Award No. 5372
Docket No. 5172
2-SP(PL)-CM-'68

NATIONAL RAILROAD ADJUSTMENT BOARD

SECOND DIVISION

The Second Division consisted of the regular members and in addition Referee James E. Knox when award was rendered.

PARTIES TO DISPUTE:

SYSTEM FEDERATION NO. 114, RAILWAY EMPLOYES' DEPARTMENT, AFL-CIO (Carmen)

SOUTHERN PACIFIC COMPANY (Pacific Lines)

DISPUTE: CLAIM OF EMPLOYES:

(1) That the Southern Pacific Company violated **Article II, Section 6,** Paragraph (a) of the November 21, 1964 Agreement.

(2) That accordingly, the Southern Pacific Company compensate Shop Carman A. A. Pegueros eight (8) hours at the straight time rate of pay, for his birthday while on vacation, which was denied.

EMPLOYES' STATEMENT OF FACTS: Carman A. A. Pegueros, hereinafter referred to as the Claimant, was regularly employed by the Southern Pacific Company (Pacific Lines), hereinafter referred to as Carrier, as a carman in Carrier's Shop at San Francisco, California, with workweek Monday through Friday, rest days Saturday and Sunday.

Claimant took his 1965 vacation, July 26 through August 6, both dates inclusive, returning to service Monday, August 9, 1965. Claimant's birthday was Tuesday, August 3, 1965, 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, August 3rd.

Claim was filed with proper officer of the Carrier under date of September 13, 1965, contending that Claimant was entitled to eight (8) hours Birthday Holiday compensation for his birthday, August 3rd, 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 April 16, 1942 as subsequently amended, particularly by the Agreement of November 21, 1964, is controlling.

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 above, 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 workday of the claimant's workweek, 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. Moreover, claimant is not assigned to work any holidays occurring during his regular work week, except when he may stand for such service under equal division of overtime provisions.

CONCLUSION

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 employes and are made a part of this particular question in dispute.

Carrier reserves the right, if and when it is furnished with the submission which has been or will be filed ex parte by the Petitioner in this case, to make such further answer as may be necessary in relation to all allegations and claims as may be advanced by the Petitioner in such submission, which cannot be forecast by the Carrier at this time and have not been answered in this, the Carrier's initial submission.

Carrier does not desire oral hearing unless requested by Petitioner.

(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.

This is one of a series of identical cases presenting the question of what compensation is due when an employe's "birthday" holiday falls during a work week he is on vacation.

The claimant is a regularly assigned employe with a work week from Monday through Friday. In 1965 his birthday fell on Tuesday during a week

he was on vacation. The claimant was not regularly assigned to work holidays, and his position was blanked on his birthday.

For this Tuesday the carrier paid the claimant eight hours at the pro rata rate pursuant to the vacation provisions. The employes claim that he should have been paid twice: Once pursuance to the holiday provisions and once pursuant to the vacation provisions. We find neither party is correct.

An employe's birthday was established as a paid holiday by the Agreement of November 21, 1964. At the time the birthday holiday was added, the relationship between vacations and the other paid holidays was clear. Section 3 of Article I of the Agreement of August 21, 1954, provided:

> "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."

This provision had been construed as meaning that an employe is to be paid pursuant to the vacation provisions, but not the holiday provisions, for any holiday which occurs while he is on vacation. E.g., Award 2–3477 (Bailer); Award 2–2277 (Wenke); Award 3–9640 (Crowther). Under this provision an employe is not paid twice; his vacation is not extended.

The birthday holiday was not specifically added to those holidays which Article I, Section 3, provides are to be counted as vacation days. To determine the relationship between holidays and vacations in the absence of Article I, Section 3, we have to go back before this provision was adopted in 1954.

Prior to the 1954 agreement, holidays were merely days off without pay. At that time, the effect of the occurrence of a holiday during an employe's vacation turned on whether he was regularly scheduled to work holidays. If regularly scheduled to work holidays, his vacation was not extended. If not so scheduled, his vacation was extended an extra day. This distinction was based on the wording of the Vacation Agreement of December 17, 1941, which granted vacations in terms of "work days." If an employe's position was not regularly scheduled to work a holiday, it was not a "work day" and, consequently, could not be counted as a day of vacation. This was acknowledged by both the employes and the carriers in the proceedings before Emergency Board 106 which led to the 1954 agreement. Transcript of Proceedings of Emergency Board No. 106, folio pages 88–89, 923, 1826. And the decisions of this Board have so held. E.g., Award 2–2124 (Carter).

Would the conversion of holidays from days off without pay to days off with pay have affected the pre-1954 practice in the absence of Article I, Section 3? No, said the carriers, in the proceeding before the Emergency Board.

Employe Vacation Proposal No. 4 before the Emergency Board provided:

"If a paid holiday shall fall during the employe's vacation period, he shall be granted 1 additional day of vacation for each such holiday."

