Form 1 **NATIONAL RAILROAD ADJUSTMENT BOARD**
THIRD DIVISION

Award No. 44617
Docket No. MW-45125
22-3-NRAB-00003-210251

The Third Division consisted of the regular members and in addition Referee Edwin H. Benn when award was rendered.

(Brotherhood of Maintenance of Way Employes Division -
(IBT Rail Conference
PARTIES TO DISPUTE: (
(The Kansas City Southern Railway Company
(former SouthRail Corporation)

STATEMENT OF CLAIM:

"Claim of the System Committee of the Brotherhood that:

(1) The Agreement was violated when the Carrier failed and refused to allow Mr. D. Cunningham to work eleven (11) hours of straight time on December 27, 2016 and eleven (11) hours of straight time on December 28, 2016 so that he would receive forty (40) hours straight time pay for the period of December 25 through December 29, 2016 [System File C 16 12 26 (089)/K0417-7092 SRL].

(2) As a consequence of the violation referred to in Part (1) above, Claimant D. Cunningham shall '… be compensated two (2) hours' vacation pay at his B&B Carpenter rate of pay during these days in question which totals $85.05, plus late payment penalties based on a daily periodic rate of .0271% (Annual Percentage Rate of 9.9%) calculated by multiplying the balance of the claim by the daily periodic rate and then by the corresponding number of days over sixty (60) that this claim remains unpaid.' "

FINDINGS:

The Third Division of the Adjustment Board, upon the whole record and all the evidence, finds that:

The carrier or carriers and the employee or employees involved in this dispute are respectively carrier and employee within the meaning of the Railway Labor Act, as approved June 21, 1934.

This Division of the Adjustment Board has jurisdiction over the dispute involved herein.

Parties to said dispute were given due notice of hearing thereon.

At the time this dispute arose in 2016, the Claimant was assigned to a mobile gang working a four day - ten hours per day schedule. Christmas Eve and Christmas Day are contractually designated holidays. Christmas Eve fell on Saturday, December 24, 2016 and Christmas Day fell on Sunday, December 25, 2016.

Rule 30 of the Agreement provides:

"RULE 30

HOLIDAYS

*** * ***

Christmas Eve
Christmas Day

NOTE: When any of the above holidays fall on Sunday the day observed by the Nation shall be considered the holiday. When Christmas Day falls on Sunday and is observed on Monday, then Sunday shall be considered the holiday for Christmas Eve."

The February 19, 1988 Letter of Agreement provides:

"(c) When a holiday falls or is observed on any day from Monday through Friday, employees assigned to mobil gangs working a four-day work week will work two eleven-hour days and one ten-hour day. Employees will be paid that pro-rata rate for the 32 hours."

In accord with Rule 30, Christmas Day was observed on Monday, December 26, 2016.

According to the Organization in its June 15, 2017 letter [emphasis omitted]:

> **"Our Claimant was paid eight (8) hours holiday pay for Sunday December 25, 2016, and Monday December 26, 2016. Then he worked ten (10) hours regular on Tuesday, Wednesday, and Thursday. The agreement states that When a holiday falls or is observed on any day from Monday through Friday, employees assigned to mobile gangs working a four-day workweek will work two eleven-hour days and one ten-hour day. The Carrier did not allow our Claimant to work this shift and only paid thirty (30) hours, instead of the thirty-two (32) resulting in two (2) hours of lost work opportunity."**

According to the Carrier in its August 10, 2017 letter, "... the employee was appropriately compensated during the period of December 25 – December 29, 2016 ...." In that letter, the Carrier referred to the its response to the claim in a letter dated April 21, 2017, which stated that "[i]nformation provided by Payroll indicates the employee was paid a total of forty-six (46) hours during the period December 25 – 29, 2016."

No paystubs from the Claimant or payroll records from the Carrier were provided in the record to this Board to show when the Claimant worked and how he was paid during the period in dispute. All we have are the parties' general assertions. Those source documents would have been helpful to this Board.

"This is a contract dispute therefore placing the burden on the Organization to demonstrate a violation of the Agreement." First Division Award 28478. Without the source documents from either party, it could be found that the Organization did not carry its burden because of lack of direct evidence other than a general assertion and the contention of the Carrier that the Claimant was properly paid. However, closer examination shows that the Organization has sufficiently carried its burden.

Rule 30 designates Christmas Day as a holiday. The February 19, 1988 Letter of Agreement specifically states that "[w]hen a holiday falls or is observed on any day from Monday through Friday, employees assigned to mobil[e] gangs

working a four-day work week will work two eleven-hour days and one ten-hour day." Christmas Day was observed on Monday, December 26, 2016.

The focus is in this case is on the Letter of Agreement and the hours worked requirement. The Organization contends that the Claimant did not work the two eleven-hour days following the Monday, December 26, 2016 observed holiday, but was only allowed to work two ten-hour days following the observed holiday. Notably, the Carrier does not deny that assertion. Instead, the Carrier focuses on the Claimant's pay during the period December 25 – December 29, 2016 while the Organization focuses on hours worked on the two days following the December 26, 2016 observed holiday, which should have been two eleven-hour days under the February 19, 1988 Letter of Agreement.

The Organization's focus here is properly on the requirement that the Claimant should have worked two eleven-hour days under the February 19, 1988 Letter of Agreement following the observed holiday which the Carrier has not denied. Because of the lack of denial by the Carrier concerning hours worked by the Claimant on the two days following the observed holiday on Monday, December 26, 2016 and absent source payroll documents from the Carrier and under its control showing hours worked by the Claimant on the two days following the observed holiday, we find that the Organization has sufficiently met its burden. Without a denial of the Organization's assertion that the Claimant only worked two ten-hour days as opposed to two eleven-hour days as required by the February 19, 1988 Letter of Agreement and the lack of source payroll documents under the Carrier's control showing the Organization's position to be in error, the Organization's assertion that the Claimant did not work the two eleven-hour days as required by the February 19, 1988 Letter of Agreement must be found as fact. The claim therefore has merit.

For a remedy, because the record sufficiently shows that the Claimant was not allowed to work two eleven-hour days following the observed holiday and only worked two ten-hour days, the Claimant shall be entitled to two hours pay at the appropriate contract rate.

We have considered the Carrier's procedural argument and find it to be insufficient to change the result.

AWARD

Claim sustained.

ORDER

This Board, after consideration of the dispute identified above, hereby orders that an award favorable to the Claimant(s) be made. The Carrier is ordered to make the Award effective on or before 30 days following the postmark date the Award is transmitted to the parties.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Dated at Chicago, Illinois, this 15th day of December 2021.