

(Advance copy. The usual printed copies will be sent later.)

Form 1

NATIONAL RAILROAD ADJUSTMENT BOARD  
SECOND DIVISION

Award No. 6505  
Docket No. 6369  
2-EL-CM-'73

The Second Division consisted of the regular members and in addition Referee Irwin M. Lieberman when award was rendered.

Parties to Dispute: ( System Federation No. 100, Railway Employees'  
( Department, A. F. of L. - C. I. O.  
( (Carmen)  
(  
( Erie Lackawanna Railway Company

Dispute: Claim of Employees:

That the Carrier compensate Carman J. Ziembicki one (1) day's pay for May 19, 1971, his birthday holiday, and Carman H. McCarey one (1) day's pay for May 17, 1971, his birthday holiday.

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.

Claimants were both Carmen employed at the Jersey City Car Department of Carrier and were regularly assigned first shift employees with a 7:30 AM starting time. One Claimant's birthday was May 17, 1971 and the other's was May 19, 1971. The Brotherhood of Railroad Signalmen called a national strike effective 6:00 AM on May 17, 1971 which lasted through May 18, 1971. On the morning of May 17 Carrier posted a bulletin discontinuing all positions as of the start of the first shift that morning because of the strike. Carrier contends that this bulletin was posted at about 10:30 AM that morning, and since there is no evidence to the contrary we shall assume that this is correct. Claimants were denied holiday pay for their birthdays since they did not work respectively on the day before or the day after their birthdays; both employees were eligible in every other respect for this holiday pay.

Article II, Section 6 (d) of the Agreement dated November 21, 1964 reads:

"(d) Other than regularly assigned employees 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 disapproval of application for employment, and (3) if on the workday preceding the workday following the employee'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 employee is available for service.

Note: 'Available' as used in subsection (ii) above is interpreted by the parties to mean that an employee 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.

The workweek for other than regularly assigned employees shall be Monday to Friday, both days inclusive, except that any such employee who is relieving a regularly assigned employee on the same assignment on both the workday preceding and the workday following his birthday will have the workweek of the incumbent of the assigned position and will be subject to the same qualifying requirements respecting service and availability on the workdays preceding and following his birthday as apply to the employee whom he is relieving.

For other than regularly assigned employees, whose hypothetical workweek is Monday to Friday, both days inclusive, if his birthday falls on Friday, Monday of the succeeding week shall be considered the workday immediately following. If his birthday falls on Monday, Friday of the preceding week shall be considered the workday immediately preceding his birthday.

Compensation paid under sick-leave rules or practices will not be considered as compensation for purposes of this rule."

The issue before us is whether or not the Claimants were available for service, as provided above, one on the day preceding his birthday and the other on the day following his birthday.

Petitioner urges that Claimants were in a furlough status on the days in question and were available for service. The Organization argues further that the test in determining availability is whether an employee was called for service by Carrier and did or did not respond. In support of these arguments a series of awards are cited largely dependent on Award 5061. That case must be distinguished from this one in that it dealt with a partial reduction in force due to decreased traffic and no work stoppage was involved.

In this dispute, regardless of the notice requirements of the April 24, 1970 Agreement, and without regard to the exact time of the posting of the notice, it is clear that Claimants did not see the notice posted on May 17, 1971 since they did not work that day. Thus it becomes essential, to support Claimants' position, that there be some evidence that they attempted to work on May 17, 1971 or otherwise made themselves available. Such evidence does not appear in the record. We have said before (Awards 4494, 6435 and others) that union members, particularly in this industry, will not usually cross picket lines. Employees have the burden of affirmatively indicating their availability in order to establish their right to benefits accruing during a work stoppage, when such benefits are based on availability. In this dispute Claimants have not presented such evidence, hence the claim will be denied.

A W A R D

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD  
By Order of Second Division

Attest: E. A. Killam  
Executive Secretary

Dated at Chicago, Illinois, this 30th day of May, 1973.