



**Award No. 5581
Docket No. 5310
2-SP(PL)-MA-'68**

**NATIONAL RAILROAD ADJUSTMENT BOARD
SECOND DIVISION**

The Second Division consisted of the regular members and in addition Referee Paul C. Dugan when award was rendered.

PARTIES TO DISPUTE:

**SYSTEM FEDERATION NO. 114, RAILWAY EMPLOYEES'
DEPARTMENT, AFL-CIO (Machinists)**

**SOUTHERN PACIFIC COMPANY
(Pacific Lines)**

DISPUTE: CLAIM OF EMPLOYEES:

1. That Motor Car Mechanic Charles B. Williams (hereinafter referred to as Claimant) was improperly compensated under applicable terms of current controlling Agreements while on vacation.

2. That accordingly, the Carrier be ordered to additionally compensate Claimant in the amount of eight (8) hours' pay at pro rata rate for the date of August 26, 1965.

EMPLOYEES' STATEMENT OF FACTS: Claimant is regularly assigned as Motor Car Mechanic at Carrier's Tucson Automotive and Work Equipment (A&WE) Shop, with a bulletin assigned work week of Monday through Friday, with rest days of Saturday and Sunday.

Claimant was on his scheduled vacation on the date of August 26, 1965, which date was a regular work day of his bulletin assigned work week, also Claimant's birthday.

While Claimant was on his scheduled vacation his position was filled every day of his assignment's work week, and the employe filling the assignment was paid eight hours at straight time rate while so used.

The record discloses that while on vacation Claimant was compensated eight (8) hours' pay at pro rata rate for the date of August 26, 1965, as a day of his scheduled vacation, but was denied "an additional day's pay" for his Birthday Holiday falling on said date, as contemplated under applicable provisions of Article II, Section 6, of the Agreement of February 4, 1965.

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.

The subject new proposal clearly shows Petitioner is now properly seeking an agreement change in the manner contemplated by the Railway Labor Act, while at the same time is asking this Division to furnish sustaining award prior to the adoption by negotiation of the new rule which the Division, of course, is not empowered to do.

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 employees and are made a part of this particular question in dispute.

(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, Motor Car Mechanic, with a work week of Monday through Friday, was on vacation, for which he was paid, when his birthday, August 26, 1965, fell on one of his regular work days. This claim is for "an additional day's pay" for said birthday.

The Organization's position is that Article II, Section 6, of the February 4, 1965 Agreement entitled Claimant, in addition to his vacation pay for said day an additional day's pay for his birthday.

Carrier raises a procedural question, claiming that Rule 28 of the Agreement was not complied with by petitioner when he failed to present his claim within sixty (60) days of the occurrence on which based as required.

Carrier points out that the occurrence of the claim is August 26, 1965 and the claim was presented in writing on January 5, 1966, more than 132 days after the date of the occurrence.

The pertinent provision of said Rule 28(b) reads as follows:

"... Any claim or grievance not presented within sixty (60) days of the occurrence on which based will be deemed to have been abandoned."

The Organization's defense to this alleged procedural defect is that Claimant made an oral claim for the additional day's pay for his birthday to Supervisor J. R. Evans on August 26, 1965, but that Supervisor Evans informed

Claimant that he was unsure of the ruling and would let him know; that after repeated conferences with Supervisor Evans, he finally denied the claim on January 4, 1966. Carrier, in the handling on the property, did not deny that Supervisor Evans delayed rendering a decision until January 4, 1965 but attempts to disregard the requests made to Mr. Evans on the grounds that claim was not made in writing as required by Rule 28(b) of the Agreement. However, examination of Rule 28(b) shows that a claim or grievance "may" be presented in writing. It does not say "shall" or "must" be in writing. Further, Carrier is estopped from maintaining a failure of filing the claim within sixty (60) days after the occurrence in view of the fact that Carrier's officer, Mr. Evans, delayed rendering a decision on the claim until January 4, 1966, after asking for more time in order to rule on the oral claim. Therefore, Carrier's objection to said procedural defect in this instance is without merit.

In regard to the merits of the claim, this Board was confronted with a similar issue involving similar agreements in Award Nos. 5230, 5328, 5414, 5454 and 5468. We have carefully examined said Awards and agree with the reasoning and conclusions reached therein, and therefore finding that they are not palpably erroneous and controlling in this matter, we are compelled to deny the claim.

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 November, 1968.