Award No. 5311
Docket No. 5036
2-SP(PL)-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. 114, RAILWAY EMPLOYES' DEPARTMENT, A. F. of L.-C. I. O. (Carmen)

SOUTHERN PACIFIC COMPANY (Pacific Lines)

DISPUTE: CLAIM OF EMPLOYES:

(1) That the Southern Pacific Company violated **Article 2, Section 6, Paragraph (A)**, of November 20, 1964.

(2) That accordingly the Southern Pacific Railroad Company compensate Shop Car Inspector, C. A. Sacco (8) hours at the straight time rate of pay or an additional day off with pay, for his birthday while on vacation, which was denied.

EMPLOYES' STATEMENT OF FACTS: Part 1 of the Claim of Employes set forth above exactly as contained in the Notice of Intent letter filed with the Board under date of February 25, 1966, contains typographical errors and an inadvertent omission of the word "agreement". It should read as follows:

"(1) That the Southern Pacific Company violated **Article II, Section 6, Paragraph (a)**, of November 21 1964 Agreement."

and we respectfully request that all concerned make the necessary correction.

Carman C. A. Sacco, hereinafter referred to as the Claimant, was regularly employed by the Southern Pacific Company (Pacific Lines) hereinafter referred to as Carrier, as a Car Inspector in Carrier's Car Shop #9 at Sacramento General Shops, with work week Monday through Friday, rest days Saturday and Sunday.

Claimant took his 1965 vacation March 1 through March 26, 1965, both dates inclusive, returning to service Monday, March 29, 1965. Claimant's birthday was Monday, March 22nd a vacation day of his vacation period for which he was paid a day's vacation pay. However, Carrier failed to allow him birthday holiday compensation for the day, Monday, March 22nd.

Claim was filed with proper officer of the Carrier under date of March 31, 1965, contending that claimant was entitled to eight (8) hours Birthday Holiday compensation for his birthday, March 22nd, in addition to vacation

As stated above, the quoted portion of the latter rule is not applicable in the instant case since (a) the birthday involved did not fall on other than a workday of the claimant's workweek, and (b) the claimant would not have been entitled to any other pay for that day under any other agreement, practice or understanding in effect on this property.

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 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.

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.

This case is identical with Award 5310, except that the provisions involved are Articles II and III of the Mediation Agreement of November 21, 1964, which are identical with Article II and III of the Mediation Agreement of February 4, 1965. Therefore, what has been said in that award is fully appicable here.

AWARD

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of SECOND DIVISION

ATTEST: Charles C. McCarthy
Executive Secretary

Dated at Chicago, Illinois, this 26th day of October 1967.

LABOR MEMBERS DISSENT TO AWARDS 5310 AND 5311

The majority erred in their conclusions and findings to Awards 5310 and 5311, The erroneous conclusions are, among other things:

"While there is a distinct difference between separate individual birthday holidays and the seven general holidays, the issue in this case is not whether the holiday as such should be paid for, but rather whether payment can be made for the holiday occurring during a vacation under the circumstances stated. Thus, the question involves the vacation agreements rather than the holiday agreements."

It is inconceivable that the majority should depart from the record in this manner, when the dispute and claim filed by the petitioners is so emphatically clear, as in Award 5310:

"(1) That under the current agreement, Machinist Pliney N. Granger, III, was improperly compensated for March 16, 1965, the claimant's birthday (holiday) and also one of his assigned vacation days.

(2) That accordingly the Carrier compensate the claimant for an additional 8 hours pay at the pro rata rate for March 16, 1965."

It is admitted in the record by both the petitioner and the Carrier that the claimants in these cases were fully compensated for their vacations, Therefore, vacation pay is not in dispute. Rather, birthday holiday pay under the February 4, 1965, and November 21, 1964, Agreements is in dispute. This Division does not have authority to change the record, most particularly the petitioners' dispute and claim.

We must conclude from the majority's statement that their only purpose here is to lay an erroneous foundation for the findings of the final awards. In essence, they are stating: "Your dispute and remedial action sought is not what you claim it to be, but rather what we choose to believe it is."

The uniform course of practice and precedent on this specific issue has been decided by this Division in Awards 5351, 5252, 5253, 5254, 5255, 5257 and 5258. The referee and Carrier members here completely ignore the above sound, basic principles and findings laid down by this Division in these 8 awards, which were dealt with quite thoroughly on each specific point considered in this instant case.

Further, the members of this Division here recognize certain specific differences in the birthday holiday rule from the other negotiated standard holidays. This included the differences between the holidays and the vacation agreement, when they state among other things in Award 5218, 5259 through 5296 and 5326 (only th Holiday changes):

"Claimant was required to work 8 hours on **Memorial Day, which was not only a holiday, but also his birthday.** He received 8 hours pay for the holiday, as well as a like amount for his birthday and 8 hours pay at time and one-half for working that day." (Emphasis ours.)

Surely, with this clear, unambiguous language, spelled out in the above numerous awards, the majority cannot now deny them as a valid precedent on this single point. Their error in these awards is inexcusable.

By the action of the majority in these cases, they are attempting to rewrite the clear and unambiguous language of the birthday holiday rule, making

it a will, wish or want agreement. This is an improper extension of their authority. Thus, these awards are a nullity.

We dissent.

R. E. Stenzinger

E. J. McDermott

C. E. Bagwell

O. L. Wertz

D. S. Anderson

REFEREE'S REPLY TO LABOR MEMBERS DISSENT ON AWARD NOS. 5310 AND 5311

The issue before the board is whether the Claimant was entitled to holiday pay for his birthday occurring during his vacation.

It is conceded that under Article 7(a) of the December 17, 1941 National Vacation Agreement, and the June 10, 1942 Interpretation thereof, payments are not made for general holidays occurring during vacations.

The subsequent Agreements of February 23, 1945, August 21, 1954 and August 19, 1960 amended the Agreement of December 17, 1941 in several respects, but without affecting Article 7(a), and provided that as so amended it would continue in effect until changed pursuant to Section 6 notices.

Article II of the Mediation Agreement of February 4, 1965, merely amended the Agreement of December 17, 1941 by adding Section 6 to provide for birthday holidays, but without amending its Article 7(a) or the June 10, 1942 Interpretation.

Therefore, without regard to other differences between a general holiday and a birthday holiday, the latter, like the former, is governed by Article 7(a) and the June 10, 1942 Interpretation when it occurs during a vacation.

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