

Award No. 5777

Docket No. 5532

2-N&W-CM '69

**NATIONAL RAILROAD ADJUSTMENT BOARD
SECOND DIVISION**

The Second Division consisted of the regular members and in addition Referee John J. McGovern when award was rendered.

PARTIES TO DISPUTE:

**SYSTEM FEDERATION NO. 16, RAILWAY EMPLOYEES'
DEPARTMENT, AFL-CIO
(Carmen)**

NORFOLK & WESTERN RAILWAY COMPANY

DISPUTE: CLAIM OF EMPLOYEES:

1. That under the terms of the current agreement, Carrier improperly denied Car Repairer T. W. Sprouse eight (8) hours' birthday compensation for his birthday, November 24, 1965, which fell during his assigned vacation period.
2. That accordingly, the Carrier be ordered to compensate the aforesaid employe eight (8) hours at the straight time rate as birthday compensation.

EMPLOYEES' STATEMENT OF FACTS: The aforesaid employe, hereinafter referred to as the claimant was regularly employed by the Norfolk & Western Railway Company hereinafter referred to as the carrier as car repairer at Shaffers Crossing Shops.

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 under date of December 22, 1965, 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 II—HOLIDAYS

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 Award 9640 and Second Division Awards 2277, 2800, 5230, 5231, 5232 and 5233.

It is evident from the foregoing facts that: (1) sections 6(a) and (b), article II, of the November 21, 1964 agreement do 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.

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 Sprouse was paid for eight (8) hours as time not worked on November 24, 1965 which was a work day of his workweek; also, his birthday; also, a day of his annual vacation.

Claim is for a basic day of the position to which assigned for a birthday-holiday in addition to vacation pay allowed for that day.

A birthday-holiday is not one of the seven (7) enumerated holidays which shall be considered as a work day of the period for which the employee is entitled to vacation. Article 1, Section 3 and Article II, Section 1, August 21, 1954 Agreement.

An employee having a regular assignment will be paid while on vacation the daily compensation paid by the Carrier for such assignment. Article 7(a), December 17, 1941 Vacation Agreement.

Daily compensation to be paid by Carrier for a birthday-holiday, when not worked, is a minimum basic day at the pro rata rate of the position to which the individual employee is assigned in lieu of receiving one additional day off with pay in the workweek during which his birthday falls. Article II, Section 6, 6(a) 6(c), November 21, 1964 Agreement.

An employee having a regular assignment will not be any better or worse off, while on vacation, as to the daily compensation paid by the Carrier than if he had remained at work on such assignment. Article 7(a), December 17, 1941 Vacation Agreement, June 10, 1942 Interpretation.

Claimant will be no better off if paid in accordance with his claim for an additional basic day while on vacation. If he is denied pay in lieu of an additional day off in the workweek during which his birthday-holiday falls, he will be worse off while on vacation than if he had remained at work on such assignment.

Article II, Section 6(g) of the November 21, 1964 Agreement, partially relied upon by Carrier, is not applicable to this dispute in view of all the facts and circumstances of this case.

Claimant is entitled to be paid a minimum basic day of the position to which assigned for a birthday-holiday in addition to vacation pay allowed for that day.

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 19th day of September, 1969.

DISSENT OF CARRIER MEMBERS TO AWARDS NOS. 5679-5779

These awards are completely erroneous and have no precedent value whatsoever.

The overwhelming number of prior awards (92) issued by eight different referees — all in favor of the carriers' position — would indicate a callous disregard for stare decisis, especially so when the neutral makes no effort to show where the prior awards were palpably erroneous.

A weak attempt is made to sustain the neutral's position when he indicates that the parties used "needless language" in the agreement and he suggested what language should have been used.

It is abundantly clear that this neutral went outside of the current agreement governing the parties involved to sustain claims which had absolutely

no merit, as the decision to sustain the instant claims is based on conjecture, misinterpretation or misapplication of the contract language.

Therefore, we most vigorously dissent.

/s/ H. F. M. BRAIDWOOD
H. F. M. Braidwood

/s/ W. R. HARRIS
W. R. Harris

/s/ J. R. MATHIEU
J. R. Mathieu

/s/ R. R. HUMPHREYS
R. R. Humphreys

/s/ H. S. TANSLEY
H. S. Tansley