

Award No. 5230
Docket No. 5100
2-RDG-CM-'67

NATIONAL RAILROAD ADJUSTMENT BOARD
SECOND DIVISION

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

PARTIES TO DISPUTE:

**SYSTEM FEDERATION NO. 109, RAILWAY EMPLOYEES'
DEPARTMENT, AFL-CIO (Carmen)**

READING COMPANY

DISPUTE: CLAIM OF EMPLOYEES:

1. That the Reading Company violated Article II, paragraph (a), of the November 21, 1964 Agreement.
2. That accordingly the Reading Company compensate Carman, James McCauley, eight (8) hours at the straight time rate of pay or an additional day off with pay, for his birthday while on vacation, which was denied.

EMPLOYEES' STATEMENT OF FACTS: Carman James McCauley, hereinafter referred to as the claimant, was regularly employed by the Reading Company, hereinafter referred to as the Carrier, as a Car Packer in Carrier's Reading Yards, Reading, Pennsylvania, with work week Wednesday through Sunday, rest days Monday and Tuesday.

Claimant took his 1965 vacation January 13 through January 17, 1965 both dates inclusive, returning to service Wednesday, January 20, 1965. Claimant's birthday-holiday was Thurs., January 14, 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 for the day, Thursday, January 14.

Claim was filed with proper officer of the Carrier under date of February 20, 1965, contending that claimant was entitled to eight (8) hours birthday-holiday compensation for his birthday, January 14, in addition to vacation pay received for that day, and subsequently handled up to and including the highest officer of Carrier designated to handle such claims, all of whom declined to make satisfactory adjustment.

The Agreement effective January 16, 1940, as subsequently amended is controlling.

Section 1. (a) Effective January 1, 1967, each hourly, daily or weekly rated employe shall be guaranteed 8 hours' pay at the pro rata hourly rate of the position on which he last worked before the holiday in addition to any other payments required for each of the following nine enumerated holidays . . . Employe's Birthday . . ." (Emphasis ours.)

The proposal to regard holiday compensation as "guaranteed" and the use of such an unambiguous adjective is reflective of the Brotherhood's desire to achieve a right which it does not currently possess. Carrier believes that the integrity of the Brotherhood prevents it from advancing, for negotiation, rights which it already has attained.

In view of the analysis and reasoning advanced herein, Carrier submits that the claim of the Brotherhood should be denied in its entirety.

Claim as presented to the Board by the Carmen's Brotherhood was not discussed in conference or handled by correspondence on the property.

Oral hearing is not desired unless requested by the Brotherhood.

(Exhibits not reproduced.)

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.

Claimant, a car packer with a Wednesday through Saturday work week, took January 13 through 17 as his 1965 vacation. He received his regular pay for each of those vacation days. The gist of the present claim is that, under Article II, Section 6 of the November 21, 1964 Agreement, he is entitled to an additional day's pay for Thursday, January 14, since his birthday fell on a vacation day. Article II, Section 6 reads as follows in pertinent part:

"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.

Nowhere in Article II, Section 6 is there a requirement that an extra day's pay be given for a birthday or other holiday that falls within the vacation week on a day that is a work day of the employe's regular work week. The absence of such a provision from the 1964 Agreement is particularly significant, for by the time it had been negotiated, prior awards, interpretations and Emergency Board reports had made it abundantly clear that in the railroad industry employes will not receive additional pay when a holiday occurs during their vacation on what ordinarily would be a work day. See Second Division Awards 2277, 2302, 3477, 3518 and 3557 as well as Awards 9640 and 9641 of the Third Division.

Presidential Emergency Board No. 106 considered the question in 1954 and expressly recommended "that the vacation period not be increased by allowing additional vacation days where holidays fall in the base vacation period and that when a holiday falls on what would have been a work day of the employe's regularly assigned work week, such holiday shall be considered as a work day of the period for which he is entitled to vacation."

In 1960, the question again arose, this time before Presidential Emergency Board 130. That Board had this to say:

"Holiday pay for these employes, first established after the report of Emergency Board No. 106, was premised on a doctrine of maintenance of take-home pay. Thus, unlike many employes in other industries that also recognize a fixed number of holidays, nonoperating employes in the railroad industry are paid only for those holidays which fall on a scheduled work day of the work week. This doctrine explains why employes on vacation are not entitled to additional pay for holidays falling during the vacation period, since their vacation pay already covers the day on which the holiday occurs. The Organization's proposal for additional pay for holidays falling during a vacation is inconsistent with the doctrine of maintenance of take-home pay."

In 1964, just prior to the consummation of the present Agreement, Presidential Emergency Boards 161, 162 and 163 considered the question again, reaffirmed the "maintenance of take-home pay" concept and observed that both Emergency Boards 106 and 130 had "concluded that it would be inconsistent with the maintenance of take-home pay theory of paid vacations to provide additional pay on vacation for holidays falling during vacation." Boards 161, 162 and 163 then decided that "there have been no significant developments with respect to holidays during vacations which justify any further recommendations by the Board at this time."

In view of the parties' failure to deal specifically and unambiguously with the subject in the 1964 Agreement in the face of the compelling history of denial awards and Emergency Board opinions referred to above, it is our conclusion that this claim for additional payment for a birthday-holiday that fell on a Thursday, one of Claimant's work days must be denied. In reaching this decision, we carefully distinguish the present case from the situation where a birthday occurs on other than a work day of an assigned work week.

