Award No. 5251
Docket No. 5116
2-NP-EW-'67

NATIONAL RAILROAD ADJUSTMENT BOARD

SECOND DIVISION

The Second Division consisted of the regular members and in addition Referee David Dolnick when award was rendered.

PARTIES TO DISPUTE:

SYSTEM FEDERATION NO. 7, RAILWAY EMPLOYES' DEPARTMENT, A. F. of L.-C. I. O. (Electrical Workers)

NORTHERN PACIFIC RAILWAY COMPANY

DISPUTE: CLAIM OF EMPLOYES:

1—That under the current agreement Groundman D. J. Baker, has been improperly denied payment of eight hours at straight time rate on June 15, 1965, his birthday, while he was on vacation.

2—That accordingly, the Carrier be ordered to additionally compensate the aforesaid employe in the amount of eight (8) hours for his birthday, June 15, 1965.

EMPLOYES' STATEMENT OF FACTS: Groundman D. J. Baker, hereinafter referred to as the claimant, was regularly employed by the Northern Pacific Railway Company, hereinafter referred to as the Carrier, in the Carrier's Communication Department, with work week Monday through Friday, rest days Saturday and Sunday.

Claimant took his 1965 vacation June 14 through June 18, 1965, both dates inclusive, returning to service Monday, June 21, 1965. Claimant's birthday was Tuesday, June 15, 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, Tuesday, June 15.

Claim was filed with proper officer of the Carrier under date of August 4, 1965, contending that claimant was entitled to eight (8) hours birthday holiday compensation for his birthday, June 15, 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 satisfatcory adjustment.

The Agreement effective November 1, 1954, as subsequently amended is controlling.

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

The first portion of Section 6(a) of Article II stipulates what shall be done if an employe's birthday falls on a work day of the workweek of the employe, namely, he shall be given the day off.

The second portion of Section 6(a) of Article II stipulates what shall be done if an employe's birthday falls on other than a work day of the workweek of the employe. Subject to the qualifying requirements, such an employe shall receive eight hours' pay at the pro rata rate of the position to which assigned, plus whatever other pay he may otherwise be entitled to on that date. To illustrate this application of this portion of Section 6(a) of Article II, the following example is cited: An employe assigned to work from Monday through Friday has a birthday occurring on Saturday. Subject to the qualifying requirements for birthday pay, such an employe is entitled to payment of eight hours at straight time rate on Saturday. Should such an employe be required to perform service on Saturday, he would also be entitled to payment of additional compensation computed at the rate attaching to work performed on a rest day. Work performed on rest days and holidays by Communications Department employes is subject to the application of Rule 18 of the November 1, 1964 Agreement.

Now, however, the Employes construe the phrase,

> "in addition to any other pay to which he is otherwise entitled for that day, if any,"

as applying to a birthday occurring on a work day of the workweek of the individual employe. The Employes allege that in the application of this phrase, an employe whose birthday occurs on a work day of his regular assigned workweek, shall be allowed vacation pay and in addition thereto birthday pay. This interpretation of Article II, Section 6(a), militates against the plain provisions of that section. The Employes have gone far afield in attempting to secure an additional day's pay in behalf of Mr. Baker. The foregoing phrase applies only to a rest day.

Article 7 of the December 17, 1941 Vacation Agreement determines the amount due an employe while on vacation. No where in Article II of the February 4, 1965 Mediation Agreement is Article 7 of the Vacation Agreement modified. Consequently Article 7 is controlling.

The Carrier has shown that Article 7(a) of the December 17, 1941 Vacation Agreement controls the method of calculating an employe's vacation compensation. The Carrier has also shown that the daily compensation paid by the Carrier, while Mr. Baker was on vacation, was five days of eight hours each computed at straight time rate. The claim covered by this docket should therefore be denied in its entirety.

All data in support of the Carrier's position in connection with this claim has been presented to the duly authorized representative of the Employes and is made a part of the particular question in dispute.

Oral hearing is desired.

(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.

The basic facts are not in dispute. Claimant was regularly assigned to work Monday through Friday. He was on vacation from Monday, June 14 to Friday, June 18, 1965 inclusive and he was paid eight (8) hours for each of the five (5) days at his applicable straight time hourly rate. Tuesday, June 15, 1965 was Claimant's birthday, which is one of the paid holidays in the current applicable agreement.

Employes contend that the Claimant is entitled to an additional eight (8) hours holiday pay for Tuesday, June 15, 1965. The Carrier argues that the Agreement provides for no such compensation, but rather specifically excludes additional holiday pay to an employe who receives vacation compensation for the same day.

The issue is rather complex. For that reason it is fruitful to delve into the historical background, explore the genesis of the vacation and holiday contract clauses, and examine the current contract provisions applicable to these benefits in the light of such history, and the interpretations given thereto by the Awards of the various Divisions of the National Railroad Adjustment Board.

Article 7(a) of the December 17, 1941 Vacation Agreement provided, in part, the following:

> "7. Allowances for each day for which an employe is entitled to a vacation with pay will be calculated on the following basis:
>
> (a) An employe having a regular assignment will be paid while on vacation the daily compensation paid by the carrier for such assignment."

The meaning and intent of said Article 7(a) was stated in the "Interpretations" dated June 10, 1942. It says:

> "This contemplates that an employe having a regular assignment will not be any better or worse off, while on vacation, as to the daily compensation paid by the carrier than if he had remained at work on such assignment, this not to include casual or unassigned overtime or amounts-received from others than the employing carrier."

