Award No. 5981
Docket No. 5725
2-ARTC-CM-'70

NATIONAL RAILROAD ADJUSTMENT BOARD

SECOND DIVISION

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

PARTIES TO DISPUTE:

BROTHERHOOD RAILWAY CARMEN OF AMERICA

RAILWAY EMPLOYES' DEPARTMENT, AFL-CIO

AMERICAN REFRIGERATOR TRANSIT COMPANY

DISPUTE: CLAIM OF EMPLOYES:

1. That the American Refrigerator Transit Company violated the controlling Agreement of November 21, 1964, when they denied Carman Welder J. E. Williams birthday holiday pay for July 14, 1967 his birthday.

2. That accordingly, the American Refrigerator Transit Company be ordered to compensate J. E. Williams for eight (8) hours at the pro rata rate for welders, for July 14, 1967, his birthday holiday.

EMPLOYES' STATEMENT OF FACTS: The American Refrigerator Transit Company, hereinafter referred to as the carrier, operates one of their car repair shops at St. Louis, Missouri, where J. E. Williams, hereinafter referred to as the claimant, is employed as a carman welder with a work week Monday through Friday with Saturday and Sunday as rest days.

Claimant started his vacation on Monday, July 10, 1967 through Friday, July 14, 1967 and his birthday occurred on July 14, the last day of his vacation, claimant was properly compensated for his vacation but was denied compensation for his birthday holiday and that constitutes the basis of this claim.

Article 11, Section 6 of the Agreement of November 21, 1964 provides for birthday holiday pay for all regularly assigned employes who qualify, claimant met all requirements. Therefore, the carrier violated the controlling Agreement.

This matter has been handled up to and including the highest designated officer of the carrier who has declined to adjust it.

The birthday holiday Agreement of November 21, 1964 is controlling.

POSITION OF EMPLOYES: All officers of the carrier, designated to handle violations, from the general foreman up to and including the President

that when a birthday-holiday occurs within an employe's vacation, such employe would be paid for said holiday in addition to his vacation pay, provided he otherwise would have been scheduled to work that particular day. Nowhere do we find such clear and definitive language, and therefore, historic practice, prior interpretations, Emergency Board reports and earlier Awards become significant and require consideration.

Accordingly, we find that our Awards 5230 (Weston) and 5414 (Ritter) provide persuasive precedent for denying the instant claim."

The foregoing awards have thoroughly considered all of the arguments presented by the Employes and found that the claim for an additional day's pay is not supported by the rules cited by the Employes. We believe that the issue in this case is now well settled and that the claim in this docket for an additional day's pay should be declined.

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.

That 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 assigned as a Carman Welder with work week Monday through Friday, rest days Saturday and Sunday. He was on vacation from July 10 through July 16, 1967. Friday, July 14 was his birthday. Carrier paid his 8 hours vacation pay at pro rata rate for that date. It denied him an additional 8 hours birthday-holiday pay at pro rata rate for that date. The denial, Petitioner claims, was in violation of Article II – Holidays of the National Agreement of November 21, 1964.

A. PERTINENT PROVISION OF AGREEMENTS

Holidays with pay for Non-Operating employes (Non-Ops) on a national basis were first established in the National Agreement of August 21, 1954. Pertinent provisions of that Agreement, with emphasis supplied, are:

"ARTICLE II. HOLIDAYS

Section 1. Effective May 1, 1954, each regularly assigned hourly and daily rated employe shall receive eight hours' pay at the pro rata hourly rate of the position to which assigned for each of the following enumerated holidays **when such holiday falls on a work day of the work week of the individual employe:**

New Year's Day
Washington's Birthday
Decoration Day
Fourth of July
Labor Day
Thanksgiving Day
Christmas"

Sections 2(a) and 2(b) deal with rates of pay. Qualifications for holiday pay are prescribed as follows:

"Section 3. An employe shall qualify for the holiday pay provided in Section 1 hereof if compensation paid by the Carrier is credited to the work days immediately preceding and following such holiday. If the holiday falls on the last day of an employe's work week, the first work day following his rest days shall be considered the work day immediately following. If the holiday falls on the first work day of his work week, the last work day of the preceding work week shall be considered the work day immediately preceding the holiday."

