Award No. 5442
Docket No. 5302
2-EL-CM-'68

NATIONAL RAILROAD ADJUSTMENT BOARD

SECOND DIVISION

The Second Division consisted of the regular members and in addition Referee Joseph S. Kane when award was rendered.

PARTIES TO DISPUTE:

SYSTEM FEDERATION NO. 100, RAILWAY EMPLOYES' DEPARTMENT, AFL-CIO (Carmen)

ERIE-LACKAWANNA RAILROAD COMPANY

DISPUTE: CLAIM OF EMPLOYES:

1. That under the current agreement the Carrier improperly denied Carmen K. R. Balmer, E. L. Hanichak and F. E. Lake, birthday holiday compensation for their birthdays, July 21st, July 14th and July 30th, 1965, respectively, while they were on their arbitrarily assigned vacation.

2. That accordingly, the Carrier be ordered to compensate the aforesaid employes eight (8) hours birthday holiday compensation for their respective birthdays in addition to the vacation pay received for said date.

EMPLOYES' STATEMENT OF FACTS: Carmen K. R. Balmer, E. L. Hanichak and F. E. Lake, hereinafter referred to as Claimants, are regularly employed by the Erie-Lackawanna Railroad Company, hereinafter referred to as the Carrier, as Carmen in Carrier's Susquehanna Coach Shop with workweeks of Monday through Friday, rest days Saturday and Sunday.

Carrier posted a notice under date of June 7, 1965 that the Susquehanna Coach Shop would close down for vacations Friday, July 2, 1965 and reopen August 2, 1965.

Claimants qualified for a 1965 vacation and while on their vacation their birthdays fell on a vacation day of their vacation period as follows:

Claimant Lake – Friday, July 30
Claimant Balmer – Wednesday, July 21
Claimant Hanichak – Wednesday, July 14

for which they were paid a day's vacation pay. However, Carrier failed to allow them birthday-holiday compensation for the day.

As the claimants' birthday fell on "what would be a work day of" their "regularly assigned work week", this day was properly charged as a day of vacation under the August 21, 1954 and November 21, 1964 Agreements. Accordingly, this Board should rule that this claim for an additional day's pay at the pro-rata rate, based upon the erroneous assertion that under the prosions of Section 6 (a)of the November 21, 1964 Agreement, claimants' birthday did not fall on a work day of their assignment, is without merit. Similarly, Petitioner's allegation that the scheduling of claimants' vacation period to begin at the same time as the other employes at Susquehanna Coach Shop "was arbitrarily assigned" is nothing more than mere words, and as Article 4 (b) of the Vacation Agreement fully supports Carrier's right to schedule group vacations under such circumstances, this allegation by Petitioner should be also held to be without merit.

Based upon the facts and authorities cited, Carrier submits that this entire claim is totally without substance or support, and should be denied in its entirety.

All data contained herein are known to or have been discussed with Petitioner.

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 Claimants, three in number, were regularly employed Monday through Friday, rest days Saturday and Sunday. The vacation period extended from July 2 to August 1, 1965. The claimants qualified for vacations and while on their vacations their birthdays fell on a day of their vacation, respectively Friday, July 30; Wednesday, July 21; Wednesday, July 14; for which they were paid a day's vacation pay. Carrier failed to allow them birthday-holiday compensation for an additional eight (8) hours holiday pay for July 30, 21 and 14.

The question at issue is: Were the claimants entitled to eight (8) hours Birthday-Holiday compensation in addition to vacation pay?

The Organization offers in support of the claims Article II–Holidays, Section 6(a) being pertinent, 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 workday 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."

Thus, a day of vacation is a non-work day and they should under the above agreement receive "* * * any other pay to which they are otherwise entitled for that day, if any." This would include Holiday Pay.

The Carrier's contentions were alleged in —

"ARTICLE I. VACATIONS

> Section 3. When during an employe's vacation period, any of the seven recognized holidays (New Year's Day, Washington's Birthday, Decoration Day, Fourth of July, Labor Day, Thanksgiving Day and Christmas) or any day which by agreement has been substituted or is observed in place of any of the seven holidays enumerated above, falls on what would be a work day of an employe's regularly assigned work week, such day shall be considered as a work day of the period for which the employe is entitled to vacation."

The Carrier also contended that a vacation day was a work day, under Article II–Holidays, Section 6(a), and provided for a day off with pay which the claimants received. Furthermore, that the language —

> "* * * if an employe's birthday falls on other than a work day of the work week of the individual employe he shall receive eight hours' pay at the pro rata rate of the position to which assigned in addition to any other pay to which he is otherwise entitled for that day, if any."

does not apply to situations as presented herein, but to non work days. That a vacation day is a work day. That as the claimants were on vacation and a holiday occurred such birthday holiday should be treated as any other holiday. Article I–Vacations, Section 3.

