

Award No. 5414
Docket No. 5209
2-SP (PL)-CM-'68

NATIONAL RAILROAD ADJUSTMENT BOARD
SECOND DIVISION

The Second Division consisted of the regular members and in addition Referee Gene T. Ritter when award was rendered.

PARTIES TO DISPUTE:

SYSTEM FEDERATION NO. 114, RAILWAY EMPLOYEES'
DEPARTMENT, A. F. of L. - C. I. O. (Carmen)

SOUTHERN PACIFIC COMPANY (PACIFIC LINES)

DISPUTE: CLAIM OF EMPLOYEES:

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

(2) That accordingly the Southern Pacific Railroad Company compensate Coach Cleaner Rose Marazzi (8) hours at the straight time rate of pay for her birthday while on vacation, which was denied.

EMPLOYEES' STATEMENT OF FACTS: Coach Cleaner Rose Marazzi, hereinafter referred to as the Claimant, was regularly employed by the Southern Pacific Company (Pacific Lines) hereinafter referred to as Carrier, as such at San Francisco, California, with workweek Monday through Friday, rest days of Saturday and Sunday.

Claimant took her 1965 vacation September 7 through October 4, 1965, both dates inclusive, returning to service Monday, October 11, 1965. Claimant's birthday was Thursday, September 16, 1965, a vacation day of her vacation period for which she was paid a day's vacation pay. However, Carrier failed to allow her birthday holiday compensation for the day, Thursday, September 16th.

Claim was filed with proper officer of the Carrier under date November 5, 1965, contending that claimant was entitled to eight (8) hours birthday holiday compensation for her birthday, September 16th, 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.

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

tice or understanding in effect on this property. Moreover, claimant is not assigned to work any holiday occurring during her regular workweek.

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 to make reply to such other contentions of Petitioner which may be submitted and are not included in this (Carrier's) submission based on notice referred to herein of statement of claim to be presented by Petitioner in this case.

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.

The question involved in this dispute has been considered in numerous sustaining and denial awards. It involves the question of whether or not Claimant is entitled to compensation of 8 hours at the straight time rate of pay for her birthday while on vacation, in addition to vacation pay. As a basis for this claim, the Organization cites that Carrier violated Article II, Section 6, paragraph (a) of the November 21, 1964 Agreement, which is as follows:

"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 is otherwise entitled for that day, if any."

In order to determine the intent of the above cited rule, it is necessary that we consider the historical background giving rise to this rule. The record discloses that prior to November 21, 1964, there were 7 recognized national holidays as enumerated in Section 3 of Article I of the August 21, 1954 Agreement. On May 31, 1963, various Organizations served notice under Section 6 of the Railway Labor Act, of their desire to amend Article II of the August 21, 1954 Agreement by the addition of Good Friday and Veterans Day as two additional holidays, making a total of 9 recognized holidays. Carriers declined to agree to this proposal and this proposed amendment was submitted to a National Conference Committee composed of Carrier and Employes to negotiate the subject matter of this notice. Those parties were unable to agree

and subsequently an Emergency Board was created by the President. On October 2, 1964, Emergency Board Nos. 161, 162 and 163 submitted to the President a report. Emergency Board 162 recommended that the parties agree to one additional holiday effective January 1, 1965, leaving to the parties the determination of which holiday that shall be. In compliance with this recommendation, various Carriers and Organizations further amended Article II by the addition of the above set out Section 6.

The Organization now contends that this additional holiday, since it is enumerated in a separate paragraph from the other 7 enumerated holidays, should be treated differently. This Board does not agree. From its inception, as indicated by the Section 6 notice asking for additional holidays, the Organization and Carrier contemplated that if an additional holiday was granted in pursuance to the Section 6 notice, it would be subject to the same interpretation as the 7 enumerated holidays. The fact that it is separately numbered does not make it any more or less a holiday. In 1964, the above named Emergency Boards (161, 162, and 163) held the "Maintenance of Take-Home Pay" theory when it upheld the conclusions reached by Emergency Boards 106 and 130 in that "justification for paid holidays is the maintenance of take-home pay", and that "it would be inconsistent with the maintenance of take-home theory of paid vacations to provide additional pay and vacation for holidays falling during vacation. * * *"

This Board specifically follows Award No. 5230 (Weston). In so doing, this Board feels that paragraph (a), of Section 6, of Article II, above quoted, first pertains to a regularly assigned employe whose birthday falls on a work day. That part of the sentence in said paragraph following the semicolon pertains only to a regularly assigned employe whose birthday falls on other than a work day. The language "in addition to any other pay to which he is otherwise entitled for that day, if any" does not apply to the first situation of said paragraph (a), but only to the second situation involving an employe whose birthday falls on other than a work day of his workweek. In this instance, the Board feels that Claimant's birthday fell on a work day during his regularly assigned workweek. (Awards 5314 and 5315)

This Board, in arriving at this decision, has not treated Award 5372 (Knox) lightly. This Board does, however, find that this Award (5372) reaches an erroneous conclusion for the reason that it fails to recognize that a birthday occurring during a vacation should be considered in the same manner as other holidays that occur during a vacation.

The language of Article II of Section 6 does not provide for an unqualified additional day. There is also an absence of any provision for double pay in a situation such as is involved in this dispute. Therefore, this claim shall be denied.

