



Award No. 5710

Docket No. 5549

2-N&W-CM '69

NATIONAL RAILROAD ADJUSTMENT BOARD

SECOND DIVISION

The Second Division consisted of the regular members and in addition Referee Gene T. Ritter when award was rendered.

PARTIES TO DISPUTE:

**SYSTEM FEDERATION NO. 16, RAILWAY EMPLOYEES'
DEPARTMENT, A. F. OF L.—C. I. O. (Carmen)**

NORFOLK & WESTERN RAILWAY COMPANY

DISPUTE: CLAIM OF EMPLOYEES:

1. That under the terms of the current agreement, carrier improperly denied Claimant birthday holiday compensation which fell during his assigned vacation period.

Carman A. V. McNeil for eight (8) hours at the pro rata rate of pay for February 3, 1966.

2. That accordingly, the carrier be ordered to compensate the aforesaid employee eight (8) hours at the straight time rate as birthday holiday compensation.

EMPLOYEES' STATEMENT OF FACTS: The aforesaid employee, hereinafter referred to as the Claimant was regularly employed by the Norfolk & Western Railway Company hereinafter referred to as the Carrier as Carman at Winston Salem, N. C.

Claimant's birthday fell on 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.

Claim was filed with proper officer of the Carrier, contending that Claimant was entitled to eight (8) hours Birthday Holiday compensation for his birthday holiday, in addition to vacation pay received for that day, and subsequently handled up to and including the highest officer of the Carrier designated to handle such claims, all of whom declined to make satisfactory adjustment.

The Agreement effective September 1, 1949 as subsequently amended is controlling.

POSITION OF EMPLOYEES: It is respectfully submitted that the Carrier erred when it failed and refused to allow claimant eight (8) hours birthday holiday compensation for his birthday holiday, in addition to vacation pay allowed for that day. Article II of the November 21, 1964 Agreement, reads in pertinent part as follows:

Article I, Section 3, makes provisions for holidays which occur during an employee's regular work assignment while he is on vacation by specifically stating the day will be considered as a day of vacation.

The basic question in this dispute has been firmly settled and consistently ruled upon by the Board. In Third Division Award 9635, Referee Johnson, it was stated in pertinent part:

"Under Article I, Section 3, of the Agreement of August 21, 1954, amending the Vacation Agreement of December 17, 1941, any of the seven recognized holidays (or substitutes therefor) falling within the vacation period is paid for as a vacation day, but not again as a holiday. That provisions accompanied the 1954 Agreement's liberalization of regular vacation provisions."

Also, see Third Division Awards 9640 and 9641, and Second Division Awards 2277, 2302, 3477, 3557, 5230, 5231, 5233, 5310 and 5311.

It is evident from the foregoing facts that: (1) Section 6(a), Article II of the November 21, 1964 Agreement does not provide for payment for holidays which fall within a vacation period. (2) The quoted portion of Section 6(a) stating " * * * he shall receive eight hours' pay at the pro rata rate of the position to which assigned, in addition to any other pay to which he is otherwise entitled for that day, if any.", is not applicable as to the birthday did not occur on other than a work day of the workweek of the individual, and (3) Claimant would not have been entitled to any other pay for that day under any other rule, agreement or practice on this property; therefore, the claim is without merit and should be denied by the Board.

Carrier would particularly like to call to the Board's attention Second Division Awards 5230, 5231, 5233, 5310 and 5311. These were identical claims to the one here being considered and in all cases the claims were denied. Carrier will not burden the record by quoting these awards, but a careful reading will reveal that the position is fully denied.

(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 was regularly employed by Carrier at Winston-Salem, North Carolina. Claimant was assigned his vacation, January 31 through February 25, 1966. His birthday fell on Thursday, February 3, 1966, while he was on vacation. The birthday occurred on what would have been a working day of Claimant's regular work-week assignment. Carrier paid Claimant his vacation pay, but has refused to allow him birthday compensation. Claim was made by the Organization on behalf of Claimant for 8 hours birthday holi-

day compensation, in addition to vacation pay allowed for that day. The pertinent part of Article II of the November 21, 1964 Agreement is as follows:

"ARTICLE II—HOLIDAYS

Article II of the Agreement of August 21, 1954, as amended by the Agreement of August 19, 1960, insofar as applicable to the employees covered by this Agreement is hereby further amended by the addition of the following Section 6:

"Section 6. Subject to the qualifying requirements set forth below, effective with the calendar year 1965 each hourly, daily and weekly rated employee shall receive one additional day off with pay, or an additional day's pay, on each such employee's birthday, as herein-after provided."

"(a) For regularly assigned employees, if an employee's birthday falls on a work day of the workweek of the individual employee he shall be given the day off with pay; if an employee's birthday falls on other than a work day of the workweek of the individual employee, he shall receive eight hours' pay at the pro rata rate of the position to which assigned, in addition to any other pay to which he is otherwise entitled for that day, if any."