Article II – Holidays of the August 21, 1954 Agreement was amended by Article III – Holidays of the National Agreement of August 19, 1960, which in pertinent part, with emphasis supplied, reads:

"ARTICLE III. HOLIDAYS

Article II, Sections 1 and 3 of the Agreement of August 21, 1954, are hereby amended, effective July 1, 1960, to read as follows:

Section 1. Subject to the qualifying requirements applicable to regularly assigned employes contained in Section 3 hereof, each regularly assigned hourly and daily rated employe shall receive eight hours' pay at the pro rata hourly rate of the position to which assigned for each of the following enumerated holidays **when such holiday falls on a work day of the work week of the individual employe:**

New Year's Day
Washington's Birthday
Decoration Day
Fourth of July
Labor Day
Thanksgiving Day
Christmas

Subject to the qualifying requirements applicable to other than regularly assigned employes contained in Section 3 hereof, all others who have been employed on hourly or daily rated positions shall receive eight hours' pay at the pro rata hourly rate of the position on which compensation last accrued to him for each of the above-identified holidays if the holiday falls on a work day of the work week as defined in Section 3 hereof, provided (1) compensation for service paid him by the carrier is credited to 11 or more of the 30 calendar days immediately preceding the holiday and (2) he has had a seniority date for at least 60 calendar days or has 60 calendar days of continuous active service preceding the holiday beginning with the first day of compensated service, provided employment was not terminated prior to the holiday by resignation, for cause, retirement, death, non-compliance with a union shop agreement, or disapproval of application for employment.

The provisions of this Section and Section 3 hereof applicable to other than regularly assigned employes are not intended to abrogate

or supersede more favorable rules and practices existing on certain carriers under which other than regularly assigned employes are being granted paid holidays.

* * * *

Section 3. A regularly assigned employe shall qualify for the holiday pay provided in Section 1 hereof if compensation paid him by the carrier is credited to the work days immediately preceding and following such holiday or if the employe is not assigned to work but is available for service on such days. If the holiday falls on the last day of a regularly assigned employe's work week, the first work day following his rest days shall be considered the work day immediately following. If the holiday falls on the first work day of his work week, the last work day of the preceding work week shall be considered the work day immediately preceding the holiday.

All others for whom holiday pay is provided in Section 1 hereof shall qualify for such holiday pay if on the work day preceding and the work day following the holiday they satisfy one or the other of the following conditions:

(i) Compensation for service paid by the carrier is credited;

or

(ii) Such employe is available for service.

NOTE: 'Available' as used in subsection (ii) above is interpreted by the parties to mean that an employe is available unless he lays off of his own accord or does not respond to a call, pursuant to the rules of the applicable agreement, for service.

For purposes of Section 1, the work week for other than regularly assigned employes shall be Monday to Friday, both days inclusive, except that such employes who are relieving regularly assigned employes on the same assignment on both the work day preceding and the work day following the holiday will have the work week of the incumbent of the assigned position and will be subject to the same qualifying requirements respecting service and availability on the work days preceding and following the holiday as apply to the employe whom he is relieving.

For other than regularly assigned employes, whose hypothetical work week is Monday to Friday, both days inclusive, if the holiday falls on Friday, Monday of the succeeding week shall be considered the work day immediately following. If the holiday falls on Monday, Friday of the preceding week shall be considered the work day immediately preceding the holiday."

On October 20, 1964 Presidential Emergency Boards 161, 162 and 163 **recommended** — even though precise issue was not before them — that an additional holiday be agreed upon to conform to "prevailing industry practice." The Emergency Boards left to the parties selection of the holiday to be added.

The parties, thereafter, agreed in the National Agreement of November 21, 1964, that the eighth holiday would be the employe's birthday. But the parties did not merely add the birthday-holiday to the list of holidays in the preceding two Agreements. Instead they agreed to add a new section to the Vacation Agreement singularly dedicated to birthday-holidays which in material part, with emphasis supplied, reads:

"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 employes 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 employe shall receive one additional day off with pay, or an additional day's pay, on each such employe's birthday, as hereinafter provided.

