**PROCEEDINGS BEFORE PUBLIC LAW BOARD NO. 3781**

**AWARD NO. 135**

**Cases Nos. 135, 195, 196, 197, and 215**

Referee Fred Blackwell

Carrier Member: J. H. Burton Labor Member: D. D. Bartholomay

**PARTIES TO DISPUTE:**

**BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES**

**vs.**

**CONSOLIDATED RAIL CORPORATION**

**STATEMENT OF CLAIM:**

Claim of the Brotherhood that:

1. The Carrier violated the Agreement when it failed and refused to allow Track Foreman W. Rhodes, Class 2 Operator E. Rosario, Class 3 Operator N. Schliefer holiday pay for April 9, 1993 (System Docket MW-3334).

2. The Carrier further violated the Agreement when it failed and refused to allow Track Foreman D. B. Perry and B&B Mechanics S. J. LaCavera and G. Pongonis holiday pay for February 15, 1993 (System Dockets MW-3195 and MW-3196)

3. The Carrier further violated the Agreement when it failed and refused to allow Vehicle Operator J. D. Podlogar holiday pay for April 17, 1992 (System Docket MW-2918).

4. As a consequence of the violations referred to in Parts (1), (2) and/or (3) above, each of the Claimants listed therein shall be allowed eight (8) hours of pay at their respective straight time rate.

**FINDINGS:**

*Upon the whole record and all the evidence, after hearing in the Carrier's Office, Philadelphia, Pennsylvania, the Board finds that the parties herein are Carrier and Employees within the meaning of the Railway Labor Act, as amended, and that this Board is duly constituted by agreement and has jurisdiction of the parties and of the subject matter.*

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**DECISION:**

Claims Denied.

**OPINION**

This dispute arises from claims of Claimants W. Rhodes, E. Rosario, N. Schliefer, D. G. Perry, S. J. LaCavera, G. Pongonis, and J. D. Podlogar that the Carrier violated Rules 13 and 14 of the Agreement by the improper denial of Claimants' request for compensation for various holidays in April 1992, February 1993, and April 1993.[1]

The claims are listed before the Board under four (4) System Docket numbers.

MW-3334: Three (3) Claimants, Rosario, Schliefer, and Rhodes seek holiday pay for Good Friday, April 9, 1993.

MW-3195 and MW-3196: Three Claimants, Perry, LaCavera, and Pongonis, seek holiday pay for President's Day, February 15, 1993.

MW-2918: Claimant Podlogar seeks holiday pay for Good Friday, April 17, 1992

Each Claimant was recalled to an existing vacancy prior to the holiday for which holiday pay is claimed. All Claimants worked and had compensation credited to the work days immediately preceding and following the holiday in each respective claim. Subsequent to the holidays in the various claims, the Claimants bid for and were awarded the positions to which they had been recalled prior to the holidays in question. The dates of these awards follow.

[1] All prior authorities submitted for the record have been considered and analyzed in arriving at this decision.



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April 12, 1993: Claimants Rosario, Schliefer, and Rhodes

February 22, 1993: Claimant Perry

February 16, 1993: Claimants LaCavera and Pongonis

May 18, 1992: Claimant Podlogar

In these circumstances the Organization contends that the Claimants are regularly assigned employees under paragraph (a) of Rule 14, who performed compensated service on the work days immediately preceding and following the holidays in each respective claim, and that, as such, they are entitled to holiday pay.[2]

The Carrier opposes the Organization's position, on the basis that the record facts do not establish that the Claimants are regularly assigned employees who are entitled to holiday pay as provided in paragraph (a) of Rule 14. The Carrier further submits that the facts show that instead, the Claimants are *"other than regularly assigned employees"* who did not perform eleven (11) days of work in the thirty (30) days immediately preceding the respective holiday, which is required by Rule 14 in order for this category of employees to be eligible for holiday pay.

Rule 13 enumerates the legal holidays in the United States for which holiday pay may be paid. Rule 14, which specifies the conditions which qualify an Employee for

[2] The Organization's submission asserted that Claimants LaCavera and Pongonis performed service on eleven of the thirty days immediately preceding the holiday for which they claim; the Carrier's controversion of this claim by asserting that these Claimants worked only ten (10) days prior to the holiday in question, was not rebutted by the submission of reply evidence by the Organization.

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holiday pay, reads as follows:

*"RULE 14 - PAID HOLIDAYS*

*(a) Subject to the qualifying requirements applicable to regularly assigned employees contained in paragraph (b) hereof, each regularly assigned employee shall receive eight (8) hours pay at the straight time rate of the position to which assigned for each of the holidays enumerated in Rule 13.*

*Subject to the applicable qualifying requirements in paragraph (b) hereof, other than regularly assigned employees shall be eligible for the paid holidays for pay in lieu thereof, provided (1) compensation for service paid him by the Company is credited to eleven (11) or more of the thirty (30) days immediately preceding the holiday and (2) he has had a seniority date for at least sixty (60) days or has sixty (60) days of continuous active service preceding the holiday beginning with the first day of compensated service, provided employment was not terminated prior to the holiday by resignation, for cause, retirement death, non-compliance with the union shop agreement, or disapproval of application for employment.*

*(b) A regularly assigned employee shall qualify for the holiday pay provided in paragraph (a) hereof if compensation paid him by the Company is credited to the workdays immediately preceding and following such holiday. If the holiday falls on the last day of a regularly assigned employee's workweek, the first workday following the rest days shall be considered the workday immediately following the holiday. 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.*

*All others for whom holiday pay is provided in paragraph (a) 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 Company is credited; or*

*(ii) Such employee is available for service.*

*Note: 'Available' as used in subsection (ii) above is interpreted 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.*