In 1941 and 1942 when Article 7(a) and the Interpretations were effective, no paid holidays were provided for in the then existing agreement.

Presidential Emergency Board No. 106 considered Employes proposal for paid holidays and for additional vacation pay when a holiday occurs during an employe's vacation. That Emergency Board recommended the following:

> "The proposal to allow an additional vacation day where a holiday falls in the base vacation period cannot be considered without refer-

ence to the Board's recommendations concerning paid holidays. As indicated, under 'Holidays' the Board recommends payment for certain holidays when they fall on a work day of an assigned workweek. The Board bases such recommendation primarily on the maintenance of take-home pay.

Assuming the adoption of its recommendations on paid holidays, the Board feels that it is not appropriate to recommend extension of the vacation period when a holiday falls in the base vacation period. The Board reaches this conclusion with respect to both holidays falling on a work day and holidays falling on a rest day during the vacation period in question.

The Board proposes that when, during the vacation of an employe, a holiday falls on what would have been a work day of his regularly assigned work week, he shall not be entitled to an additional vacation day because therefor, but such holiday shall be considered as a work day of the period for which he is entitled to vacation. When during the vacation of an employe, a holiday falls on what would have been a rest day he shall not be entitled to an additional vacation day because thereof."

On the basis of that Emergency Board's recommendations, a National Agreement was entered into under date of August 21, 1954, which contains the following pertinent provisions:

"ARTICLE I — VACATIONS

* * * * *

Section 3. When, during an employe's vacation period, any of the seven recognized holiday's (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 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."

* * * * *

"ARTICLE II — HOLIDAYS

Section 1. Effective May 1, 1954, each regularly assigned hourly and daily rated employe shall receive eight hours' pay at the pro rata hourly rate of the position to which assigned for each of the following enumerated holidays when such holiday falls on a workday of the workweek of the individual employe:

New Year's Day
Washington's Birthday
Decoration Day
Fourth of July
Labor Day
Thanksgiving Day
Christmas

Note: This rule does not disturb agreements or practices now in effect under which any other day is substituted or observed in place of any of the above-enumerated holidays."

The Carrier relies heavily on Second Division Award 3477 and Third Division Award No. 9635 for the interpretation and application of Section 3 of Article I and Section 1 of Article II of the August 21, 1954 National Agreement. In Award 3477 Christmas Day fell during that claimant's vacation period. The Board denied the claim for eight (8) hours holiday pay and had this to say:

> "Article I, Section 2 of the parties' fringe benefit agreement adopted on November 2, 1954 provides that when, during an employe's vacation, a contract holiday (such as Christmas) falls or is observed on what would be a work day of the 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.' Article 9 of the parties' vacation agreement provides in pertinent part that an employe who is in his regular position at the time of his vacation shall be allowed, for each day for which he is entitled to vacation with pay, an amount representing 'his daily compensation (eight hours at his straight time hourly rate) in such position.'
>
> The foregoing agreement rules are clear, specific and unambiguous as applied to the facts of this case. The plain language of these rules that the carrier was not required to grant Claimant Davis more compensation for Christmas Day, 1957 than the eight hours straight time pay which he received for that day. **Said rules expressly provide that a holiday falling on a work day of the employe's regularly assigned work week while he is on vacation shall be considered as a work day for which the employe shall be paid in the amount of eight hours at straight time rate. No agreement rule can be found which required any additional pay under the subject factual circumstances."** (Emphasis ours.)

In Third Division Award No. 9635 the Board denied holiday pay for July 4, 1955 which fell while that claimant was on vacation. The essence of the findings in that Award is:

> "Under Article I, Section 3, of the Agreement of August 21, 1954, amending the Vacation Agreement of December 17, 1941, any of the seven recognized holidays (or substitute therefor) falling within the vacation period is paid for as a vacation day, but not again as a holiday. That provision accompanied the 1954 Agreement's liberalization of regular vacation provisions."

It should here be noted that the 1954 Agreement (1) liberalized the vacation provisions, (2) it deals only with the seven holidays, or substitutes therefor, as mentioned therein, and (3) it does amend the vacation Agreement of December 17, 1941. This is contrary to the allegation by the Carrier that Section 3 of Article I and Section 1 of Article II of the August 21, 1954 National Agreement neither supersede nor amend Section 7(a) of the December 17, 1941 National Vacation Agreement.

The latter is relevant because other Awards of the National Railroad Adjustment Board have held that the 1954 Agreement does amend the 1941 Agreement and have sustained claims for holiday pay when the holiday fell while the claimant was an vacation. Thus, in Third Division Award 10550 the Board said:

> "From December 19th through the 31st, 1955, the Claimant vacationed for ten working days. Christmas Day, December 25th, a con-

tractually recognized holiday fell on Sunday but was observed on Monday, December 26th — which was one of Claimant's regularly assigned work days. The Claimant received one day's vacation pay for December 26th but claimed that he was also entitled to one day's holiday pay.

If the Claimant were not on vacation, he would have worked the holiday because his position worked that day; he would have received one day's pay for working the holiday; and also he would have received a day's holiday pay under the provisions of Article II and VII (a) of the August 21, 1954 Vacation Agreement.

Accordingly, we must conclude that the Carrier violated the Agreement and award the Claimant one day's pay as claimed."