AWARD

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of SECOND DIVISION

ATTEST: Charles C. McCarthy
Executive Secretary

Dated at Chicago, Illinois, this 3rd day of May 1968.

**LABOR MEMBERS' DISSENT TO AWARD NOS.
5414, 5415, 5416, 5417, 5418, 5419 AND 5420**

The majority in these Awards made the same error as the majority in Awards 5230 (Western) and 5310 (Johnson). They contend that the birthday pay was not due the claimants because they were off on vacation.

The Carriers admit that all of the claimants involved in these disputes qualified for the birthday pay, but that because they were off on vacation they were not given an additional day off with pay nor were they paid an additional day's pay. They allege that the 1941 Vacation Agreement along with the interpretations of that Agreement supports them in this position. The majority became confused and accepted this line of reasoning. Even though the controlling Agreements have not exception. The claimants were qualified for the additional day off by being compensated by the Carrier for the work days immediately preceding and following their birthday and the pertinent parts of the controlling Agreements read as follows:

“Section 6. Subject to the qualifying requirements set forth below, effective with the calendar year 1965 each hourly, daily and weekly rated employe shall receive one additional day off with pay, or an additional day's pay, on each such employe's birthday, as hereinafter provided.

(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 the work days immediately preceding and following his birthday, or if employe is not assigned to work but is available for service on such days. If the employe's birthday falls on the last day of a regularly assigned employe's workweek, the first work day following his rest days shall be considered the work day immediately following. If the employe's birthday falls on the first work day of his workweek, the last work day of the preceding workweek shall be considered the work day immediately preceding his birthday.”

The majority also became confused when they ignored the above quoted parts of the controlling Agreements and ruled on paragraph (a) as they did. This paragraph reads as follows:

“(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 is otherwise entitled for that day, if any.”

The Carriers themselves agree that if an employe is off on one of his regular work days and is compensated by the Carrier in accordance with another rule of an Agreement, and this is also his birthday, he is to be compensated for the day plus pay for his birthday. The Carriers admit and do pay employes who are off on one of the seven recognized National Holidays when it falls on one of the employe's regular work days which is his birthday as follows:

1. Eight hours at straight time (holiday pay) pursuant to Article II of the August 21, 1954 Agreement, as amended by the August 19, 1960 Agreement.

2. Eight hours at straight time (birthday pay) pursuant to Article II of either the November 21, 1964 or the February 4, 1965 or the April 3, 1965 Agreements, which, in so far as this issue is concerned, are the same.

We submitted the referees Second Division Award Nos. 5218, 5219, 5220, 5221 (Weston); 5237, 5238, 5239, 5240, 5241 (Johnson); 5259, 5260, 5261, (Dolnick); 5262, 5263, 5264, 5265, 5266, (Coburn); and 5267 through 5296 (no referee) wherein the Carriers admit that this is the proper method of pay due employes who are off account of a holiday which is one of their regular work days and also their birthday. The Carrier in their submission in Award No. 5218 states the following:

"The salient facts in this dispute are:

1. The regular assigned employe's workweek included the holiday, January 1, 1965.

2. The regular assigned employe's birthday occurred on the holiday, January 1, 1965.

3. The regularly assigned employe performed eight hours' work on the holiday, January 1, 1965.

This employe was allowed payment as follows on January 1, 1965:

1. Eight hours at straight time rate (holiday pay) pursuant to Article II of the August 21, 1954 Agreement, as amended by Article III of the August 19, 1960 Agreement.

2. Eight hours at straight time rate (birthday pay) pursuant to Article II of the November 21, 1964 Agreement.

3. Eight hours at time and one-half rate pursuant to Article II of the November 21, 1964 Agreement and Rules 12(a) and 14 of the March 1, 1953 Firemen and Oilers' Agreement.

There is no dispute in this docket about the payment of eight hours' holiday pay, plus eight hours' birthday pay, on January 1, 1965."

The Carriers' records show that if an employe is off on a work day for one of the seven holidays and his birthday occurs on that same day, he is entitled to the holiday pay, plus the birthday pay. It follows then that the employe who is off on vacation and his birthday occurs is also entitled to his vacation pay plus the birthday pay as they compare as follows:

OFF ON HOLIDAY

1. Holiday pay pursuant to Article II of the August 21, 1954 Agreement, as amended by the August 19, 1960 Agreement.

OFF ON VACATION

1. Vacation pay pursuant to the Vacation Agreement.

2. One additional day's pay (birthday pay) pursuant to Article II of the Agreement of August 21, 1954 as amended by the Agreement of August 19, 1960, as amended by the Agreements dated November 21, 1965, February 4, 1965 and April 3, 1965.

2. One additional day's pay (birthday pay) pursuant to Article II of the Agreement of August 21, 1954, as amended by the Agreement of August 19, 1960, as amended by the Agreements dated November 21, 1965, February 4, 1965 and April 3, 1965.

Therefore, employees are by contract entitled to receive **one additional day off with pay, or an additional day's pay for their birthday** as the pertinent part of the controlling Agreements reads as follows:

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

The facts in all of these disputes are that the employees did meet the requirements set forth in the rule, they were not given an additional day off with pay, they are entitled to an additional day's pay as provided for above and the employes' claims should have been sustained.

This in addition to the Labor Members' dissents to Award Nos. 5230, 5231, 5232, 5233, 5310, 5311 and the findings in Award Nos. 5254 and 5372 points out the sound reasons why these instant awards are in error and palpably erroneous.

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