



**Award No. 5751**

**Docket No. 5516**

**2-N&W-MA '69**

**NATIONAL RAILROAD ADJUSTMENT BOARD**

**SECOND DIVISION**

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

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**PARTIES TO DISPUTE:**

**SYSTEM FEDERATION NO. 16, RAILWAY EMPLOYES'  
DEPARTMENT, AFL-CIO (MACHINISTS)**

**NORFOLK AND 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.

H. T. Stout—Machinist

Birthday—October 17, 1955

Shaffers' Crossing Roundhouse

Roanoke, Virginia

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, is regularly employed by the Norfolk & Western Railway Company hereinafter referred to as the Carrier as a Machinist at Shaffers' Crossing Roundhouse.

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.

Article 7(a), above, provides that an employee will be no better or worse off by virtue of being on vacation. On this property all holidays are considered unassigned work days, therefore, had Claimant not been on vacation, he would not have worked on his birthday and would have received one day's pay for that day.

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 provision accompanied the 1954 Agreement's liberalization of regular vacation provisions."

Also, see Third Division Awards 9640 and 9641, and Second Division Awards 2124, 2277, 2291, 2302, 2800, 3477, 3518 and 3557.

It is evident from the foregoing facts that: (1) Section 6(a), Article II, of the February 4, 1965 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 the birthday did not occur on other than a work day of the work week 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, 5232, and 5233. 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 taken by Carrier is fully confirmed and the Employees' 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 employee or employees involved in this dispute are respectively carrier and employee 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.

During the period in question, Claimant H. T. Stout was regularly assigned Machinist in Carrier's Shaffers' Crossing Shops, Roanoke, Virginia. His working assignment was Thursday through Monday, second shift, rest days Tuesday and Wednesday.

Claimant Stout was on vacation, October 14 through October 18, 1965, and his birthday was Sunday, October 17. The birthday occurred on what would have been a work day of Claimant's work-week assignment and would have been observed by him as a holiday during his regular work-week pursuant to the terms of Article II, Section 6, Mediation Agreement of February 4, 1965 (Cases A-7127 and A-7128, IAM, SMWIA, IBEW) if he had not been scheduled off for observing his earned vacation with pay in accordance with the applicable Vacation Agreement.

Claimant was compensated for the assigned work days, Thursday through Monday of his regularly assigned work-week, while scheduled off for vacation, at the pro rata rate of pay of his regularly assigned position. Carrier denied his claim for an additional eight-hour day, at the pro rata rate of the position to which he was assigned, as premium pay for a birthday-holiday which fell on his assigned work day in the work-week during which he was on a paid vacation.

The awards of this Division involving disputes over the interpretation and application of Article II, Section 6 of the Mediation Agreement are in hopeless conflict. The parties to such disputes apparently believe that the name of the game is "fool the Referee" and it appears that they prepare their submissions with that thought in mind, with the following results.

Denial Awards 5230, 5231, 5232, 5233, 5310, 5414, 5415, 5416, 5417, 5418, 5419, 5420 have drawn vigorous dissents from the Labor members.

A classic dissent of eighteen (18) pages by the Carrier members takes issue with sustaining awards 5251, 5252, 5253, 5254, 5255, 5256, 5257, 5258. The labor members are on record in support of those same awards.

We could not say more in support or in criticism of the awards by able Referees, who have been drawn into the disputes at issue, than has been once said in the dissents of the Division's partisan members, and we would not try if we could. The awards have been examined. The scholarly views of the Referees are intelligently presented and the awards all bear evidence of painstaking efforts on the part of each Referee. We share the burden, subject to some likely criticism from others, despite our best efforts.

Article II of the Agreement of August 21, 1954, as amended by the Agreement of August 19, 1960, was later amended when the parties negotiated one additional holiday as provided in Article II, Section 6 of the February 4, 1965 Agreement, which brings us down to the place in our deliberations where we have the individual employee's birthday settled upon as a roving holiday. The price is not in evidence, but the bargain is far reaching and appears to be carefully thought out, the object being to grant "one additional day off with pay, or an additional day's pay" on the birthday of each individual employee covered by the Agreement with only the qualifying requirements as spelled out in Section 6(a) (b) (c) (d) (e) (f) (g) (h).

Qualifying requirements: (a) applies to regularly assigned employees; (b) other than regularly assigned employees; (c) applies to days which are

compensated for immediately preceding and following the birthday; (d) applies to other than regularly assigned employees and they qualify for the additional day off or pay in lieu thereof according to some different standard. A hypothetical work-week is also established for them and, further sick leave pay will not be considered as compensation for purposes of this Rule; (e) applies to wage adjustments in the monthly rates of monthly rated employees; (f) applies to an employee working at a location away from his residence; (g) preserves existing rules and practices governing whether an employee works on a holiday and payment for work performed; (h) is a moratorium.

Each of the above qualifications has some meaning all its own, most of which point, however, in the direction of vesting one additional day's pay in the individual employee each year when his birthday comes around without regard to what the effect will be upon the other provisions of the collectively bargained agreement.

We will not assume the burden of discussing all the qualifying requirements, but will not shirk the duty to get on record as to any of those which have influenced the decision in this case.

Section 6(a) readily admits of the interpretation that a regularly assigned individual employee will be off with pay at the pro rata rate on one of this five (5) assigned work days in his regularly assigned work-week, to celebrate his natal day, subject to the requirements of Section 6(c) and Section 6(g). If the individual employee's birthday falls on a day in his assigned work-week which is not a work day for him, it appears to us that he is nevertheless entitled to receive an additional day's pay at the pro rata rate of the position to which assigned without the holiday premium pay being offset against "any other pay" for "that day". At this point we stress the fact that "he shall receive eight hours pay at the pro rata rate for the position to which assigned in addition to any other pay to which he is otherwise entitled for that day, if any", without any reference being made to work or service performed.

Section 6(c) qualifies the regularly assigned employee "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", again without any reference being made to work or service performed. (Emphasis supplied)

Section 6(g) applies to whether an employee works on his birthday and how he shall be paid when existing rules and practices govern, and is not applicable in this dispute.

Claimant was a regularly assigned employee. His birthday fell on a work day of his work-week while he was on his scheduled vacation; and therefore, he was not entitled to a day off with pay. The compensation paid him by the Carrier for his scheduled vacation was credited to the work days immediately preceding and following his birthday. Since his birthday was celebrated during his vacation it fell on a day other than a day of work for the individual employee for which he received vacation pay. Therefore, "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".

**A W A R D**

**Claim (1) sustained;**

**Claim (2) sustained.**

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

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

**Dated at Chicago, Illinois, this 30th day of June, 1969.**