"(c) A regularly assigned employee shall qualify for the additional day off or pay in lieu thereof if compensation paid him by the carrier is credited to the work days immediately preceding and following his birthday, or if employee is not assigned to work but is available for service on such days. If the employee's birthday falls on the last day of a regularly assigned employee's workweek, the first work day following his rest days shall be considered the work day immediately following. If the employee's birthday falls on the first work day of his workweek, the last work day of the preceding workweek shall be considered the work day immediately preceding his birthday."

"(f) If an employee'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."

This dispute was vigorously argued and the history of the above quoted sections of Article II was vividly reviewed. Therefore, this Board has reconsidered all prior awards touching upon this dispute; this Board has reconsidered Section 3 of Article I of the August 21, 1954 Agreement which enumerated 7 recognized holidays; it has reviewed the May 31, 1963 Section 6 notice under the Railway Labor Act which various organizations served in an attempt to add Good Friday and Veteran's Day as two additional holidays; this Board has considered the actions taken by Emergency Board Nos. 161, 162 and 163 and their reports submitted to the President; this Board has reconsidered the recommendation of Emergency Board 162 to the effect that the parties (Carriers and Organizations) agree to one additional paid holiday effective January 1, 1965; and this Board has considered the above set out Article II, Section 6, which was a result of the recommendation of Emergency Board 162.

It is well settled that prior to November 21, 1964, if one of said 7 enumerated holidays fell during an employee's vacation, this employee would not be entitled to an additional day's pay. On May 22, 1953, Carriers were served with a Section 6 notice, a proposal calling for compensation on holidays including pay for such holidays when they fell on one of the employee's vacation days and vacation period to continue to be extended an additional day. The parties were unable to negotiate an agreement on this point and an emergency board was appointed. This emergency board did not recommend pay for the 7 enumerated holidays when they fell on one of the employee's regular vacation days. The employees agreed to this, and the language of this agreement is contained in Section 4 of the Agreement. On May 31, 1963, another Section 6 notice was served on the Carriers asking for two additional paid holidays, among other things. Again, the parties failed to agree and another emergency board was appointed. This Emergency Board recommended one additional paid holiday to be agreed upon by the parties. The parties negotiated the birthday holiday and added this agreement to the August 21, 1954 holiday agreement as a new Section 6.

Since that time, there have been numerous claims filed before this Board by various Organizations involving this same dispute. A careful examination of numerous awards indicate that the question involved in this dispute was for a period of time interpreted both favorably and unfavorably for the various Claimants.

Award 5230 (Weston) was a denial award which considered Presidential Emergency Board No. 106 and its recommendation "that the vacation period not be increased by allowing additional vacation days where holidays fall in the base vacation period and that when a holiday falls on what would have been a work-day of the employee's regularly assigned work week, such holiday shall be considered as a work-day of the period for which he is entitled to vacation." This award also considered Emergency Board No. 130 which upheld the doctrine of maintenance of take home pay. This award failed to find any requirement for an extra day's pay when a birthday or any other holiday fell within the vacation week on a day that is a work-day of the employee's regular work-week and attached particular significance to this point in considering it with the interpretations and Emergency Board reports. In Award 5251 (Dolnick), this Board sustained a claim on the point involved in this dispute, but failed to take into consideration the recommendations of Emergency Boards; the agreement as a whole; and the history giving rise to the birthday holiday. In Awards Nos. 5310 and 5311, both by Referee Johnson, claims on this identical dispute were denied and held that the interpretation of June 10, 1942, and all agreements subsequent to Article VII(a) of the December 17, 1941, National Vacation Agreement are in full force and effect and must be followed by this Board. In Award 5372 (Knox), a similar claim to the claim involved in this dispute was sustained. However, it was later found in Award 5414 (Ritter) that Award 5372 failed to recognize that a birthday occurring on a vacation should be considered in the same manner as other holidays that occur during a vacation. Since Award 5414, this Board has denied similar claims in Awards 5468 (Ives), 5645 (Ritter), 5454 (Coburn), 5442 (Kane), 5252 (Murphy), 5581 (Dugan). This Board finds that there are relatively few sustaining awards when compared to a total of more than 75 denial awards by Referee Weston, Johnson, Ritter, Kane, Coburn, Ives, Murphy and Dugan. denial awards are in palpable error and they will, therefore, be followed.

If the doctrine of stare decisis has any meaning, it would certainly and overwhelmingly apply in this instance. This Board fails to find that these

denial awards are in palpable error and they will, therefore, be followed. It is the position of this Board, in the interest of stabilizing the railway industry, to be consistent in its interpretation of contracts. To be otherwise would create chaos in the industry. It is not this Board's function to rewrite or add to contracts and agreements entered into between parties to a dispute; the proper place for the submission of the question involved in this dispute is at the negotiation table, not before this Board.

The argument presented in prosecuting this claim contained no new material, and this question has been too well settled to give it further consideration.

A W A R D

Claim denied.

**NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Second Division**

**ATTEST: Charles C. McCarthy
Executive Secretary**

Dated at Chicago, Illinois, this 6th day of June, 1969.