Mr. Goebel, Vice President of Personnel of the Baltimore & Ohio Railroad Company, testfiying on this proposal, stated:

"Mr. Leighty has testified that the Organizations feel every man should be entitled to the seven paid holidays which they proposed and he stated that this vacation proposal was designed to insure that they got those seven holidays above and beyond their vacation. **The carriers agree that a man should not be penalized if a holiday falls withi nhis vacation period. But the amazing thing about this proposal is that the present vacation agreement is already framed to prevent any penalty in the case of unpaid holidays; and it would continue to prevent any penalty if paid holidays were adopted.** * * *

* * * * *

Let us look now at the examples. The first example is the case of the employe who is not regularly scheduled to work holidays. Item (a) shows which days of vacation he gets under the present agreement. This is very important because it illustrates the way in which **the present vacation agreement automatically provides that an employe shall not be penalized by a holiday falling within his vacation period. The present vacation agreement provides for vacations in terms of work days, and this fact automatically takes care of this problem.** The employe in Item (a) gets Monday and Tuesday as vacation days. Wednesday is a holiday, and that is not circled. **This employe is not scheduled to work holidays, and Wednesday is, therefore, not a work day. It is consequently not counted as one of his five work days of vacation.**

* * * * *

Let us turn now to example 3, . . . which is the only instance in which Vacation Proposal No. 4 makes any difference at all. This is the case of the employe who is regularly scheduled to work holidays.

The situation under the present agreement is shown in Item (a). Under the present agreement, if an employe is regularly scheduled to work holidays, the holiday becomes a 'work day.' It is thus counted as one of his days of vacation. If he had actually worked on Wednesday, however, he would have been paid time and one-half because it is a holiday. * * *

The situation, therefore, is that he gets Monday, Tuesday, Wednesday, Thursday and Friday as vacation days, and is paid one day's pay for each of them except Wednesday, for which he gets one and one-half day's pay. He returns to work on Monday; it is not a day of his vacation, and so he gets paid at the regular straight time rate.

Item (b) shows the situation if all of the proposals were adopted except Vacation Proposal No. 4. The employe gets the same

five days off that he gets under the present agreement; the only difference between Items (a) and (b) is that in Item (b) under the present holiday proposals, the employe is paid triple time for Wednesday instead of the time and one-half which is the penalty rate under the present agreement.

Item (c) shows the only way in which Vacation Proposal No. 4 changes anything. In the previous examples, examples 1 and 2, we have seen that Items (b) and (c) are the same, which means that **the employe gets the same thing without Vacation Proposal No. 4 as he would get with it.**

Here we have the only instance in which Item (b) and Item (c) are different, and this is consequently the only instance in which Vacation Proposal No. 4 adds anything.

This is what Mr. Leighty says it does: He says that it also gives an employe Monday off as the last day of his vacation.

Item (c), then, is the same as Item (b), except that the employe does not have to work the second Monday in Item (c); he gets that day off.

But, in Item (b), on the other hand, he would have to work the second Monday.

In Item (c), then, the employe gets not only an extra day off, but he also gets three days' pay for the Wednesday which was a holiday, and which was not worked at all.

This is a pretty remarkable result, because this is the one instance which Mr. Leighty admitted on cross-examination could not be justified." Transcript of Proceedings of Emergency Board No. 106, folio pages 922–24. (Emphasis ours.)

Emergency Board 106 recommended, **contrary to the expressed intention of both the employes and the carriers,** "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 thereof, but such holiday shall be considered as a work day of the period for which he is entitled to vacation." Report of Emergency Board No. 106, page 36. Article I, Section 3, followed.

From the pre-1954 practice of the parties and their acknowledgment in the 1954 proceedings that this practice would not be affected by the conversion of holidays to be paid days off, we find that it is the parties' apparent understanding that first the holiday provisions are applied and then the vacation provisions are applied to the situation created by the application of the holiday provisions. What begins as a work day is converted to a non-work day by the occurrence of a holiday, unless the employe's position is regularly scheduled to work, notwithstanding the occurrence of a holiday. Such a non-work day cannot be counted as a day of vacation, for only work days can be so counted.

In the terms of this case, this means that Tuesday was a work day for which the claimant was entitled to be off with pay by virtue of the fact that

it was his birthday. The compensation he received on Monday and Wednesday pursuant to the vacation provisions satisfied the qualification requirements of the holiday provisions. E.g., Award 2–4064 (Daugherty). Since he was entitled to the day off and since his position was not scheduled to work such holidays, this Tuesday was transformed into a non-work day which could not be counted as a day of his vacation.

To reverse such a result in the case of the other holidays, the parties adopted Article I, Section 3, which provides that such non-work days are, nevertheless, to be treated as work days for purposes of the vaction provisions. The parties did not add the birthday holiday to the list of holidays to be so treated. Was this failure an inadvertent oversight?

