

Award No. 5077

Docket No. 4333

2-N&W-MA-'67

NATIONAL RAILROAD ADJUSTMENT BOARD

SECOND DIVISION

The Second Division consisted of the regular members and in addition Referee Paul C. Dugan when award was rendered.

PARTIES TO DISPUTE:

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

NORFOLK AND WESTERN RAILWAY COMPANY

DISPUTE: CLAIM OF EMPLOYEES:

1. That Management violated the Agreement by refusing to pay the following employes holiday pay for December 26, 1960 and January 2, 1961 who were furloughed December 23rd, 1960 and returned to work January 9th, 1961.

Machinists

L. R. Secrest
C. B. Pond
J. R. Hubble
M. T. Sink
W. A. Parker
P. J. Boehm
J. P. Peterson
G. W. Hooper, Jr.
R. A. Updike
H. V. Weyhmann
J. R. Perfater
Edmond Thierry

2. That accordingly the Carrier be ordered to compensate the above named employes for eight (8) hours at the straight time rate for December 26, 1960 and January 2, 1961, for the aforesaid violation.

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.

Carrier raises the following objections to this claim: First, Machinist Thierry was paid holiday pay for January 2, 1961 and should not be paid twice by Carriers for said holiday; Second, Machinist Sink and Weyhmann were on vacation on the day following the holiday and thus were not "available for service" on said workday, and they were paid vacation pay for said holiday and are not entitled to both vacation pay; Third, claim for December 26, 1960 holiday pay for Sink and Weyhmann was not presented within sixty (60) days after December 26, 1960 and not presented initially to the departmental foreman, as required by Article V of August 21, 1954 Agreement and Rule 35 of the Agreement; Fourth, none of the claimants, except Edmond Thierry, made request for furloughed relief work, as required by Article IV of August 21, 1954 Agreement during the period of their furlough, December 23, 1960 to January 9, 1961, and thus were not "available for service" in accord with the requirements of Article III, Section 3 of the '60 Agreement.

First, although an allegation, without adequate proof to support it, cannot normally be considered by this Board, in its rebuttal to Carrier's submission, the Organization does not refute Carrier's allegation that claimant Machinist Thierry was paid holiday pay for January 2, 1961. Therefore, his claim for said January 2, 1961 holiday pay will be denied.

Second, in regard to the contention of Carrier that Claimants Sink and Weyhmann were on vacation and should not be allowed both holiday pay and vacation pay, and also Carrier's contention that because these two claimants were on vacation and thus not "available for service" as required by the pertinent provisions of Section 3, Article III of the '60 Agreement, the facts show that these two claimants, as well as all the other claimants were furloughed by Carrier as of December 24, 1960, and called by Carrier to return to service on January 9, 1961. Claimants Sink and Weyhmann were on vacation on January 2, 3, 4, 5 and 6, 1961.

Carrier argues that because of Article II, Section 1 of the August 21, 1954 Agreement, Claimants Sink and Weyhmann, not being regularly assigned employees are not entitled to holiday pay for January 2, 1961. The Agreement of August 21, 1954, concerning the holiday pay for these two claimants is not the controlling Agreement in regard to the determination of this dispute. Being other than regularly assigned employees, the claim of Claimants Sink and Weyhmann must be governed by the applicable provisions of Article III of the August 19, 1960 Agreement. Therefore, if they meet the "available for service" requirement of Section 3 (ii) and the "Note" therein of Article III of the '60 Agreement, then this second objection of Carrier is without merit. As we said in Award 5061, the test for determining "availability" is not whether an Employee is required to respond to a call, but whether or not the Carrier did call, in this instance these two Claimants, for service, and whether they did or did not respond to such a call. Inasmuch as there is no contention on the part of the Carrier that they did call Claimants Sink and Weyhmann for service, its second objection must therefore be rejected.

Third, in regard to the allegation by Carrier that the claims for Machinists Sink and Weyhmann were not presented within 60 days after the Christmas Day holiday, the record shows that the letter of W. H. Johnston, Chairman Shop Committee, dated February 23, 1961 (Carrier's Exhibit A) to the Foreman, Roanoke Shops, is the initial presentation of the time claim of these two claimants to the departmental foreman. Said letter reads:

"Please accept this as a time-claim for the following machinists, employed in Roanoke Shops, for December 26th, 1960 and January 2nd, 1961, for failing to comply with Article 3, Section 1, of the Agreement dated August 19, 1960.

L. R. Secrest - December 26, 1960 and January 2nd, 1961.
C. B. Pond - December 26th, 1960 and January 2nd, 1961.
J. R. Hubble, Jr. - December 26th, 1960 and January 2nd, 1961.
M. T. Sink - January 2nd, 1961.
J. P. Peterson - December 26, 1960 and January 2nd, 1961.
W. A. Parket - December 26, 1960 and January 2nd, 1961.
P. J. Boehm - December 26th, 1960 and January 2nd, 1961.
G. W. Hooper, Jr. - December 26th, 1960 and January 2nd, 1961.
R. A. Updike - December 26th, 1960 and January 2nd, 1961.
H. V. Weyhmann - January 2nd, 1961.

/s/ W. H. Johnston
Chairman Shop Committee"

Although the holidays listed after each man's name in said letter fail to list the Christmas holiday for claimants Sink and Weyhmann, yet the initial paragraph of said letter referred to the claim for both holidays for claimants named thereafter, which included Claimants Sink and Weyhmann, and therefore these claimants' claim was presented initially within the 60 days time limit requirement to the departmental foreman and the Carrier's objection must be rejected.

Fourth, in regard to Carrier's contention that all the other claimants were not "available for service" within the intent and meaning of Section 3 (ii) and the "Note" therein of Article III of '60 Agreement, because of failure of said claimants to comply with Article IV of August 21, 1954 Agreement, it has been decided by this Division previously in Award 5061. In that Award, we held that Article IV of the '54 Agreement is not the controlling rule of the applicable agreement and that it is not necessary for an employee to comply with said Article IV in order to be considered "available for service" as required by said Section 3 (ii).

Further, Carrier's argument that because claimants failed to notify Carrier in writing of their desire to be considered available to perform relief work is tantamount to "laying off of their own accord", is without merit. These Claimants were furloughed by Carrier and could not have laid off of their own accord.

It is the opinion of this Board that Claimants were "available for services" within the intent and meaning of Section 3 (ii) and the "Note" therein of Article III of the '60 Agreement, and this claim, with the exception of

Claimant Thierry's claim for January 2, 1961 holiday pay, will be sustained. Claim of Machinist Thierry will be denied for January 2, 1961 holiday for the reasons set forth herein in this award.

AWARD

Claim of Machinist Thierry denied as to January 2, 1961 holiday pay and sustained as to December 26, 1960 holiday pay.

Claim sustained as to all the other Claimants for December 26, 1960 and January 2, 1961 holiday pay.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of **SECOND DIVISION**

ATTEST: Charles C. McCarthy
Executive Secretary

Dated at Chicago, Illinois, this 31st day of March, 1967.

[See Award 5061 for Carrier Members' dissent.]