Award No. 5844
Docket No. 5726
2-GM&O-CM- '70

NATIONAL RAILROAD ADJUSTMENT BOARD

SECOND DIVISION

The Second Division consisted of the regular members and in addition Referee John H. Dorsey when award was rendered.

PARTIES TO DISPUTE:

SYSTEM FEDERATION NO. 29, RAILWAY EMPLOYES' DEPARTMENT, AFL — CIO (Carmen)

GULF, MOBILE AND OHIO RAILROAD COMPANY

DISPUTE: CLAIM OF EMPLOYES:

1. That the Carrier violated the controlling agreement, particularly Rule 6(F) of the Shop Craft Agreement, and Article II, Section 6(g) of the National Agreement dated November 21, 1964, when Carman J. W. Poythress was not permitted to work his birthday, May 4, 1967, and his position was filled by Carman C. T. Rowe who is regularly assigned to another Department.

2. That accordingly, the Carrier be ordered to make Carman Poythress whole by additionally compensating him for eight (8) hours at the time and one-half rate of pay.

EMPLOYES' STATEMENT OF FACTS: Carman J. W. Poythress, hereinafter referred to as the claimant, is employed by the Gulf, Mobile and Ohio Railroad Company, hereinafter referred to as the carrier, at Meridian, Mississippi. He is regularly assigned as car inspector in the train yard, 7:00 A.M. to 3:00 P.M., Monday through Friday.

Thursday, May 4, 1967, was the claimant's birthday. He was advised by the foreman that he would not be used on this day since it was his birthday.

Carman C. T. Rowe, who is regularly assigned to the repair track department was brought to the train yard and worked from 7:00 A.M. to 3:00 P.M. on the job normally filled by the claimant.

This dispute has been handled with carrier officials up to and including the highest officer designated by the company, with the result he has declined to adjust it.

The agreement effective January 1941, as subsequently amended, is controlling.

POSITION OF EMPLOYES: Rule 6(D) of the Shop Craft Agreement reads as follows:

"(D) Service performed on the following legal holidays, namely:

(3) Rule 6 of the current agreement is an overtime rule. There was no overtime involved in the instant case.

(4) The agreement was not intended to require the carrier to work an employee at penalty rates when such work is not necessary.

The claim is not supported by the agreement and should be denied.

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

The carrier or carriers and the employe or employes involved in this dispute are respectively carrier and employe 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 waived right of appearance at hearing thereon.

Claimant was regularly assigned as Car Inspector in the train yard at Meridian, Mississippi. Thursday May 4, 1967 was Claimant's birthday — a work day of his work week. He was informed by his Foreman that he would not be used on that day since it was his birthday. He was paid eight hours birthday-holiday pay. In his absence a Carman from the repair track was sent to assist in the train yard.

The claim is that Carrier was contractually obligated, by Rules and practices, to work Claimant on his birthday for which he would have received eight hours of time and one-half in addition to his birthday-holiday pay which it now prays Carrier be ordered to pay.

In support of its position Petitioner cites the following provisions of Rule 6 of the Shop Craft Agreement on Carrier's property, effective January 1941:

> "(d) Service performed on the following legal holidays, namely: New Years Day, Washington's Birthday, Decoration Day, Fourth of July, Labor Day, Thanksgiving Day and Christmas, (provided when any of the above holidays fall on Sunday, the day observed by the State, Nation, or proclamation shall be considered the holiday) shall be paid for at the rate of time and one-half.
>
> "(f) Holiday service will, **so far as possible,** be prorated among regularly assigned men in the following manner:
>
> "Running repairs among qualified roundhouse forces;
>
> "Machine work among men assigned to similar Machines on week days, Blacksmiths' work among qualified blacksmiths;
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> "Electric work among quailified electricians, except that at points where electricians are regularly assigned to running repair work, holiday service will be prorated only among such men;
>
> "**Train Yard work among train yard men.**" (Emphasis supplied)
>
> "(G) **When, for any reason, the necessary number of men for holiday service cannot be obtained as provided above, the senior qualified man, or men, may be drawn from forces assigned in other departments.**"