The birthday holiday was negotiated after Emergency Boards 161, 162 and 163 had recommended "that the parties agree to one additional paid holiday." Report of Emergency Boards No. 161, 162 and 163, page 20. At the same time, they recommended an additional holiday, these Emergency Boards refused to endorse the employes' proposal that vacations be extended for a holiday, even where the position is not assigned to work on the holiday. Id. page 22. In rejecting the employes' proposal the Emergency Boards relied upon the conclusions of prior Boards "that it would be inconsistent with the maintenance of take-home pay theory of paid holidays to provide additional pay or vacation for holidays falling during vacations." Id. page 22.

The parties were not compelled to follow the Emergency Boards' recommendations. The prior history shows us that these recommendations may not have been very persuasive on the question of extending a vacation under the circumstances of this case. From the beginning, the carriers have recognized that the extension of a vacation for a holiday on which the employe's position is not scheduled to work would be fair and consistent with the maintenance-of-take-home-pay theory. In such circumstances, the question is not how much pay for a particular day, but the preservation of the agreed number of holidays and vacation days. What the carriers have been opposing is any extension for a holiday which is considered a work day because the employe's position is scheduled to work.

It, therefore, would not be surprising to find that the carriers agreed not to extend the rule applied to the existing holidays, which they themselves had characterized as a penalty, to the new birthday holiday. The birthday holiday provisions themselves support this conclusion. These provisions provide that the birthday holiday is to be afforded regardless of whether it falls on a work day. The other holidays are available only if they are observed on a work day. Agreement of August 21, 1954, Article II, Section 1. This difference not only shows that the parties were not equating the birthday holiday with the other holidays, but points up the anomaly that would result if a birthday holiday falling on a work day were counted as a vacation day in the same manner as the other holidays. An employe on vacation would lose his birthday holiday if it fell on a work day, but not if it fell on a rest day. Such a result is especially incredible in light of the preference the parties have always accorded holidays falling on work days over holidays falling on rest days.

Considering all the circumstances, we can not conclude that these experienced and sophisticated negotiators failed to recognize the significance of Article I, Section 3, or that they recognized its significance, but forgot to

amend it. If the carrier did err in this regard, there is nothing in the record in this case which would charge these employes with knowledge of such an error. The employes' proposal of May 17, 1966, that a vacation be extended for any holiday on which an employe is not assigned to work is not inconsistent with the belief that the birthday holiday already had such an effect. Moreover, by this time the present dispute had developed, and the birthday holiday may have been included with the other holidays in an attempt to resolve this dispute.

We, therefore, find that the occurrence of a birthday holiday transforms a work day on which the employe's position is not scheduled to work into a non-work day which cannot be counted as a day of vacation. Implicit within this finding is the finding that the day during an employe's work week on which his birthday holiday falls is not transformed into a non-work day by the fact that he is on vacation the other days of that work week. That is to say, such a day is a work day for which the employe is to be given the day off with pay under the birthday holiday provisions.

In making these findings contrary to previous decisions of this Board, e.g., Award 2–5230 (Weston); Award 2–5251 (Dolnick); Award 2–5310 (Johnson), we are not turning away from the salutary principles of stare decisis developed by this Board.

First, these previous decisions are recent, and it cannot be said that they have been acted upon or adopted by the parties. Second, these decisions were reached without our attention being directed to the understanding of the parties that a holiday on which an employe is not regularly scheduled to work is not a "work day" within the meaning of the vacation provisions. In the face of such understanding, any decision contrary to that reached in this case would be palpably erroneous. And, finally, which previous decision could we select to follow? There are contrary decisions involving this same System Federation and carrier. Compare Award 2–5254 (Dolnick) with Award 2–5311 (Johnson) and Award 2–5330 (Weston). Moreover, the birthday holiday was a national agreement, and there are contrary decisions involving the carmen. Compare Award 2–5311 (Johnson) with Award 2–5255 (Dolnick).

We believe, however, that in this case we have found the correct answer to this problem and that, as a result of the award in this case and its companion cases (Awards No. 2–5373 et sub), which, collectively cover both the National Agreement of November 21, 1964, and the National Agreement of February 4, 1965, this question should be finally laid to rest under the principles of stare decisis applied by this Board.

While we have not decided this case on the specific premise of either party, we find that our award is within the claim before this Board. The claim is that the claimant was not properly paid for his birthday holiday. In processing this claim, the parties discussed the vacation provisions and the holiday provision and their relationship to each other. While we have found that the claimant was not entitled to be paid twice for his birthday, once pursuant to the vacation provisions and once pursuant to the holiday provisions, as contended by the employes, we have found that the claimant was entitled to be paid for his birthday pursuant to the holiday provisions, contrary to the contention of the carrier.

The claimant has not been paid pursuant to the birthday holiday provisions for the day on which his birthday occurred. He has, however, been improperly paid for that day pursuant to the vacation provisions. To set off the required payment against the improper payment would deprive the claimant of the additional day of vacation to which he was entitled but which he did not receive because of the carrier's improper payment for his birthday.

AWARD

Claim sustained for 8 hours at the straight time rate of pay.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of SECOND DIVISION

ATTEST: Charles C. McCarthy
Executive Secretary

Dated at Chicago, Illinois, this 29th day of February, 1968.

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