Award No. 5237
Docket No. 5029
2-SP(PL)-MA-'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. 114, RAILWAY EMPLOYES' DEPARTMENT, AFL-CIO (Machinists)

SOUTHERN PACIFIC COMPANY (Pacific Lines)

DISPUTE: CLAIM OF EMPLOYES:

That in accordance with the applicable Agreements and provisions thereof the Carrier be ordered to additionally compensate Machinist M. J. Opich (hereinafter referred to as claimant), in the amount of eight (8) hours at the time and one-half rate for service rendered on February 22, 1965 — Washington's Birthday, a legal holiday — which was also claimant's birthday, a holiday consistent with provisions of the Agreement dated February 4, 1965.

EMPLOYES' STATEMENT OF FACTS: Claimant is a regularly assigned Machinist at Carrier's Roseville Diesel Shop, with a bulletined workweek of Monday through Friday, including holidays, with rest days of Saturday and Sunday.

Claimant worked his regular position on Monday, February 22, 1965, Washington's Birthday, which was also his birthday.

The record discloses that Carrier accepted the fact that two (2) bonafide holidays had occurred on February 22, 1965, consistent with Claimant's assigned workweek, in that Claimant received eight (8) hours compensation at the pro rata rate for each of the two (2) holidays involved — Washington's Birthday and Claimant's Birthday-Holiday. He was also compensated eight (8) hours at time and one-half rate for time worked on his birthday holiday, but was denied the additional payment of eight (8) hours compensation at time and one-half rate for service rendered on the Washington Birthday holiday, which he was contractually entitled to receive under applicable provisions of the current controlling agreement pertaining to each of the seven (7) legal holidays as referred to in Rule 6(a) thereof.

This dispute has been handled up to and with the highest Carrier officer designated to handle such matters, with the result no adjustment can be effected on the property.

sions on the property that it is Petitioner's contention the Agreement of February 4, 1965, changed previous agreements and practices so as to be interpreted as providing that employes whose birthdays fall on a recognized holiday on an assigned work day of the work week of the individual employe will be allowed 16 hours at penalty rate for such day, in addition to 8 hours at pro rata rate for the birthday and 8 hours at pro rata rate for the recognized holiday.

The Agreement of February 4, 1965 will be searched in vain for specific wording to so provide. On the contrary, the agreement specifies under Article II, Section 6(g), that the determination of whether an employe works on a holiday and the payment for work performed on Holidays shall apply on his birthday. Said agreement merely provides for an arbitrary allowance of 8 hours at pro rata rate to qualified employes for their birthdays which was not allowed prior to February 4, 1965, and for continuation of the same payment applied under previous rules and practices for work performed on holidays.

There is no rule that states that an additional payment of 8 hours at penalty rate is to be allowed separate and apart from payments for work performed on recognized holidays, and any interpretation to that effect in the absence of specific language in the rule would constitute a unilateral unauthorized change in the existing agreement contrary to required proceedures necessary under the Railway Labor Act.

CONCLUSION

Carrier asserts the instant claim is entirely lacking in agreement or other support and requests that it be denied.

All data herein have been presented to the duly authorized representative of the employes and are made a part of this particular question in dispute.

Carrier reserves the right, if and when it is furnished with the submission which has been or will be filed ex parte by the Petitioner in this case, to make such further answer as may be necessary in relation to all allegations and claims as may be advanced by the Petitioner in such submission, which cannot be forecast by the Carrier at this time and have not been answered in this, the Carrier's initial submission.

Carrier does not desire oral hearing unless requested by Petitioner.

(Exhibits not reproduced.)

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's birthday was February 22, 1965, and being Washington's birthday was also a general holiday, and thus two holidays in one. Claimant

was paid 8 hours at straight time as holiday pay for Washington's birthday, and also 8 hours at straight time as his own birthday pay. The day fell on Monday, which was a working day of his regular assignment.

Claimant worked that day, for which he was paid 8 hours at time and a half under Rule 6 of the current Agreement for the Washington's Birthday holiday. Although only one day's work was involved, he claims an additional day's pay at time and one-half under Article II, Section 6, of the National Mediation Agreement of February 4, 1965.