(a) For regularly assigned employes, if an employe's birthday falls on a work day of the work week of the individual employe he shall be given the day off with pay; if an employe's birthday falls on other than a work day of the work week of the individual employe, 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.

(b) For other than regularly assigned employes, if an employe's birthday falls on a day on which he would otherwise be assigned to work, he shall be given the day off and receive eight hours' pay at the pro rata rate of the position which he otherwise would have worked. If an employe's birthday falls on a day other than a day on which he otherwise would have worked, he shall receive eight hours' pay at the pro rata hourly rate of the position on which compensation last accrued to him prior to his birthday, in addition to any other pay to which he is otherwise entitled for that day, if any.

(c) A regularly assigned employe 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 employe is not assigned to work but is available for service on such days.

* * * * *

(d) Other than regularly assigned employes shall qualify for the additional day off or pay in lieu thereof, provided (1) compensation for service paid him by the carrier is credited to 11 or more of the 30 calendar days immediately preceding his birthday, and (2) he has had a seniority date for at least 60 calendar days or has 60 calendar days of continuous active service preceding his birthday beginning with the first day of compensated service, provided employment was not terminated prior to his birthday by resignation, for cause, retirement, death, non-compliance with a union shop agreement, or dis-

approval of application for employment, and (3) if on the work day preceding and the work day following the employe's birthday he satisfies one or the other of the following conditions.

(i) Compensation for service paid by the carrier is credited;

or

(ii) **Such employe is available for service.**

NOTE: 'Available' as used in subsection (ii) above is interpreted by the parties to mean that an employe is available unless he lays off of his own accord or does not respond to a call, pursuant to the rules of the applicable agreement, for service.

* * * * *

(f) An employe working at a location away from his residence may, by giving reasonable notice to his supervisor, have the day immediately preceding the first day during which he is not scheduled to work following his birthday considered as his birthday for the purposes of this Section. An employe whose birthday falls on February 29, may, on other than leap years, by giving reasonable notice to his supervisor, have February 28 or the day immediately preceding the first day during which he is not scheduled to work following February 28 considered as his birthday for the purposes of this Section. If an employe'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.

(g) Existing rules and practices thereunder governing whether an employe works on a holiday and the payment for work performed on holidays shall apply on his birthday."

B. RESOLUTION OF ISSUE

We are cognizant that the parties to the holiday agreements, supra, have recently settled the issue presented in the instant case through the collective bargaining process. The agreement reached is not retroactively applicable to the disposition of the dispute in this case which we have been petitioned to resolve. We commend the parties for recognizing the vacillating unsettled disturbing conditions resulting from our conflicting awards and their initiative resort to good faith collective bargaining to find and agree upon a cure. Arbitration, being an adversary proceeding, does not afford the comfort of certainty attainable through good faith collective bargaining.

Article II – Holidays, Section 1 of the August 21, 1954 Agreement and Article III – Holidays, Section 1, of the August 19, 1960 Agreement, which expressly amends the prior Agreement, each contain the following identical language:

"* * * each regularly assigned hourly and daily rated employe shall receive eight hours' pay at the pro rata hourly rate of the position to which assigned for each of the following enumerated holidays **when such holiday falls on a work day of the work week of the individual employe.**" (Emphasis ours.)

The amending language is addressed to qualifications for holiday pay and brings within the ambit of holiday pay entitlement employes other than those "regularly assigned." These two Agreements, because of their construction, must be read together to determine the intent of the parties. Both of them exclusively limit holiday pay and day off to a "work day of the work week of the individual employe."

Article II – Holidays of the November 21, 1964 Agreement does not amend any provisions of the preceding two Agreements which continued unaffected in their prescription limited to the seven holidays named therein. The parties saw fit to treat birthday-holidays separate and apart from the treatment of the seven holidays encompassed in the preceding Agreements in that they **added** an entire Section 6 peculiarly specific and exclusively applicable to birthday-holidays. Amendment by addition is distinguishable from amendment of pre-existing terms of an agreement. An amendment by addition is in legal effect a new agreement and must be interpreted as such in the absence of expressed terms tying it in, in some fashion, to pre-existing agreements. Had it been the intention of the parties that birthday-holidays were to be governed in the same manner as the seven holidays in the pre-existing Agreements the parties had but to add "birthday holiday" to the list. Certainly it cannot be held that the many detailed provisions of Section 6 are redundancy; especially, since they are so strikingly dissimilar to the Holiday provisions of the August 21, 1954 Agreement as amended by the August 19, 1960 Agreement.

