

Award No. 5232
Docket No. 5098
2-GM&O-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. 29, RAILWAY EMPLOYES'
DEPARTMENT, AFL-CIO (Carmen)**

GULF, MOBILE AND OHIO RAILROAD COMPANY

DISPUTE: CLAIM OF EMPLOYES:

1. That Carman E. E. Woodney was improperly paid for April 22, 1965 which was his birthday and a vacation day.
2. That accordingly, the Carrier be ordered to additionally compensate Mr. Woodney in the amount of eight (8) hours at the straight time rate.

EMPLOYEES' STATEMENT OF FACTS: Carman E. E. Woodney, herein-after referred to as the Claimant, was regularly employed by the Gulf, Mobile and Ohio Railroad Co., hereinafter referred to as Carrier, as Carman at Tamms, Illinois, with work week Tuesday through Saturday, rest days, Sunday and Monday.

Claimant took 1965 vacation April 6 through May 1, 1965, both dates inclusive, returning to service Tuesday, May 4, 1965. Claimant's birthday was Thursday, April 22nd a vacation day of his vacation period for which he was paid a day's vacation. However, Carrier failed to allow him birthday holiday compensation for the day, Thursday, April 22nd.

Claim was filed with proper officer of the Carrier under date of June 3, 1965, contending that claimant was entitled to eight (8) hours' Birthday Holiday compensation for his birthday, April 22nd, 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, 1941, as subsequently amended, particularly by the November 21, 1964 agreement, is controlling.

POSITION OF EMPLOYES: It is respectfully submitted that the Carrier erred when it failed and refused to allow claimant eight (8) hours' birthday

The foregoing facts are fully known and have been fully reviewed with Petitioner's representative. It is, therefore, evident that reliance is being placed on that portion of Section 6(a), Article II-Holidays of the Agreement of November 21, 1964, reading:

"... 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." (Emphasis ours.)

As stated, the quoted portion of the latter rule is not applicable in the instant case since, (a) the birthday involved did not fall on other than a work day of the claimant's work week, and (b) the claimant would not have been entitled to any other pay for that day under any other agreement, practice or understanding in effect on this property.

In conclusion, the Carrier asserts the instant claim is entirely lacking in agreement or other support and requests that it be denied.

All data herein have been presented to the duly authorized representative of the employees and are made a part of this particular question in dispute.

(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 employee or employees involved in this dispute are respectively carrier and employee 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.

In 1965, Claimant's birthday, April 22, fell on one of his vacation days as well as on a work day of his assigned work week. He received vacation pay for April 22 but Carrier did not allow him additional compensation for the birthday holiday. It is Petitioner's position that he is entitled to such additional compensation under Article II, Section 6 of the November 21, 1964 Agreement. In Award 5230 we considered the same issue, contentions and agreements and denied a claim substantially similar to the one now before us. We see no justification for reaching a different result in this case and will deny the claim.

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 employee'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 employee 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 employee'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 employee shall receive one additional day off with pay, or an additional day's pay, on each employee's birthday . . .

(a) . . . if an employee's birthday falls on other than a work day of the work week of the individual employee, 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 employee 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 employee'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 employees' 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 employee'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 employee's regularly assigned work week, such day shall be considered as a work day of the period for which the employee 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 employee's birthday. It also provides that if the birthday falls on one of the seven holidays, the employee 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 employees 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 employee'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 employee's rest day.

The findings in Award 5230 refer to Emergency Board reports and Second Division Awards Numbers 2277, 2302, 3477, 3518, 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