*(c) When any of the holidays enumerated in Rule 13, or the day observed, falls during an employee's vacation period, he shall, in addition to*

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*his vacation compensation, receive the holiday pay provided for in paragraph (a) of this Rule provided he meets the qualification requirements specified. The 'workdays' and 'days' immediately preceding and following the vacation period shall be considered the 'workdays' and 'days' preceding and following the holiday for such qualification purposes. An employee's vacation period will not be extended by reason of any of the eleven (11) recognized holidays, or the day observed.*

*(d) Special qualifying provision for employees qualifying for both the Christmas Eve and Christmas Day holiday:*

*An employee who meets all other qualifying requirements will qualify for holiday pay for both Christmas Eve and Christmas Day if on the 'workday' or the 'day', as the case may be, immediately preceding the Christmas Eve holiday he fulfills the qualifying requirements applicable to the 'workday' or the 'day' before the holiday and on the 'workday' or the 'day', as the case may be, immediately following the Christmas Day holiday he fulfills the qualifying requirements applicable to the 'workday' or the 'day' after the holiday.*

*An employee who does not qualify for holiday pay for both Christmas Eve and Christmas Day may qualify for holiday pay for either Christmas Eve or Christmas Day under the provisions applicable to holidays generally.*

*(e) Under no circumstances will an employee be allowed more than one (1) overtime payment for service performed by him on a holiday which is also a work day, a rest day and/or a vacation day."*

* * * * * * * * * * *

The Organization's argument is that the Carrier recalled the Claimants from furlough and placed them in positions that were not the positions of other employees; thus, the Claimants were not filling positions which were temporarily vacant because the incumbents were off for vacation or sickness. They were each placed on a position, respecting which, they became the regular employee thereof by bid and award, until such status was changed by a contractually permitted event such as abolishment of the position, or displacement from the position. In addition, once recalled from furlough, each

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of the Claimants remained in service in some capacity throughout the work season. The Organization's argument concludes that, in consequence of these considerations, once the Claimants were recalled from furlough they became regularly assigned employees as contemplated by Rule 14 and as such are entitled to the holiday pay herein claimed.

In support of this argument, the Organization cites this extract from Third Division Award 27753 (03-02-89):

> *"The Board has carefully reviewed the precedent awards and arguments of the parties. Based on that review, we conclude that Carrier is not correct when it asserts that the term 'regularly assigned employee' means 'an employee who owns an advertised position, having obtained his position either through bidding or displacement rights. The better seasoned awards within this Division have taken a broader view, concluding that employees assigned to and identified with a specific position for indefinite duration all within the meaning of a 'regularly assigned employee' even though the position they occupy is not bulletined."*

The Carrier's countering argument is that the Claimants were not regularly assigned employees on the work day immediately before and the work day immediately after the holiday in question, because there was no way of knowing at that time, that any Claimant would become the qualified senior bidder on the positions to which recalled; and because the Agreement contains no provision which changes an employee's status to "regularly assigned" retroactively, so as to cover a holiday, due to such employee being awarded a position subsequent to the holiday. The Carrier further submits that none of the Claimants performed service on eleven (11) of the thirty (30) days immed-

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iately preceding the holiday, which would have met the criteria in Rule 14, paragraph (a) for holiday pay for *"other than regularly assigned employees."*

The Organization's suggested construction of Rule 14 plainly does not fit the language of the rule and, therefore, the claim will be denied.

The Organization's argument appears to be based, at least in part, on the omission from Rule 14 of a definition of the term "regularly assigned employees". The lack of such definition may present a problem in some circumstances; however, that is not so in respect to the circumstances of record in this case, because the phrase *"other than regularly assigned employees"*, Rule 14 (a) covers all employees except those regularly assigned. The *"other than regularly assigned"* category of employees qualifies for holiday pay under Rule 14 by working eleven (11) of the thirty (30) days preceding the holiday and by having sixty (60) days of seniority prior to the holiday. Regularly assigned employees are recognized in the Railroad Industry by several indicia, chief among them being the award of a position pursuant to job bulletin; this category of employee qualifies for holiday pay by working the day before and the day after the holiday.

The fact that the parties structured these criteria into Rule 14 leave no doubt that the Rule 14 text covers the categories of employees that were intended to be covered by the parties and in a manner that was agreeable to the parties. Furthermore, the text provides no basis for an implied third category of employee, i.e. a quasi regularly assigned employee, that comes into existence as a result of a ruling in an arbitration award. Moreover, and most important, it is noted that granting the disputed holiday pay

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would have the effect of interpreting the Agreement as authorizing a changed status of the Claimant's employee status, retroactively, to commence before the claimed holiday, because they became the incumbents of the positions to which recalled, subsequent to the holiday. However, the concept of retroactivity must be rejected because the Agreement provisions before the Board contain no method or authority whereby an employee's status could be changed retroactively in the manner suggested by the Organization. Accordingly, inasmuch as the Agreement provides no authority for retroactivity in the confronting circumstances, and inasmuch as the Board has no independent substantive authority, it necessarily follows that the Board has no power to issue a ruling that provides retroactivity where authority for same does not arise from the contract.

In view of the foregoing, and based on the record as a whole, the claim will be denied for lack of record support.

Fred Blackwell
Chairman / Neutral Member
Public Law Board No. 3781

September 16, 1997

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## AWARD

The Carrier did not violate the agreement. Accordingly, the claim is hereby denied for lack of record support.

BY ORDER OF PUBLIC LAW BOARD NO. 3781.

Fred Blackwell, Neutral Member

J. H. Burton, Carrier Member

D. D. Bartholomay, Labor Member

Executed on 10/2, 1997

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