The applicable portions of the rules are as follows:

Rule 6(a) of the current Agreement:

> "Rule 6(a) Work performed by hourly rated employes on their rest days and the following legal holidays, viz: * * * Washington's Birthday, * * * shall be paid for at the rate of time and one-half." Article II, Section 6 of the Mediation Agreement of February 4, 1965:
>
> "Section 6. Subject to the qualifying requirements set forth below, effective with the calendar year 1965 each hourly, daily and weekly rated employe shall receive one additional day off with pay, or an additional day's pay, on each such employe's birthday, as hereinafter provided.
>
> (a) For regularly assigned employes, if an employe's birthday falls on a work day of the workweek of the individual employe he shall be given the day off with pay;
>
> * * * * *
>
> (f) * * * If an employe's birthday falls on one of the seven holidays named in Article III of the Agreement of August 19, 1960, he may, by giving reasonable notice to his supervisor, have the following day or the day immediately preceding the first day during which he is not scheduled to work following such holiday considered as his birthday for the purposes of this Section.
>
> (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."

It will be noted that the birthday provision has now been incorporated into Rule 6(a), along with legal holidays and rest days; and that it says that "**Work** performed will be paid for * * *." (Emphasis ours.)

It seems apparent that the parties' agreement upon two or three separate circumstances under which work on a certain day shall bear the punitive rate, does not constitute, or even imply, an agreement that the day's work is to be paid for two or three times if two or all three of those circumstances apply to the day. Certainly Rule 6(a), which now includes all three, does not suggest any such intent; on the contrary, it says that the "work performed * * * shall be paid for" at the rate named. Obviously, if the day's work is paid for once at that rate, the work is paid for, and the rule is complied with, unless it specifically states that the work is to be paid for two or three times, which it

fails to do. The inclusion of birthdays, rest days and legal holidays in Rule 6(a) seems to recognize that fact clearly.

However, a second day's pay for the one day's work is still claimed under Article II, Section 6 of the Mediation Agreement of February 4, 1965, paragraph (g) of which, as above quoted, provides that:

> "(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."

It is not contended that existing rules and practices thereunder governing the payment for work performed on legal holidays required two days' pay when there were two separate rules or circumstances calling for penalty pay. On the contrary, the Carrier includes in its Submission, and the Employes do not deny, this statement:

> "Petitioner is fully aware and has agreed for many years preceding and following the 1949 revision of Rules 5 and 6 of the current agreement that no dual payment for one work period was intended by the parties writing said rules, and this is clearly shown by the complete absence of claims for dual penalty payments for one work period prior to this date."

Thus the duplicate payment cannot be supported on the authority of paragraph (g).

The Employes contend further that by paying twice for the holiday and birthday holiday as such the Carrier is bound also to pay for the day's work twice. But the two days of holiday pay would have been received by Claimant whether the holidays were separate or concurrent; since neither of them involved a day's work it was immaterial to the Carrier whether they were concurrent or not. On the other hand, rules governing pay for a working day involve a different consideration; each day's pay naturally presupposes a day's work. As Rule 6(a) says, the "work * * * shall be paid for", without requiring that it be paid for twice. Nevertheless, Claimant seeks two days' pay for the one day's work.

This raises the question whether in adopting the overtime pay rate for the eighth holiday — the birthday holiday — the parties intended to give Claimant and others similarly situated a preferential right over the great majority of employes, whose birthdays do not fall on legal holidays. To receive two days' pay at punitive rate under similar circumstances the average employe must work two separate days, — his birthday and the legal holiday.

It seems quite clear that the parties intended no such inequitable result; on the contrary they sought to make the benefits equal for all, by providing (Section 6(f) of Article II of the Mediation Agreement of February 4, 1965), that an employe whose birthday coincides with a legal holiday may designate another day for birthday holiday purposes. Thus, Claimant, like the majority of employes, could have elected to take another day for birthday holiday purposes, so as to have either the additional day off or the additional day's work at the penalty rate, whichever might develop. In view of this clear attempt to equalize things between the great majority and the relatively few whose birthdays fall on legal holidays, it is inconceivable that there was an

intention to give the latter a preferential right to two days' pay at time and one-half for one day's work in the event they might elect not to accept the equalization privilege.

For the foregoing reasons this Division concurs in the conclusions of the Third Division and Third Division (Supplemental) in their Awards Nos. 14921, 14922, 15013, 15388, 15401, 15451 and 15520, and finds that the Agreement was not violated.

AWARD

Claim denied.

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.

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