Third Division Award 11827 lays down the principle to be applied to claims for additional compensation on holiday that fall while claimants are on vacation. That Award says:

"* * * There are a consistent line of decisions which hold that a vacationing employe is entitled to receive, for a holiday falling within his vacation period, just what he would have received had he worked (i.e. double time and one-half) if (1) the position regularly works on the day on which the holiday falls; (2) the position has always been filled on the holiday; (3) the position was filled on the particular holiday for which claim is made. Nothing in these decisions indicates that it is necessary to bulletin the holiday assignment in order to take it out of the casual and unassigned overtime * * *"

Similar conclusions were reached in Third Division Awards 11113 and 11976.

It is undisputed that Claimant's position was not filled while he was on vacation. He, therefore, did not qualify to compensation under the principle enunciated in Third Division Award 11827. Rather, the principle stated in Second Division Award 3477 and Third Division Award 9635 applies.

But all of the previous mentioned awards deal with the seven holidays set out in Section 3 of Article I and Section 1 of Article II of the August 21, 1954 National Agreement. None of them had to consider the birthday holiday.

Presidential Emergency Boards No. 161, 162 and 163 concluded that more than seven (7) paid holidays "is now or will soon become the prevailing industry practice." That Board recommended "that the parties agree to one additional paid holiday effective January 1, 1965, it leaves to the parties the determination of which holiday that shall be." The parties thereafter bargained and two agreements resulted — November 21, 1964 and February 4, 1965. Among other things, the parties agreed to an additional paid holiday which is designated as the employe's birthday. The pertinent contract provision, identical in both the November 21, 1964 and February 4, 1965 contracts, reads as follows:

"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 em-

ployes covered by this Agreement is hereby further amended by the addition of the following Section 6:

> **Section 6.** Subject to the qualifying requirement 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.
>
> (a) For regularly assigned employes, if an employe's birthday falls on a work day of the workweek of the individual employe he shall be given the day off with pay; if an employe's birthday falls on other than a work day of the workweek 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 otherwise was entitled for that day, if any.**" (Emphasis ours.)

Carrier argues that "the origin of the birthday-holiday as the eighth paid holiday is important in understanding that the birthday-holiday is to be treated no differently than any of the other seven holidays." They rely on the Report of Presidential Emergency Boards Nos. 161, 162 and 163 and particularly upon Second Division Awards 5230, 5231, 5232 and 5233 which denied claims premised on the same kind of facts as those which are involved in the instant claim.

Basic Award 5230 justifies the denial of the claim for the following reasons:

> "There is no sound basis for treating a birthday that falls on a work day of the employe's assigned workweek differently than any of the seven other recognized holidays insofar as the question at issue is concerned. This is true because of the language of Article II Section 6 and its history which relates back to the National Agreements of August 21, 1954, and August 19, 1960. Article II, Section 6, added an eighth contractually recognized holiday pursuant to the recommendation of October 20, 1964 of Presidential Emergency Boards 161, 162 and 163 that an additional holiday be agreed upon to conform to 'prevailing industry practice'. The Emergency Board left it to the parties to decide which holiday should be added. The parties to the November 21, 1964, Agreement then agreed that the eighth holiday would be the employe's birthday."

The Board said that Section 6 of Article II does not require "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 workweek." (Emphasis ours). Essentially, the Board relied on the principle of "maintenance of take-home pay" enunciated by Presidential Emergency Boards 106, 130, 161, 162 and 163.

The reports of Emergency Boards 106 and 130 are irrelevant. Neither have anything to do with birthday holiday pay. They concern only with the seven holidays set forth in Section 3 of Article I and in Section 1 of Article II of the August 21, 1954 National Agreement. Emergency Boards 161, 162 and 163 merely recommend "that the parties agree to one additional paid holiday effective January 1, 1965; it leaves to the parties the determination of which

holiday that shall be." Whether those Emergency Boards intended to perpetuate the "maintenance of take-home pay" principle to the eighth holiday is material only when the contract language is ambiguous and it is necessary to refer back to the legislative history to give meaning and intent to the agreement.

The Agreements of November 21, 1964 and February 4, 1965 neither amend nor modify Section 3 of Article I or Section 1 of Article II of the August 21, 1954 National Agreement. Each deals with seven specific paid holidays; neither refers to or is concerned with the eighth holiday — the employe's birthday. If the parties had intended to perpetuate the "maintenance of take-home pay" principle to the birthday holiday, they would have amended Article I, Section 3 and Article II, Section 1 by adding the birthday holiday to each. Instead, the 1964 and 1965 Agreements added Section 6 to Article II. The language in that Section is clear and meaningful. There is no ambiguity. Whatever Emergency Boards 161, 162 and 163 may have intended with respect to the "maintenance of take-home pay" principle is cancelled out by the express language in the 1964 and 1965 Agreements. This is particularly true in view of the language in Section 4 of Article II which reads:

> "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."

While this Section 4 was in effect prior to the 1964 and 1965 Agreement, it is, nevertheless, another indication that the birthday holiday was to be applied differently than the other seven holidays.

Section 6 of Article II says:

> "If an employe's birthday falls on a day other than a day on which he otherwise would have worked, he shall receive eight hours' pay at the pro rata hourly rate of the position on which compensation last occurred to him prior to his birthday, **in addition to any other pay to which he is otherwise entitled for that day, if any.**" (Emphasis ours.)

Article II, Section 1 has no such language; neither does Article I, Section 3.

Carrier says that the above quoted language applies only to a rest day. But that is not the contract language. Additional holiday pay applies to an employe's birthday when it falls on a day "other than a day on which he otherwise would have worked." It is not limited to rest days. In addition to a rest day, it may apply to Christmas Day, which may also be the employes birthday — similarly for any of the other six holidays — and to a birthday that falls during an employe's vacation. The language is not narrowly limited as urged by the Carrier. The words used in Article II, Section 6 must be given their usual and common meaning. The application of this principle voids Carrier's position.