Glaringly omitted from Section 6 is confinement of contractual right to holiday pay to "when such holiday falls on a work day of the work week of the individual employe." In contrast Section 6 provides:

"Subject to the qualifying requirements, set forth below * * * each hourly, daily and weekly rated employe shall receive one **additional** day off with pay, or an **additional** day's pay, on each such employe's birthday * * *." (Emphasis ours.)

The word "additional" as employed therein and the words "in addition" in (a), (b), (c) and (d) are persuasively convincing, in the context which used, that the qualifying employe is contractually entitled to birthday-holiday pay with the day off "in addition to any other pay to which he is otherwise entitled for that day."

Claimant did have the day off on his birthday; but, it was not an "additional day off" because it was one of his vacation days. Consequently he qualifies for the alternative prescribed in the introductory of Section 6: "or an **additional** day's pay." Otherwise stated, he was entitled to birthday-holiday pay for that day "in addition" to the vacation pay for that day, which he had earned, and to which he was "otherwise entitled."

Claimant was a regularly assigned employe. Paragraphs (a) and (c) of Section 6 are devoted to that category of employes. Paragraph (a) is not a

qualification for birthday-holiday benefits. It merely prescribes how those benefits will be satisfied if: (1) the birthday falls on a work day of the work week; or (2) it falls on other than a work day of the work week. Paragraph (c) prescribes qualification:

> "A regularly assigned employe **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 * * *." (Emphasis ours.)

Vacation days are work days of the employe's work week. Vacation days are tolled in work days. Claimant, therefore, was credited with compensation for work days immediately preceding and following his birthday; ergo, he qualified for birthday benefits which are (1) an additional day off with pay; or (2) an additional day's pay other than what he was otherwise entitled to for that day.

A reading of Section 6, as a whole, unambiguously spells out that employes who qualify under that Section are entitled to birthday-holiday benefits whether their birthday falls on a work day or a rest day or another holiday (paragraph (f) is particularly noteworthy); and, in the case of qualified unassigned employes, such as extra employes, even on a day when they are neither scheduled nor required to work.

Section 6(g) reads:

> "Existing rules and practices thereunder governing **whether an employe works on a holiday** and the **payment for work performed on holidays** shall apply on his birthday." (Emphasis ours.)

The limitations of this provision are clear on its face. It does not merge Section 6 into the Holiday Agreements of August 21, 1954 and August 16, 1960.

For the foregoing reasons and our findings, infra, that awards of this division denying identical disputes do not draw their essence from Article II – Holidays of the collective bargaining agreement of November 21, 1964, we will sustain the claim in the instant case.

C. DENIAL AWARDS DO NOT DRAW THEIR ESSENCE FROM AGREEMENT.

In Carrier Members' dissent to sustaining Award No. 5764 it is stated that: "ninety-two awards had been rendered by eight different Referees denying similar claims; twenty-nine decisions by three Referees had resulted in sustaining awards;" and, therefore, 'the weight of authority' substantially supports the denial awards. Further, it is justly critical that that Award does not on its face spell out reasons for in effect holding that the prior denied awards do not draw their essence from the birthday-holiday Agreement of November 21, 1964. (NOTE: The referee sitting with the Board as a member thereof in the consideration of the dispute in Award No. 5764 is also serving in the same capacity in the instant case.) As to that dissent we make two observations: (1) The Board issues awards; not referees; and (2) the weight of numbers of awards sustaining or denying identical disputes does not establish weight of authority — authority is founded in legally sound substance. To this we add that a prior award in an identical dispute, if legally

sound, should not be reversed notwithstanding that a majority of the Board as constituted in a succeeding case may have come to a different legally sound conclusion if it was considering the dispute de novo — this in satisfaction of the mandate of the Act prescribed in Section 2 "to provide for the prompt and orderly settlement of all disputes growing out of * * * the interpretation or application of agreements covering rates of pay, rules or working conditions."

