



Award No. 5236

Docket No. 5028

2-MP-CM-'67

NATIONAL RAILROAD ADJUSTMENT BOARD

SECOND DIVISION

The Second Division consisted of the regular members and in addition Referee Howard A. Johnson when award was rendered.

PARTIES TO DISPUTE:

**SYSTEM FEDERATION NO. 2, RAILWAY EMPLOYEES'
DEPARTMENT, AFL-CIO (Carmen)**

MISSOURI PACIFIC RAILROAD COMPANY

DISPUTE: CLAIM OF EMPLOYEES:

1. That the Missouri Pacific Railroad Company violated the controlling agreement, particularly Note to Rule 5, and the Agreement of November 21, 1964, particularly Article II, Section 6(g), when Carman H. P. Allen, Houston, Texas, was not permitted to work his regularly assigned position on his birthday holiday, Thursday, January 28, 1965, and his position was filled by Setup Helper O. Powell.

2. That accordingly, the Missouri Pacific Railroad Company be ordered to compensate Carman Allen in the amount of eight (8) hours at the overtime rate account being deprived of working his regular assignment on his birthday holiday, January 28, 1965.

EMPLOYEES' STATEMENT OF FACTS: Mr. H. P. Allen, hereinafter referred to as the Claimant, is employed as carman by the Missouri Pacific Railroad Company, hereinafter referred to as the Carrier, at Settegast Train Yards, Houston, Texas. The Claimant has assigned work week of Wednesday through Sunday, rest days Monday and Tuesday, hours 11:00 P.M. to 7:00 A.M.

Claimant's birthday holiday occurred on Thursday, January 28, 1965, which was also one of his regularly assigned work days, however, Car Foreman H. H. Gwinn instructed the Claimant to take this day off (January 28th), which the Claimant did. However, on Wednesday, January 27, 1965, Car Foreman Gwinn instructed Setup Helper O. Powell to work Claimant's assignment on January 28, 1965, which he did, thereby depriving the Claimant of working his regular assignment in line with Note to Rule 5 and Article II, Section 6 (g) of the Agreement of November 21, 1964, which constitutes the basis of the claim.

When the Carrier sent the Claimant home and re-arranged the force, as in the instant case, they did not comply with Note to Rule 5 and the estab-

geographical boundaries within which service is to be performed. The latter is not possible because all admit that service must be performed in industry yards and on line of road.

The only service boundaries established by the agreement are the seniority districts, so, it makes no difference whether the specification involved appears on the bulletin or not, the employe can be required to perform service within the seniority district as needed."

See also Award 3337.

At Settegast, all carmen being on the same seniority roster and having seniority rights to work in both the train yard and repair track are assigned to work where needed. On the date of claim, the men assigned to work that day were given work assignments by their foremen based on the work to be performed that day. The force was rearranged as necessary to meet the demands of the service taking into account the fact men were absent for various reasons, including Carman Allen's absence on his birthday holiday.

It has been a practice on the property to rearrange the force as required. See Award 4257. The Agreement recognizes the need to do so. See Rule 10 applicable where an employe is required to change shifts in a rearrangement of forces. The use of a man from the repair track to help out in the train yard is not prohibited by the agreement. In fact, it is the well accepted practice on this property. There is no merit to the claim for an additional eight hours' pay at the punitive rate for a man at home enjoying his birthday holiday for which he had already been paid a day's pay. This claim must be denied.

All matters contained herein have been the subject matter of correspondence and/or conference.

Oral hearing is not requested.

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.

The claim is that the Carrier violated the controlling Agreement, particularly the Note to Rule 5, and the Agreement of November 21, 1964, particularly Article II, Section 6 (g), when Claimant was not permitted to work his regularly assigned position on his birthday holiday, but set-up Helper Powell was used to fill his position.

Claimant was given the day off with pay, as provided by Article II, Section 6 (a) of the Agreement of November 21, 1964. There were many carmen in the mechanical department of Settegast Yard; Claimant was one of five car inspectors on his shift in the train yard, and as all five were needed there, a carman from the repair facilities was used in Claimant's place.

The Carrier contends that Claimant's position was not worked; that there was simply one less carman in Settegast Yard during that shift, but that the others merely absorbed his work without filling his position; but Powell, instead of performing his usual work in a repair facility, performed the work as a fifth car inspector, which Claimant would have performed but for his birthday holiday. It seems obvious, therefore, that he filled Claimant's position for that day.

The Employes' position is that under the agreement provisions cited by them, Claimant should have worked that day at the overtime rate if his position was to be worked at all.

The applicable rules are as follows:

Article II, Section 6 (a) of the Agreement of November 21, 1964:

"(a) For regularly assigned employes, if an employe's birthday falls on a work day of the work week of the individual employe he shall be given the day off with pay, . . ."

Article II, Section 6 (g) of the Agreement of November 21, 1964:

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

Note to Rule 5 of the current Agreement:

"NOTE: Notice will be posted five (5) days preceding a holiday listing the names of employes assigned to work on the holiday. Men will be assigned from the men on each shift who would have the day on which the holiday falls as a day of their assignment if the holiday had not occurred and will protect the work. Local Committee will be advised of the number of men required and will furnish names of the men to be assigned but in event of failure to furnish sufficient employes to complete the requirements the junior men on each shift will be assigned beginning with the junior man."

Thus after providing that if an employe's birthday falls on a work day of his work week he shall be given the day off with pay, the Agreement of November 21, 1964 proceeds to state that whether he is to work on his birthday holiday shall be governed by existing rules and practices governing whether he is to work on other holidays; and on this property the practice under the rules is that if the job is worked, it will be by an employe who would have worked "if the holiday had not occurred," which under this record, would have been the Claimant.

In its rebuttal the Carrier says:

"The practice and circumstances which apply on the seven recognized holidays do not apply to birthday holidays. From the time the

birthday holiday rule first became effective, the Carrier has been permitting employes to be absent on their birthdays to celebrate the occasion. This is in accordance with the birthday holiday rule. It creates a new situation and the practice on the seven recognized holidays does not furnish a pattern to be followed on birthday holidays."

However, as noted above, Article II, Section 6 (g) of the Agreement of November 21, 1964, provides that with relation to the question whether an employe works on his birthday holiday, the practices and circumstances which determine that matter for the seven recognized holidays shall apply. That provision, like all others in the Agreement of November 21, 1964, must be observed.

The Note to Rule clearly provides that when positions have to be filled on holidays they shall be filled from among those who would have worked if the holiday had not occurred. It further provides that men so assigned "will protect the work."

A birthday holiday differs from others in that it relates only to an employe whose birthday anniversary it happens to be. However, under the provisions of the Note to Rule 5 of the current Agreement, and Article II, Section 6 (g) of the Agreement of November 21, 1964, he must work on that holiday and protect the work if his position is worked on that day.

Consequently, the claim must be sustained.

AWARD

Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of SECOND DIVISION

ATTEST: Charles C. McCarthy
Executive Secretary

Dated at Chicago, Illinois, this 21st day of July, 1967.