The continuity of contract interpretation is desirable and necessary to give effective and consistent administration to a collective agreement. It serves no useful purpose to either party to such an agreement to give many and valid interpretations to the same contract provisions. The doctrine of stare decisis should be invoked wherever and whenever possible without destroying the parties' intent as expressed by the Agreement. But this doctrine

does not apply where the precedent is erroneous. It is our considered judgment that anchor Award 5230 is palpably erroneous. It follows that Awards 5231, 5232 and 5233 are also in error.

The conclusions reached by this Board is based solely upon well established principles of contract interpretation. All pertinent contract provisions have been considered. The entire Agreement was read as a whole. Every relevant Rule was carefully examined and read in relation to every other relevant Rule. The fact remains that Section 6 of Article II is clear, meaningful and free from ambiguity. It is a specific Rule. As such it takes precedence over Article 7 (a) of the December 17, 1941 National Vacation Agreement — a general Rule — and amends, by its specific language, Section 3 of Article I and Section 1 of Article II. No element of emotion or speculation entered into the application of these principles.

For all of the reasons herein recited, we are obliged to conclude that Carrier violated the Agreement.

AWARD

Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of SECOND DIVISION

ATTEST: Charles C. McCarthy
Executive Secretary

Dated at Chicago, Illinois, this 13th day of October 1967.

DISSENT OF CARRIER MEMBERS TO AWARDS NOS. 5251, 5252, 5253, 5254, 5255, 5256, 5257 AND 5258.

The majority's findings in **Award No. 5251**, which are also affirmed and adopted as its findings in **Awards Nos. 5252 through 5258**, constitute a hodgepodge of tangled, disjointed and illogical reasoning. Despite all assertions to the contrary, they establish only one thing with any degree of clarity; that the ultimate decision to sustain the claims presented is based in large measure on conjecture, misinterpretation or misapplication of contract language, non-existent or irrelevant facts and invalid or unsupported conclusions.

Following a brief discussion of Third Division **Award No. 9635**, the majority's findings suggest the Carrier is wrong in asserting that "Section 3 of Article I and Section 1 of Article II of the August 21, 1954 National Agreement neither supersede nor amend Section 7(a) of the December 17, 1941 National Vacation Agreement." If there is a valid basis for such a suggestion, it is not to be found in the findings or the evidence of record, nor can it be supported by any of the language in the agreements to which reference is made.

Considered as a whole, the December 17, 1941 National Vacation Agreement has been amended in various respects by subsequent agreements, including the August 21, 1954 National Agreement. No one disputes this. None of the subsequent agreements, however, affected Article 7(a) of the December 17, 1941 National Agreement or the June 10, 1942 Interpretation thereof, so

it is self-evident that those particular provisions have never been amended or superseded.

If the subsequent agreements have had any effect at all on Article 7(a) of the December 17, 1941 National Vacation Agreement and the June 10, 1942 Interpretation thereof, it has been to reaffirm their continued existence and application in unamended form. Proof of this can be found in the section of each of the subsequent agreements which clearly states that unless amended the 1941 National Vacation Agreement is to remain in effect subject to at least seven months' notice by any carrier or organization of a desire to change the agreement, specifying the changes desired, and a thirty days' notice by the other party, specifying the changes desired by it, whereupon the proposals would be negotiated and progressed to a conclusion. In the August 21, 1954 National Agreement, for example, such a provision is found in Section 7 of Article I.

The same reaffirmation of the continued existence and application of Article 7(a) of the December 17, 1941 National Vacation Agreement and the June 10, 1942 Interpretation thereof can be found in the February 4, 1965 National Agreement. Article II of which amended the August 21, 1954 National Agreement by the addition of a new Section 6 relating to the employe's birthday. Section 2 of **Article III — Vacations** of the February 4, 1965 Agreement provides that as amended the 1941 National Vacation Agreement is to continue in effect, subject to the respective seven months' and thirty days' notices of desires for change to be followed by negotiations and subsequent agreements.

Up to the present time, then, neither Article 7(a) of the December 17, 1941 National Vacation Agreement nor the June 10, 1942 Interpretation thereof has been changed or amended in accordance with the above-mentioned requirements of the parties' agreements. Accordingly, those provisions remain in full effect and cannot be ignored or lightly regarded by this Division.

Because Article 7(a) of the December 17, 1941 National Vacation Agreement and the June 10, 1942 Interpretation thereof remain in full effect, and because the basic issue in the instant case is whether an additional payment is required for a holiday occurring **during the Claimant's vacation,** the majority has made a serious mistake in adopting findings which deal with these pertinent provisions of the National Vacation Agreement only in perfunctory fashion and even go so far as to suggest that they have been amended or superseded by subsequent agreements when they clearly have not.

When the amjority states in its findings that no paid holidays were provided for in the agreements existing when Article 7(a) of the December 17, 1941 National Vacation Agreement and the June 10, 1942 Interpretation thereof first became effective, what it really has done is attempt to casually brush aside the relevancy of those provisions with a mere statement of fact. No one disputes the fact that the agreements existing in 1941 and 1942 did not provide for paid holidays, but a statement of this fact does not come to grips with the problem of what application Article 7(a) of the Vacation Agreement and the 1942 Interpretaton had on the date the instant dispute arose, especially when it is remembered that those provisions have been reaffirmed several times since the parties' collective bargaining agreements have provided for paid holidays. As previously noted, the most recent reaffirmation of those provisions can be found in Section 2 of **Article III — Vacations** of the February 4, 1965 National Agreement, the very agreement under which the instant claim was progressed to this Division.

