid on a daily basis as a result of the paid holiday provisions.

This, however, is quite separate from the operation of Sections 2 and 7 of the 1949 Agreement. Here, the problem can be seen in these terms: daily rated employes receive pay for each day worked, so that, owing to varying rest days and their effect on the calendar (as well as the effect of the Leap Year extra day), there is no problem of pay for daily rated employes -- one day's wage for each day worked; those who work a greater number of days in a calendar year get more pay than those who work fewer days.

The effect on monthly rated employes is different. They, too, work a varying number of days in each calendar year, depending on rest day schedules. Section 2 of the 1949 Agreement provided extra days of pay for those who worked a greater number of days than others performing the same work. Section 7 emphasized that the system of equal monthly payments should not give an employee less "than he would have received had he been paid on a daily basis..."

The Carrier is correct in stating that at no time, during all the changes in reference to holiday pay and additional holidays, did the parties alter the number "254" in Section 2. If there were nothing to modify this, the Carrier would be technically correct in arguing there would be full language support for continuing to use 254 days, regardless of other negotiated changes. Section 7, however, provides otherwise. A daily rated employe working 253 days in a calendar year obviously earns more than a daily rated employe working 252 days in a calendar year, even though in both instances the daily rated employes are working only regularly scheduled days. Section 7 simply applies the same principle to employes paid on a monthly basis.

This is aptly demonstrated by a review of Carrier's Exhibit H, a group of memoranda issued by the Carrier to determine which monthly rated employes should receive additional pay under Section 2. Exhibits H-1 and H-2 issued in 1950 and 1960, respectively, show that the least number of days worked by a monthly rated employe is 254, with additional pay provided for days above that. In other words, extra days worked above the lowest number were compensated.

Carrier's Exhibit H-7, covering 1973, and Carrier's Exhibit A, covering 1974, tell a different story. Here, schedules for monthly rated employes cover from 252 to 257 days. On both 1973 and 1974 memoranda of payment, Carrier asserts that monthly rated employes working 253 or 254 days should receive the same annual pay as those working 252 days. This, however, is clearly not the case for daily rated employes, who receive pay for each day worked. Thus, Section 7 necessarily modifies Section 2, for only by using the figure 252 in Section 2 can the "intent of this agreement", as required by Section 7, be followed.

In its full presentation, the Carrier argues that the Organization is mixing "apples and oranges" in seeking both increased hours of pay per month, owing to more generous holiday pay provisions and reduced base for calculation of extra day or days of pay (252 vs. 254). Actually, there are provisions for both fruits: the "apples" are the increased holiday pay provisions; the "oranges" have been present all the time in the form of additional days of pay worked by some monthly rated employes in relation to other monthly rated employes, exactly as is always true for daily rated employes.

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: Acting Executive Secretary
National Railroad Adjustment Board

By Rosemarie Brasch
Rosemarie Brasch - Administrative Assistant

Dated at Chicago, Illinois, this 10th day of March 1982.