



Award Number 5956

Docket Number 5845

NATIONAL RAILROAD ADJUSTMENT BOARD

SECOND DIVISION

The Second Division consisted of the regular members and in addition Referee Nicholas H. Zumas when award was rendered.

PARTIES TO DISPUTE:

**SYSTEM FEDERATION NO. 2, RAILWAY EMPLOYEES'
DEPARTMENT, A. F. of L. - C. I. O.
(Carmen)**

MISSOURI PACIFIC RAILROAD COMPANY

DISPUTE: CLAIM OF EMPLOYEES:

1. That the Missouri Pacific Railroad Company violated the Agreement of November 21, 1964, when they deprived Carman J. J. Janavaras, San Antonio, Texas, the right to work his regular assignment on Wednesday, April 6, 1966, his birthday holiday.
2. The carrier has agreed to compensate Carman Janavaras in the amount of eight (8) hours at the straight time rate for their violation of the Agreement of November 21, 1964, but has refused to allow him the full benefit of the claim, i.e., eight (8) hours at the punitive rate, therefore, that accordingly, the Missouri Pacific Railroad Company be ordered to additionally compensate Carman J. J. Janavaras the difference between the straight time rate and punitive rate for Wednesday, April 6, 1966.

EMPLOYEES' STATEMENT OF FACTS: J. J. Janavaras, hereinafter referred to as the Claimant, is employed by the Missouri Pacific Railroad Company, hereinafter referred to as the Carrier, as car inspector at San Antonio, Texas, work week Monday through Friday, rest days Saturday and Sunday, hours 3:00 P.M. to 11:00 P.M.

The Claimant's birthday occurred on Wednesday, April 6, 1966, one of his regular work days. The Claimant was advised not to report for work that day, however, the Carrier found it necessary to fill this position on this date (April 6, 1966) but failed to comply with the rule and practice, i.e., filling the job the same as other holidays and working the incumbent, which constitutes the basis of the claim. The Claimant works all holidays on his assignment, however, as stated the Carrier did not work this holiday in line with the rules and practices of working other holidays.

This case was progressed on the property of the Carrier in line with Rule 31 of the controlling agreement of June 1, 1960, and the Carrier and Employees agreed to hold this case in abeyance pending decision from your Honorable Board in a similar case referred to as Docket 5152. Decision was handed down in this case by your Honorable Board in Award 5523 sustaining the Employees' entire claim, i.e., eight (8) hours at the punitive rate. However, the Carrier has now refused to honor the provisions of this award

2-2385, S, Wenke, CM v. CRI&P
 2-2487, S, Schedler, SM v. NYC&StL
 2-2513, S, Whiting, EW v. CRI&P
 2-2628, S, Donaldson, CM v. C&NW
 2-2700, S, Begley, CM v. CRI&P
 2-2802, S, Smith, BM v. B&M
 2-2843, S, Ferguson CM v. MP
 2-2956, S, Burke, EW v. NYNH&NH
 2-2958, S, Burke, MA v. GN
 2-3405, S, Carey, Jr., CM v. CRI&P
 2-3406, S, Carey, Jr., CM v. CRI&P
 2-3410, S, Carey, Jr., CM v. CRI&P
 2-3444, Comp., Murphy, EW v. PULL
 2-3836, Comp., Anrod, SM v. ACL
 2-3873, Comp., Anrod, SM v. B&M
 2-3903-04, S, Doyle, EW v. PULL
 2-4265, S, Anrod, CM v. NYC&StL
 2-4322, S, Harwood, CM v. P&LE
 2-4335, Comp., Anrod, CM v. GTW
 2-4416, S, McDonald, EW v. PULL
 2-4815, Comp., Hall, CM v. NYNH&H
 2-4838, S, H. A. Johnson, CM v. L&N
 2-4955, S, H. A. Johnson, CM v. MKCSJA
 2-4956, S, H. A. Johnson, CM v. MKCSJA
 2-5051, S, H. A. Johnson, CM v. L&A

In accordance with the principles followed by your Board in the above awards, the Carrier allowed the Claimant in this dispute an additional eight hours at the pro rata rate in settlement of claim that he should have been required to work on his birthday holiday which claim is similar to the one sustained by your Board in Award 5523. The Carrier raises in this docket the question of the amount of the penalty, if any, which should be awarded where your finds a violation of the Agreement pertaining to birthday holidays. The Carrier believes that your Board will find that Awards 5236 and 5523 are erroneous and not follow those awards in future cases. The instant claim was held in abeyance pending issuance of Award 5523 by your Board and the Carrier has sought to settle the instant dispute in the light of the sustaining Award 5523 but has limited the amount of the payment to the proper rate, that is, the pro rata rate for work not performed.

The Agreement between the parties does not provide for the allowance of any penalty even though your Board may find a violation of the Agreement occurred in this case and, therefore, your Board should not award any penalty. In the event your Board should take it upon itself to award a penalty, the penalty for work not performed as in this case should be limited in line with the long series of awards listed above to the pro rata rate. Claimant has been allowed eight hours at the pro rata rate in addition to holiday pay and the claim for the difference between the punitive and the pro rate should be denied.

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 were given due notice of hearing thereon.

The only question to be determined in this dispute is whether Carrier should be required to pay the pro rata rate or the premium rate to an employe who does not work a birthday holiday but whose position is worked by someone else.

The Board has carefully examined all of the awards cited and referred to by both parties and concludes that the proper measure of a Claimant's loss under the circumstances is what he would have received had he performed the service. Such rate is applicable whether work on the holiday is performed by the employe who is entitled to it, or by someone else.

The Board can find no basis for Carrier's theory that only the "pro rata" rate should be paid. To do so would create a rate of pay not provided in the Agreement and not agreed to by the parties.

A W A R D

Claimant is entitled to be paid at the premium rate.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Second Division

ATTEST: E. A. Killeen
Executive Secretary

Dated at Chicago, Illinois, this 25th day of June, 1970.