Struggling hard to avoid giving any effect to Article 7(a) of the December 17, 1941 National Vacation Agreement and the June 10, 1942 Interpretation thereof, the majority also makes the vague and almost meaningless statement that Section 6 of Article II of the February 4, 1965 National Agreement is a "specific Rule" and, as such, "takes precedence" in the instant case. But in what respect is Section 6 of Article II of the 1965 Agreement more specific than the Vacation Agreement insofar as the issue at hand is concerned? This crucial question the majority conveniently fails to answer, for the obvious reason that there is no language in Section 6 of Article II of the 1965 Agreement which specifically addresses itself to this issue. The majority can point to no such language because there is none.

Actually, if there is one single provision in the parties' collective bargaining agreements which deals more directly with the issue before this Division than any other, it is the June 10, 1942 Interpretation of Article 7(a) of the December 17, 1941 National Vacation Agreement, which clearly and concisely states "that an employe having a regular assignment will not be any better or worse off, while on vacation, as to the daily compensation paid by the Carrier than if he had remained at work on such assignment. * * *" By brushing aside this interpretation and allowing the Claimant, a regularly assigned employe, compensation which makes him better off than if he had not been on vacation during the time in question, the majority has made a mockery of Article 7(a) of the National Vacation Agreement.

Under the Railway Labor Act the National Railroad Adjustment Board, including the Second Division, has authority only to interpret collective bargaining agreements concerning rates of pay, rules, or working conditions. The Board has no authority to write new rules for the parties, under the guise of interpretation or otherwise. It has no authority to ignore or brush aside pertinent rules in order to achieve results it may consider desirable.

Brushing aside the June 10, 1942 Interpretation of Article 7(a) of the December 17, 1941 National Vacation Agreement without making the slightest effort to apply or reconcile that provision with the other contractual provisions cited by the parties in the instant case is a deplorable act for which the majority must bear full responsibility. In addition to being beyond the scope of this Division's authority under the Railway Labor Act, it is an act in direct contravention of the sound and universally recognized rule of contract construction that all parts of collective bargaining agreements should, if possible, be construed and applied so as to give effect to all their provisions. One of the many awards of this Board which recognizes and applies this rule is Third Division **Award No. 14702**, TE v. CMStP&P, Referee David Dolnick:

> "It is a cardinal rule of contract interpretation that the entire agreement should be read as a whole. Every part should be interpreted with reference to all other parts. Effect should be given to the entire general purpose of the agreements."

The findings in this case at no time clearly reveal the majority's purpose in referring to, or quoting portions of, Third Division **Awards 10550, 11113, 11827, and 11976.** The lack of such a revelation is quite puzzling in and of itself, but the reference to those awards becomes even more puzzling when viewed in the light of the fact that they involve an issue completely different from that involved in the instant case, namely, the issue of whether work performed on a holiday by an employe filling the position of a vacationing employe is assigned overtime work (as distinguished from casual or unas-

signed overtime work) which the vacationing employe would have performed and for which he would have received a payment in addition to holiday pay if he had not been on vacation. If the work in question is assigned overtime, then the weight of authority holds that the vacationing employe is entitled to such compensation in order to be no better or worse off than if he had remained at work on his regular assignment.

The majority appears to recognize this difference in issues when it states that the principle enunciated in Third Division **Award No. 11827** does not apply in the instant case because "It is undisputed that Claimant's position was not filled while he was on vacation." In order to be completely correct, however, the majority should have included the other three awards — **10550, 11113 and 11976** — in this same statement, and should **not** have classified **Award 10550** as one sustaining a claim for "holiday pay" when the holiday fell while the claimant was on vacation. As previously noted, and as the following paragraph from the petitioner's submission in that award makes abundantly clear, the claimant there was not claiming "holiday pay" per se, but rather pay he would have received for working the holiday if he had not been on vacation:

> "When the position of a vacationing employe is filled with another employe, the cost to the Carrier is ordinarily an extra day's pay (one day's pay for the one on vacation and one day's pay for the employe filling the vacancy). If Crawford was not on vacation, he would have worked the holiday, received one day's pay for working the holiday, and in addition, received a day's pay for the holiday under Article II of the August 21, 1954 Agreement. Based upon the Carrier's present interpretation, all that the vacationing employe should be paid is one day's pay, which has the effect of costing the Carrier only two day's pay; one for a day's vacation and one for the employe relieving him. This is the exact amount the Carrier would have had to pay if the employe had not been on vacation, and is entirely inconsistent and out of line on these seven day positions, and in effect, relieves the Carrier entirely from any payment whatsoever for the holiday as such."

If Third Division **Awards 10550, 11113, 11827, and 11976** hold any significance at all in the instant case, it is because they involve the application of Article 7(a) of the December 17, 1941 National Vacation Agreement and the June 10, 1942 Interpretation thereof and thereby underscore the fact that these provisions remain in full effect and must be recokoned with. The earliest of those four awards, **10550**, involves a dispute which arose on December 26, 1955, more than a year and a half subsequent to the effective date of the first national holiday pay agreement.