Further, Petitioner cites the following provision of Article II of the November 21, 1964 National Agreement:

> "(g) **Existing rules and practices thereunder governing whether an employee works on a holiday and the payment for work performed on holidays shall apply on his birthday.**" (Emphasis added)

From this Petitioner argues that it was the practice on the property that "Train Yard" Carmen have the contractual right to work on their birthday—holiday, at penalty rates, unless the work of their position is absorbed by regularly assigned "Train Yard" Carmen to the exclusion of all other Carmen or other employes.

The pivotal issue can be resolved only by a finding, from evidence of record, of "Existing Rules and practices" as prescribed in Article II, Section 6(g) of the November 21, 1964 National Agreement. We have the Rules before us. What were the "practices" is a question of fact that can only be determined from a preponderance of evidence of probative value.

Petitioner states in its Submission that the Rules it cites are "clear and unambiguous". From this declaration it avers "practices" to be:

> "Rule 6(F) explicitly provides that holiday service will, so far as possible, be pro-rated among the employes regularly assigned in the different departments. It clearly lists Train Yard as one of these departments. The only exception is where the necessary number men are not available, in which case the senior qualified man or men may be drawn from another department. No attempt was made to secure the Claimant or anyone else in his department, but Carman Rowe was brought from another department to fill the job. It cannot be denied that the Claimant would have been used had this been one of the regular holidays.
>
> We must now look at Article II, Section 6(g) of the National Agreement dated November 21, 1964 which explicitly provides that whether an employe works on his birthday will be governed by rules **and practices** pertaining to other holidays. Had the day in question been one of the regular holidays, the Claimant would have worked and would have been paid time and one-half rate in line with the provisions of Rule 6(D). (Emphasis supplied)
>
> Instead of using the Claimant on the day in question, or trying to secure a man from the Train Yard Department, Carman Rowe from a different department was used for the full eight hours."

Carrier in its Submission states the "practices" to be:

> "As a result of the November 21, 1964 Agreement establishing birthday holidays for Shop Craft employees, and knowing that the intent of the additional holiday granted these employees was to allow the employees a day off to celebrate their birthday, Carrier issued instructions that employees were not to be worked on their birthday unless there was an emergency that could not be avoided. This is similar to Carrier's policy concerning the other seven holidays in that no employee is assigned to work holidays and employees are only required to work if the service cannot be protected otherwise. It is the practice at Meridian, as well as all of our other terminals where repair tracks are maintained and repair track forces are on duty, that when it is necessary to fill vacancies on the first

shift in the train yard or to augment train yard forces to avoid delays to trains to send men from the repair track to the train yard and that is exactly what was done in this case. Carman Poythress' vacancy was not filled; he was allowed the day off to celebrate his birthday; the force was not increased, and a man was sent from the repair track to assist with the train yard work."

And, in its Rebuttal Submission Carrier avers:

"All of the carmen at Meridian, whether they work in the train yard or on the repair track, are in the same Department, i.e., Mechanical Department."

We find from the evidence of record that: (1) Rule (6), a General Rule in the Shop Crafts Agreement, is not "clear and unambiguous" as to whether "Train Yard work" is a department or only a classification in the Mechanical Department; (2) Petitioner had the burden of proving "practices" which would support its position; (3) there is a conflict in the evidence as to "practices" which this Board cannot resolve; (4) Petitioner has not established by a preponderance of evidence of probative value the "practices" which it alleges to be fact; (5) Awards cited by Petitioner involving other properties, in support of its position, are unapposite in that "practices" are peculiar to single properties. We, consequently, are compelled to dismiss the Claim for failure of proof.

A W A R D

Claim dismissed for failure of proof.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Second Division

ATTEST: E. A. Killeen
Executive Secretary

Dated at Chicago, Illinois, this 30th day of January, 1970.

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