In finding that awards denying claims in identical disputes do not draw their essence from the Agreement of Article II – Holidays, dated November 21, 1964, we have selected as representative Award Nos. 5230 and 5310 for analysis:

1. AWARD NO. 5230

This Award issued July 20, 1967, and has been cited in support of all subsequent denial awards. It does not draw its essence from the Agreement for the following reasons:

1. It fails to recognize that Section 6 is singularly dedicated to birthday-holidays and that it is a principle of contract construction that specific provisions prevail;

2. It fails to give any significance to the phrases: (a) "one **additional** day off with pay, "or an **additional** day's pay;" and (b) "in **addition** to any other pay to which he is otherwise entitled for that day." Both of the phrases are meaningful as to the intent of the parties and there is no counterpart in the prior vacation agreements;

3. It fails to give weight to paragraph (f) of Section 6 as evidence of intent of the parties;

4. It is in error when it states: "There is no sound basis for treating a birthday that falls on a work day of the employe's assigned work week differently than any of the seven other recognized holidays insofar as the question at issue is concerned." We find nothing in the terms of Section 6 that relates back to the provisions of the National Agreements of August 21, 1954 and August 19, 1960;

5. Emergency Boards make only **recommendations** to the parties. **Agreements** are made by the parties. This Board's statutory function is to interpret existing agreements. Emergency Board's function is equated to mediation; this Board to arbitration. Recommendations of Emergency Boards are not binding on the parties nor legally enforcible — the awards of this Board are;

6. Emergency Board recommendations might in some situations be studied as an aid in determining the intent of the parties; but this only when the intent of the parties is not evidenced in the agreement and **evidence** adduced before the Emergency Board is material and relevant to a finding of intent;

7. The awards cited in support interpret and apply terms of agreements which are separate and apart and in complete variance with Section 6. They are inapposite;

8. The birthday-holiday benefits provided in Section 6 are earned by employes that qualify thereunder. Were these to be denied to an employe by

wrongfully attempting to equate them to stranger agreements the doctrine of maintenance of take-home pay would not be satisfied. The words "by the addition," and "an additional day's pay," as employed in Section 6, have a bite not found in the preceding vacation agreements;

9. Section 6 is a "significant development with respect to holidays during vacations" which came into being after Emergency Boards 106, 130, 161, 162 and 163 had made their respective Reports to the President;

10. There is not a word in the Award which supports the declaratory statement: "we carefully distinguish the present case from the situation where a birthday occurs on other than a work day of assigned work week."

2. AWARD NO. 5310

This Award issued on October 26, 1967. While it cited Award No. 5230 in support, in an incidental fashion, its arguments and conclusions are premised on:

> "While there are distinct differences between separate individual birthday holidays and the seven general holidays, **the issue in this case is not whether the holiday as such should be paid for, but rather whether payment can be made for the holiday occurring during a a vacation, under the conditions stated. Thus the question involved the Vacation Agreements rather than the Holiday Agreements.**" (Emphasis ours.)

The National Vacation Agreement is dated December 17, 1941. It has been the subject of a multitude of interpretations and awards and amendments. It was not until 1954, almost thirteen years later, that a National Holiday Agreement was executed. The parties, by design, have always seen fit to treat vacations and holidays as separate and distinct subject matters. This is evidenced in the National Agreements of August 21, 1954, August 19, 1960 and November 21, 1964.

We find that this Award: (1) on its face, does not draw its essence from Article II – Holidays, Section 6, of the November 21, 1964 Agreement — the provision which this Board was petitioned to interpret and apply; (2) is premised on sophistry; and (3) is wholly without support in reason and fact.

AWARD

Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of SECOND DIVISION

ATTEST: E. A. Killeen
Executive Secretary

Dated at Chicago, Illinois, this 14th day of September, 1970.

Keenan Printing Co., Chicago, Ill. Printed in U.S.A.