While it is certainly too much to expect everyone to analyse and interpret awards of this Board in exactly the same way, it nevertheless is very apparent that the majority in this case misinterprets the findings of Second Division **Award No. 5230** when it suggests that the claim presented there was denied "essentially" because of the Division's reliance "on the principle of 'maintenance of take-home pay' enunciated by Presidential Emergency Boards 106, 130, 161, 162 and 163." No doubt about it, this well-established principle did weigh heavily in the Division's consideration of that case, and rightfully so, but to suggest that all of the other factors considered were subordinate in importance or of little consequence is simply not accurate. A careful reading of the findings in **Award No. 5230** will reveal that, in addition to the

"maintenance of take-home pay' principle, this Division considered and gave considerable weight to the following:

(a) the fact that, under the plain meaning of the language of Section 6(a) of the birthday-holiday provisions applicable to situations in which a regularly assigned employe's birthday falls on a work day of his workweek, the claimant there was not entitled to the additional compensation he was demanding;

(b) the fact that the birthday-holiday provisions and the recorded history of the negotiations and hearings leading to the consummation of those provisions reveal no reason for treating the birthday-holiday any differently than the seven recognized legal holidays when it falls during an employe's vacation; and

(c) the fact that the parties to the birthday-holiday agreement failed to include therein specific language requiring the Carriers to pay the additional compensation claimed, in the face of a sound and long-established line of Adjustment Board and Emergency Board authority supporting the proposition that employes are not entitled to such additional pay when a holiday occurs during their vacation on what ordinarily would be a work day.

What **Award No. 5230** does, and what the instant award does not do, is place the burden of proof on the proper party — the Organization. It is the Organization's responsibility in these cases to point to some clear and unmistakable language in the parties' collective bargaining agreements which requires the carriers to pay the additional compensation demanded. This has not been done in the instant case. It is not the carrier's responsibility to point out language which states that such additional compensation is not required, even though this is in fact what the Carrier has done in the instant case by pointing to Article 7(a) of the December 17, 1941 National Vacation Agreement, the June 10, 1942 Interpretation of that article and the portion of Article II, Section 6(a) of the February 4, 1965 National Agreement dealing with situations in which a regularly assigned employe's birthday occurs on a work day of his workweek.

Consistent with its obvious desire to sustain the claim at all costs, the majority's findings conveniently overlook the fact that the Organization has been relieved of its burden of proof in the instant case. That this Division is not at liberty to overlook or misplace the burden of proof in this or any other case is abundantly clear, however, for there are hundreds of awards of the various divisions of this Board which hold that the proponent of a claim must bear and successfully carry that burden. One such award is Third Division **Award No. 14439**, TE v. L&N, Referee David Dolnick, which reads in part as follows:

"It is axiomatic that the burden of establishing facts upon which to base a valid claim rests with the Petitioner."

Accordingly, then, one of the more serious and obvious shortcomings of the majority's findings in the instant case is that, instead of making an attempt to show how the claim is supposedly supported by the facts and circumstances of record, they are primarily concerned with rebutting or evading the Carrier's defenses and the precedents and other authority cited in support thereof. Even if the Carrier's defenses were wholly irrelevant or without merit,

and this certainly is not the case, it would not necessarily follow that the instant claim would be meritorious and therefore allowable. No, indeed! The Organization would still be required to make a **prima facie** showing that the claim has merit.

Few things in this world are absolute or imutable, but it is probably safe to say that most everyone will agree the validity of a conclusion can be judged only by the validity of the premises upon which it is based. It also is probably safe to say that, if the premises upon which a conclusion is based cannot be clearly defined or articulated, the chances that the conclusion is based more on emotion than logic are very high. If there is more truth than fiction in these two statements, and we believe this to be true, then it is not unfair or unduly critical to submit that the majority's findings in the instant case reach an invalid conclusion, one that is based more on emotion than logic, when they attempt to unanchor "anchor Award 5230" with little more than the statement that "It is our considered judgment that anchor Award 5230 is palpably erroneous."

By definition, a "palpably erroneous" award is one that is plainly incorrect on its fact, without any basis in fact or logic. The majority's findings in the instant case, as previously indicated, offer no substantial reasons or evidence which even remotely tend to show that **Award 5230** is plainly incorrect on its face, and there is certainly nothing in that award which would afford a sound basis for such a showing. Therefore, it is the majority's unsupported conclusion concerning **Award 5230** that is palpably erroneous — not **Award 5230.**

The majority, as noted earlier, is somewhat critical of **Award 5230's** consideration of the "maintenance of take-home pay" principle, but it does not identify this as the basis for its ultimate conclusion concerning that award, nor does it suggest why the Division was obviously wrong in considering that principle in the light of all the other facts and circumstances presented there.

Even if it is assumed this Division committed an obvious error in **Award 5230** when it considered the "maintenance of take-home pay" principle in reaching its ultimate decision, it does not necessarily follow that that decision is plainly incorrect, without any basis in fact or logic. On the contrary, as explained earlier, the Division considered several other material facts and circumstances in that case, and although they all had a bearing on the final decision, the elimination of the "maintenance of take-home pay" principle would not make that decision fatally defective.

It is self-evident, however, that the "maintenance of take-home pay" principle was properly before this Division and was properly considered in reaching the decision in **Award 5230.** Why? Because the June 10, 1942 Interpretation of Article 7(a) of the December 17, 1941 National Vacation Agreement, which reads as follows, was in full effect on the date the dispute in that case arose:

> "Article 7(a) provides:
>
> > 'An employe having a regular assignment will be paid while on vacation the daily compensation paid by the carrier for such assignment.'
>
> This contemplates that an employe having a regular assignment will not be any better or worse off, while on vacation, as to the

daily compensation paid by the carrier than if he had remained at work on such assignment, this not to include casual or unassigned overtime or amounts received from others than the employing carrier."