The issue in this dispute has been recently before the Board in Award 5251 sustaining, 5230 denial, 5310 denial, 5372 sustaining, 5414 denial. Complete reviews of the subject have been made, both historically and economically, of the background that brought this issue before the Board. Nothing more can be added. However, an analysis of Article II, Section 6(a), Holidays, fails to indicate either expressed or implied that a birthday holiday observed while on vacation should be treated differently than any other holiday. Article I, Section 6(a) states: "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 * * * " On the facts before us the claimant was a regular assigned employe, on vacation, observing his birthday holiday, the day was considered a work day; for the payment of vacation pay; the vacation agreement also provides in Article III—Vacations, Section (a), "Effective with the calendar year 1965, an annual vacation of five (5) consecutive work days with pay will be granted to each employe * * *." Other holidays observed during Vacation periods are also considered work days. He received the day off with pay.

In Article I – Vacations, Section 3, "* * * 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." Thus, the rules have recongized a day as a work day although no duties have been performed.

The remaining portion of Section 6(a) of Article II–Holidays, "if an employe's birthday falls on other than a work day of the work week of the individual employe he shall receive eight hours' pay at the pro rata rate of the position to which assigned in addition to any other pay to which he is otherwise entitled for that day, if any." This language applies to a regularly assigned work week wherein he would receive birthday holiday pay plus any other pay accruing to the position if not on a credited work day. This situation is not present in the facts at issue, as a vacation day is considered a work day. The language of the section is silent on the subject of vacations, although providing for compensation on work days and other than work days which would imply rest days.

A further review of Article II–Holidays, Section 6(c), provides for the qualifications necessary to be eligible for holiday pay:

> "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 * * *."

Thus, to qualify for birthday holiday pay an employe must be compensated for work days prior to and subsequent to the holiday. Thus, if he must be credited for work days for those days it is a logical conclusion to presume that the vacation day is considered a work day. If an employe is on vacation and observes his birthday in order to qualify the days prior to and subsequent must be considered work day in or to be paid for the holiday. However, when we examine Section 6(a) we note that he can receive only a day's pay on a work day of his birthday holiday. This pay the claimant received.

Section (f) considers situations wherein birthday holidays fall on one of the seven holidays and provides special considerations wherein the employe can have the following day or the day preceding the first day during which he is not scheduled to work following such holiday considered as his birthday holiday for the purposes of this section.

Section (g) "Existing rules and practices thereunder governing whether an employe worked on a holiday and the payment for work performed on holidays shall apply on his birthday." No rules have been changed to provide for the contentions of the claimants.

No language in any sections of the Agreement gives special consideration to employes on vacation while observing a birthday holiday.

Thus, Article II – Holidays, in its entirety, and the pertinent Section 6(a) fails to reveal any provision for the payment of birthday holiday pay and vacation pay while an employe is on vacation in a manner different than other holidays. Article I, Section 3–Vacations, states that certain holidays while on vacation " * * * Shall be considered as a work day for the period for which the employe is entitled to vacation. Although the birthday holiday is not considered in this section and the Holiday provision of Article II, Section 6(a), is silent on the subject of vacations, both sections of the agreement must be considered in an attempt to give some contractual constructions to the intentions of the parties, as the entire agreement encompasses the relationship of the parties and is before the Board.

The Board is of the opinion that when the parties agreed on Article II, Section 6(a)–Holidays, thus giving it separate consideration that if they intended birthday holiday payments to apply differently during vacations than other holidays they would have so included such a provision, as was included, when birthdays are observed on actual work days of the employe's work week and when birthdays are observed on other than work days of the work week.

However, the agreement does not provide specifically for birthday holidays in any place other than Article II, Section 6(a), and that article does not specifically provide for payment for birthday holidays that fall during vacations in a manner different than the seven other holidays are provided for.

Thus, the Board is of the opinion that the claimants have failed to carry the burden of proof and establish by the preponderance of evidence that Article II–Holidays, Section 6(a), requires both vacation and birthday holiday pay when an employe is on vacation and observing his birthday.

See Awards 5230, 5310 and 5414.

The Board is further of the opinion that the section of the claim alleging "that while they were on their arbitrarily assigned vacation", was withdrawn by the claimants.

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 June, 1968.

LABOR MEMBERS' DISSENT TO AWARD NOS. 5442, 5443, 5444, 5445, 5446, 5447, 5448, 5449 and 5450

The majority in these awards failed to properly consider the Agreements involved as pointed out by the Labor Members in their dissent to Award Nos. 5414, 5415, 5416, 5417, 5418, 5419 and 5420, which reads as follows:

> "The majority in these Awards made the same error as the majority in Awards 5230 (Weston) 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 Agree-

ment, supports them in this position. The majority became confused and accepted this line of reasoning. Even though the controlling Agreements have no such 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, insofar as this issue is concerned, are the same.

We submitted to 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 Carrier's 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	OFF ON VACATION
1. Holiday pay pursuant to Article II of the August 21, 1954 Agreement, as amended by the August 19, 1960 Agreement.	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, employes 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 employes 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."

These awards are equally in error and palpably erroneous.

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Keenan Printing Co., Chicago, Ill. Printed in U.S.A.