Award No. 5233
Docket No. 5103
2-SLSF-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. 22, RAILWAY EMPLOYES' DEPARTMENT, AFL-CIO (Carmen)

ST. LOUIS-SAN FRANCISCO RAILWAY COMPANY

DISPUTE: CLAIM OF EMPLOYES:

1. That Carman Henry J. Schaefer and Painter Helper Donald O. Shank, Springfield, Missouri were improperly compensated, under the terms of current agreement for their individual birthday-holidays, May 14 and 26 respectively, which fell on a work day of their work week of their regular assignment during their scheduled vacation. The November 21, 1964 Agreement is controlling.

2. That, accordingly, the carrier should be ordered to additionally compensate Carman Schaefer and Painter Helper Shank in the amount of 8 hours each, at their respective pro rata rates.

EMPLOYES' STATEMENT OF FACTS: Carman Henry J. Schaefer and Painter Helper Donald O. Shank, hereinafter referred to as the Claimants, were regularly employed by the St. Louis-San Francisco Railway Company, hereinafter referred to as Carrier, as Carman and Painter Helper, respectively, in Carrier's Springfield, Missouri Shops, with work week Monday through Friday, rest days Saturday and Sunday.

Claimants took their 1965 vacation May 3 through May 28, 1965, both dates inclusive, returning to service Monday, May 31, 1965. Claimant Schaefer's birthday was Friday, May 14th and Claimant Shank's birthday was Wednesday, May 26th a vacation day of their vacation period for which they were paid a day's vacation pay. However, Carrier failed to allow them birthday holiday compensation for their birthday holiday.

Claim was filed with proper officer of the Carrier under date of June 16, 1965, contending that claimants were entitled to eight (8) hours' Birthday Holiday compensation for their birthdays, March 14th and May 26th respectively, 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.

in the Carrier's opinion, lead only to the logical conclusion that the parties left undisturbed the announced principle in Award 4064 that an employe cannot collect double pay in the circumstances involved in this dispute and that if it had been the intent of the parties to depart from that principle respecting the birthday-holiday such an intent would have been specifically expressed "as hereinafter provided" in Article II, Section 6 of the Agreement of November 21, 1964.

The Carrier's position is also buttressed by the reports and recommendations of Emergency Boards 106, 130 and 162. Both Emergency Boards 106 and 130 concluded that it would be inconsistent with the maintenance of the take-home pay theory of paid vacations to provide additional pay or vacation for holidays falling during vacations, and Emergency Board 162 concluded, as it did in connection with the proposals to change the eligibility rules for paid holidays, that there have been no significant developments with respect to holidays during vacations which justify any further recommendations by the Board. (Pages 39 and 40 of the Report and Recommendations of Emergency Board 162.)

The reparations portion of the claim requests that the claimants be allowed an additional day's pay at pro rata rate. This portion of the claim serves only to lend additional support to the Carrier's position.

Should this Division decide that this dispute can be resolved by isolating and construing Article II, Section 6 of the Agreement of November 21, 1964 separately and independently of any other provision in the agreements, the claimants are regularly assigned employes and Paragraph (a) of the said Section provides that for such 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. That, however, is not the claim before this Division. The claim here is for an additional day's pay. Paragraph (a) of the rule standing alone does not support the claim as appealed. The claimants did not work their birthday-holidays. They were away on vacation and nothing in the Agreements provides in the circumstances here involved that such an employe's vacation period shall be extended to the extent of the employe's birthday-holiday.

Upon the basis of the record and all of the evidence, the Carrier respectfully requests this Division to find that the Carrier did not violate the Agreement.

(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 waived right of appearance at hearing thereon.

Claimants' birthdays occurred during their 1965 vacations. They also fell on one of the work days of their assigned work weeks. Each received vacation pay for the day on which his birthday occurred but insists that under Article II, Section 6 of the November 21, 1964 Agreement, he is entitled to additional compensation for his birthday-holiday.

This Board considered and denied a substantially similar claim in Award 5230 which concerned the same issue, contentions and agreements. We see no reason to adopt a different course 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 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 employes' 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.

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