Obviously, a regularly assigned employe who collects additional compensation for a birthday-holiday falling during his vacation is in a position better than that of just maintaining his regular take-home pay.

The June 10, 1942 Interpretation of Article 7(a) of the December 17, 1941 National Vacation Agreement remains in full effect today. It was in full effect on the day the dispute in the instant case arose. Therefore, the "maintenance of take-home pay" principle was before this Division in the instant case and should have been followed.

The following two paragraphs appear near the end of the majority's findings:

"Section 6 of Article II says:

'If an employe's birthday falls on a day other than a day on which he otherwise would have worked, he shall receive eight hours' pay at the pro rata hourly rate of the position on which compensation last occurred to him prior to his birthday, **in addition to any other pay to which he is otherwise entitled for that day, if any.**' (Emphasis ours.)

Article II, Section 1 has no such language; neither does Article 1, Section 3.

Carrier says that the above quoted language applies only to a rest day. But that is not the contract language. Additional holiday pay applies to an employe's birthday when it falls on a day 'other than a day on which he otherwise would have worked'. It is not limited to rest days. In addition to a rest day, it may apply to Christmas Day, which may also be the employes birthday — similarly for any of the other six holidays — and to a birthday that falls during an employes vacation. The language is not narrowly limited as urged by the Carrier. The words used in Article II, Section 6 must be given their usual and common meaning. The application of this principle voids Carrier's position."

In regard to these two paragraphs several observations and criticisms are in order. First, the language quoted from "Section 6 of Article II" is the second sentence of Article II, Section 6(b), of the February 4, 1965 National Agreement and, when read in context, applies only to "other than regularly assigned employes." Second, because the Claimant in the instant case was regularly assigned employes during the time in question, Section 6(b) of Article II of the February 4, 1965 National Agreement is irrelevant and immaterial to the issue presented. Third, a complete review of the record in the instant case will reveal that the Carrier has never concerned itself with either the first or second sentence of Article II, Section 6(b), of the February 4, 1965 National Agreement, and thus has never indicated that the second sentence thereof "applies only to a rest day." Fourth, a complete review of the record in the instant case will also reveal that the Organization did not progress its claim to this Division under Article II, Section 6(b), of the February 4, 1965 National Agreement, nor has it even so much as suggested that that particular section is pertinent in any way to the issue presented.

The observations and criticisms just noted stand as clear evidence of the fact that the majority's findings are base, to a considerable degree, on an incorrect or incomplete reading and understanding of the record. Clear evidence of the fact that the majority is also somewhat bewildered and confused by the record is found in its contradictory findings concerning the question of whether Article II of the August 21, 1954 National Agreement is amended by the November 21, 1964 and February 4, 1965 National Agreements. It first finds that "the Agreements of November 21, 1964 and February 4, 1965 neither amend nor modify Section 3 of Article I or Section 1 of Article II of the August 21, 1954 National Agreement," then reverses itself and finds that Section of Article II of the 1964 and 1965 Agreements "amends, by its specific language, Section 3 of Article I and Section 1 of Article II" of the August 21, 1954 National Agreement.

The latter findings, of course, is the correct one, for the introductory paragraph of Article II of the November 21, 1964 and February 4, 1965 National Agreements specifically states that "Article II of the Agreement of August 21, 1954, as amended by the Agreement of August 19, 1960, insofar as application to employes covered by this Agreement is hereby further **amended** by the **addition** of the following Section 6:" (Emphasis ours). This fact, coupled with the majority's inability to point to any language in the '64 and '65 Agreement which even remotely tends to prove the parties intended to treat a birthday-holiday falling during an employe's vacation any differently than the seven other holidays provided for in the '54 Agreement, severely undermines the majority's apparent conclusion that the '64 and '65 Agreements were designed to guarantee the employes and additional day's pay in such situations.

It is heartening to see the majority's findings at least pay lip-service to the principle that the words used in a collective bargaining agreement "must be given their usual and common meaning," for what the Carrier has said all along is that the instant claim has no merit under the usual and common meaning of the words used in the establishment preceding the semicolon in Section 6(a) of Article II of the February 4, 1965 National Agreement:

> "(a) For regularly assigned 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; * * *"

The Claimant in the instant case was a regularly assigned employe during the time in question, his birthday fell on a workday of his workweek, and he had that day off with pay. Nothing more was, or is, required.

The statement following the semicolon in Section 6 (a) of Article II of the February 4, 1965 National Agreement, part of which is emphasized in the majority's findings for some unexplained reason, can stand alone, completely independent of anything else, and clearly does not modify the statement preceding the semicolon. To apply the statement following the semicolon in Section 6(a) as modifying the statement preceding that semicolon in any way, as the majority apparently does, is to defy fundamental rules of English grammar. See James C. Hodges, **Harbrace College Handbook** (Harcourt, Brace and Company — New York, 4th Edition), pp. 18-21 and 139-149; and **Webster's Seventh New Collegiate Dictionary** (G. & C. Merriam Company — Springfield, Mass.) p. 1196.

The statement following the semicolon in Section 6(a) of Article II of the February 4, 1965 National Agreement would be applicable in the instant

case only if the Claimant's birthday had fallen on other than a work day of his regularly assigned workweek. That such was not the case is abundantly clear, however, for even the majority's findings of fact readily acknowledge the Claimant's birthday fell on Tuesday of his regularly assigned Monday through Friday workweek. A similar acknowledgement is made by the Organization's representative on this Division in the proposed findings he submitted when the case was deadlocked:

> "The claimant was on vacation from June 14 to June 18, 1695. **June 15 was one of his regular assigned work days.** It was also his birthday * * *" (Emphasis ours).