AWARD

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of SECOND DIVISION

ATTEST: Charles C. McCarthy
Executive Secretary

Dated at Chicago, Illinois, this 20th day of July, 1967.

LABOR MEMBERS' DISSENT TO AWARDS
NUMBERS 5230 - 5231 - 5232 - 5233

The findings in the lead case, Award No. 5230, after quoting Article II, Section 6 (a), (c) and (f) state the following:

"Article II, Section 6 (a) expressly provides for two separate and distinct situations. The first concerns a birthday that occurs on a work day of the employe's work week; Claimant's case clearly comes within that category for his birthday fell on Thursday, a work day of his assigned work week. As to the first situation, Section 6 (a) stipulates that the employe will be given the day off with pay, one of the two alternatives mentioned in the first sentence of Section 6.

The second situation is where an employe's birthday occurs on other than a work day of his work week; there he is entitled to '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.' From an examination of the language, punctuation and construction of Section 6 (a), it is entirely clear that the clause just quoted does not apply to the first situation."

It is clear from the above that the majority failed to give proper consideration to Article II, Section 6 as a whole as the pertinent parts read as follows:

"Subject to the qualifying requirements set forth below, effective with the calendar year 1965 each hourly, . . . rated employe shall receive one additional day off with pay, or an additional day's pay, on each employe's birthday . . .

(a) . . . 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.

(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 work days immediately preceding and following his birthday . . ."

There was no question in these disputes as to the claimants' qualifying for the birthday pay. Therefore, they should have received one additional day off with pay, or an additional day's pay on their birthday as quoted in the first paragraph in the quoted part of (a).

The findings in Award No. 5230 read in part as follows:

"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."

The findings then go on to support this statement by referring to Presidential Emergency Boards 106, 161, 162 and 163's recommendations. But, if you check these recommendations you will find that none of these Boards had the Birthday pay question before them; therefore, none of these have any merit to be considered in disposing of these disputes. Further, the recommendations of these Boards have no binding power insofar as the agreement as written and agreed to by the parties is concerned. The agreement is controlling in any dispute and not what an Emergency Board recommends.

In regard to a sound basis for treating a birthday that falls on a vacation day differently than the seven holidays that fall on a vacation day is the agreements themselves.

The August 21, 1954 Agreement is the one that permits the pay for the seven holidays under Article II. This same agreement in Article I, Section 3 provides that if any of these seven holidays fall on a work day of the employes' work week, it would be considered as a work day for vacation purposes. Article I, Section 3 reads as follows:

"Section 3. When, during an employe's vacation period, any of the seven recognized holidays (New Year's Day, Washington's Birthday, Decoration Day, Fourth of July, Labor Day, Thanksgiving Day and Christmas) or any day which by agreement has been substituted or is observed in place of any of the seven holidays enumerated above, falls on what would be a work day of an employe's regularly assigned work week, such day shall be considered as a work day of the period for which the employe is entitled to vacation."

If the parties intended to have the birthday considered the same as one of the seven holidays when they fell on a vacation, they would have had to amend this Section to change the word "seven" to "eight" and add the "birthday holiday" to it. They did not do this, therefore, these awards are in error as they amend the rules and the Railway Labor Act does not give the Adjustment Board that power.

The parties to this same agreement knew that there were other holidays provided in some of the agreements at that time and they did not include them in with the seven. Article II, Section 4 reads as follows:

"Provisions in existing agreements with respect to holidays in excess of seven holidays referred to in Section 1 hereof, shall continue to be applied without change."

This proves that the parties did not intend that any holiday other than the seven were to be considered in Article I, Section 3. They did not amend Article I, Section 3 of the August 21, 1954 agreement, therefore, the birthday cannot be included without the parties amending it to include same.

If you read the November 21, 1964 agreement, Article II, you will find that the parties provided for one additional day off with pay, or an additional day's pay on each employe's birthday. It also provides that if the birthday falls on one of the seven holidays, the employe can get another day off with pay. There is no such provision for the seven holidays. Therefore, the parties agreed that the birthday is different than the seven holidays.

If the employes are not on vacation when one of the seven holidays occur, they are not permitted to work and, therefore, the holiday is not a work day for them. The same thing applies to the birthday, therefore, it is not a work day as such. Therefore, the claimants come under Article II, Section 6 (a), the part quoted.

The seven holidays prior to the August 21, 1954 agreement, even though they fell on an employe's work day of his work week, were a day off without pay and that was the reason the doctrine of maintenance of take-home pay was applied to them. But the birthday was not included in this doctrine as the November 21, 1964 agreement provides an additional day's pay when the birthday falls on one of the seven holidays of the employe's rest day.

The findings in Award 5230 refer to Emergency Board reports and Second Division Awards Numbers 2277, 2302, 3477, 3510, 3557 and Third Division Awards Numbers 9640 and 9641. These all deal with the seven holidays and all were before the agreement of November 21, 1964. Therefore they do not apply to these disputes.

Oren Wertz
D. S. Anderson
C. E. Bagwell
E. J. McDermott
R. E. Stenzinger