The fact that the Claimant performed no service for the Carrier on the date in question did not make that date other than a work day of his regularly assigned workweek. There are at least two good reasons why it did not: (1) under Rule 5(i) of the parties' basic Schedule Agreement, it is the bulletin establishing the employe's position — not his performance of service — which determines whether any particular day is a work day of his regularly assigned workweek; and (2) the Claimant could not have been on vacation on the date in question if it had not been one of his work days, for the National Vacation Agreement grants annual vacations only in terms of "consecutive work days" (see, e.g., Section 1 of **Article III—Vacations** of the February 4, 1965 National Agreement).

Even if the date in question had been other than a workday of the Claimant's regularly assigned workweek, it would not automatically follow that the additional compensation demanded on his behalf would then be payable. On the contrary, under the plain meaning of the words used in the statement following the semicolon in Article II, Section 6(a), of the February 4, 1965, National Agreement, the Claimant would still be required in such a case to point to some clear contractual language supporting his demand. He has already received eight hours' pay at the proper pro rata hourly rate for the date in question, so he would still have to show what additional pay, **if any**, he was contractually entitled to for that day.

Referring to Article I, Section 3 and Article II, Section 1, of the August 21, 1954 National Agreeement, the majority enters the realm of pure speculation when it asserts that "If the parties had intended to perpetuate the 'maintenance of take-home pay' principle to the birthday holiday, they would have amended Article I, Section 3 and Article II, Section 1 by adding the birthday holiday to each." There is, of course, no way of determining from the record in this case what the parties would have done, or would not have done, even if it could be determined exactly what was in their collective minds when they negotiated the 1965 Agreement, which it cannot. All this Division knows is what they did, and the decision must be made in the light of the facts of record, the language of the collective bargaining agreements before the Division and the rules of contract construction and other principles which have been established and followed by the National Railroad Adjustment Board over the years.

When viewed in this light, as the Carrier has attempted to do by pointing out all of the facts and circumstances previously discussed, it is perfectly clear this Division would be on much sounder ground if the instant claim were denied because of the parties' failure to deal specifically and unambiguously with the issue presented in the February 4, 1965 National

Agreement. It is the Organization's burden to point to some such language in that agreement supporting its position, and this has not been done.

Near the end of the majority's findings the following statements are also made:

> "Whatever Emergency Boards 161, 162 and 163 may have intended with respect to the 'maintenance of take-home pay' principle is cancelled out by the express language in the 1964 and 1965 Agreements. This is particularly true in view of the language in Section 4 of Article II which reads:
>
> > '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.'
>
> "While this Section 4 was in effect prior to the 1964 and 1965 Agreements, it is, nevertheless, another indication that the birthday holiday was to be applied differently than the other seven holidays."

Section 4 of Article II of the August 21, 1954 National Agreement, to which the majority refers, is wholly irrelevant and immaterial to the issue presented in the instant case for the following reasons:

(a) Under the usual and common meaning of the language used, it applies only to provisions in agreements in existence on August 21, 1954 — not to provisions in agreements consummated in 1964 or 1965, as the birthday-holiday provisions were;

(b) There is no evidence of record in the instant case to even indicate what the agreements in existence in 1954 provided "with respect to holidays in excess of seven holidays referred to in Section 1;"

(c) If any of the agreements in existence in 1954 specifically dealt with the problem of what payment should be made when one of the "excess holidays" fell during an employe's vacations, and it is doubtful they did, it is just as likely as not that they incorporated the "maintenance of take-home pay" principle and ruled out the payment of additional compensation such as that claimed in the instant case;

(d) When read in context, it is clear Section 4 of Article II of the August 21, 1954 National Agreement had no other purpose than to preserve whatever "excess holidays," if any, were observed on one or more of the ralroad properties across the country because of local custom or practice (e.g., Bunker Hill Day in Boston, Mass.; Battle of Bennington Day in the State of Massachusetts; Mardi Gras Day in New Orleans, La.; Robert E. Lee Day in some of the Southern States); and

(e) Insofar as the issue presented in the instant case is concerned, there is nothing, absolutely nothing, in Section 4 of Article II of the August 21, 1954 National Agreement which furnishes any support whatsoever for the majority's statement that it is "another indication that the birthday holiday was to be applied differently than the other seven holidays."

Accordingly, the majority's findings in this case do not support a sustaining award, and we most vigorously dissent.

C. L. Melberg

F. P. Butler

H. F. M. Braidwood

H. K. Hagerman

P. R. Humphreys

LABOR MEMBERS' ANSWER TO CARRIER MEMBERS' DISSENT TO AWARD NOS. 5251, 5252, 5253, 5254, 5255, 5256, 5257 AND 5258

A dissent which merely expresses the chargin of the dissenters is of little value. The dissent of the Carrier Members to Award Nos. 5251 through 5258 is such a dissent.

The dissent does nothing but review the arguments presented to the Division which were considered and disposed of in the findings of Award No. 5251.

The findings in Award No. 5251 and the Labor Members' dissents to Award Nos. 5230, 5231, 5232, 5233, 5310 and 5311 point out all of the reasons that Award Nos. 5230, 5231, 5232, 5233, 5310, 5311, 5328, 5329 and 5330 are palpably erroneous. Therefore, Award Nos. 5251, 5252, 5253, 5354, 5255, 5256, 5257 and 5258 should dispose of this issue.

D. S. Anderson

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R. E. Stenzinger

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