Award No. 5468
Docket No. 5248
2-SP(PL)-MA-'68

NATIONAL RAILROAD ADJUSTMENT BOARD

SECOND DIVISION

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

PARTIES TO DISPUTE:

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

SOUTHERN PACIFIC COMPANY (Pacific Lines)

DISPUTE: CLAIM OF EMPLOYES:

1. That Machinist W. L. Dubois (hereinafter referred to as claimant) was improperly compensated under applicable terms of current controlling Agreements while on vacation.

2. That accordingly, the Carrier be ordered to additionally compensate claimant in the amount of eight (8) hours' pay at the pro rata rate for the date of September 13, 1965, the date of claimant's birthday falling on a work day of his assigned work week while on vacation.

EMPLOYES' STATEMENT OF FACTS: Machinist W. L. Dubois, hereinfter referred to as the Claimant, was regularly employed by the Southern acific Company (Pacific Lines) hereinafter referred to as Carrier, as a achinist in Carrier's Sacramento General Shops, with work week Monda. rough Friday, rest days Saturday and Sunday.

Claimant took one week of his 1965 vacation September 13 through eptember 17, 1965, both dates inclusive, returning to service Monday, Septem- r 20, 1965. Claimant's birthday was Monday, September 13th, a vacation y of his vacation period, for which he was paid a day's vacation pay. owever, Carrier failed to allow him birthday holiday compensation for the y, Monday, September 13th.

Claim was filed with proper officer of the Carrier under date of September , 1965, contending that Claimant was entitled to eight (8) hours' Birthday oliday compensation for his birthday, September 13th, in addition to vacation y received for that day, and subsequently handled up to and including the hest officer of Carrier designated to handle such claims, all of whom lined to make satisfactory adjustment.

prior to the adoption by negotiation of the new rule which the Division, of course, is not empowered to do.

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.

(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.

Claimant, a machinist with a Monday through Friday work week, seeks pay for an additional eight hours at the pro rata rate for his birthday, which occurred on Monday, September 13, 1965, while he was on vacation. Petitioner avers that claimant is entitled to an additional day's pay for his birthday which fell on a "vacation day" of his vacation period under Article II, Section 6 of the February 4, 1965 Agreement, which in part provides 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 employes covered by this Agreement is hereby further amended by the addition of the following Section 6:
>
> 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.
>
> (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; if an employe's birthday falls

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

(c) A regularly assigned employe shall qualify for the additional day off or pay in lieu thereof if compensation paid him by the carrier is credited to 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 work week, 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 work week, the last work day of the preceding work week shall be considered the work day immediately preceding his birthday.

(f) * * * If an employe's birthday falls on one of the seven holidays named in Article III of the Agreement of August 19, 1960, he may, by giving reasonable notice to his supervisor, have the following day or the day immediately preceding the first day during which he is not scheduled to work following such holiday considered as his birthday for the purposes of this Section.

(g) Existing rules and practices thereunder governing whether an employe works on a holiday and the payment for work performed on holidays shall apply on his birthday."

Carrier insists that a birthday-holiday, which occurs during an employe's vacation on what would ordinarily be a work day, must be treated in the same manner as the other seven (7) recognized holidays under the provisions of Article I, Section 3 of the August 21, 1954 Agreement, which provides as follows:

"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."

Petitioner contends that a birthday, which occurs on what would ordinarily be a work day during an employe's vacation, must be considered a "other than a work day of the work week of the individual employe" under the provisions of Article II, Section 6 (a) of the February 4, 1965 Agreement, and that such an employe is entitled to receive eight hours' pay at the pro rata rate for the birthday holiday in addition to any other pay, such as vacation pay, to which he is otherwise entitled for that particular day. Petitioner asserts that Article I, Section 3 of the August 21, 1954 Agreement was not amended by the 1965 Agreement to reflect the additional holiday and not applicable to birthday-holidays.

The fundamental issue involved in this dispute has been the subject of numerous conflicting Awards. Historically, the "maintenance of take-home pay" principle arose out of the June 10, 1942 Interpretations to Article VII (a)

the December 17, 1941 National Vacation Agreement, and has been applied to paid holidays falling on what ordinarily would be regularly assigned work days of employes during vacation periods. In fact, this practice was incorporated under the provisions of Article I, Section 3 of the August 21, 1954 Agreement as to seven (7) recognized holidays.

Pursuant to the recommendations of Presidential Emergency Boards 161, 162 and 163, an additional recognized holiday was agreed to by the parties which is provided by Article II, Section 6 of the February 4, 1965 National Agreement. This agreement specifically amends the earlier Agreement of August 21, 1954, as amended by the Agreement of August 19, 1960, but neither alters nor modifies Section 3 of Article I or Article II of August 21, 1954 National Agreement by including any reference to the eighth paid holiday, an employe's birthday. Consequently, we must assume that the parties intended that only the provisions of Article II, Section 6 of the February 4, 1965 Agreement would be controlling as to eligibility for the birthday holiday provided therein.

Were the language found in Article II, Section 6 entirely clear and unambiguous, the instant claim could be resolved without consideration of either past practice or previous Agreements between the parties, but here we find plausible conflicting interpretations of the applicable language of this Agreement. Carrier urges that a birthday holiday, which occurs during an employe's vacation on what would ordinarily be a work day, must be considered "a work day of the work week of the individual employe" under Article II, Section 6(a) for wrich such employe is entitled to receive only one day's compensation. Petitioner, with equal vigor, urges that an employe's birthday, which occurs on what would ordinarily be a work day during a vacation period, constitutes "a day other than a day on which he otherwise would have worked" for which said employe shall receive eight hours' pay at the pro rata hourly rate in addition to his vacation pay.

Careful consideration of prior conflicting Awards as well as historical practice pertaining to vacations requires us to conclude that claimant's birthday during his vacation period occurred on a regularly assigned work day of his regular work week as he was constructively on duty in the sense that under Article 7(a) of the 1941 Vacation Agreement, he was entitled to be no worse off as to his daily compensation while on vacation than he would have been had he remained at work on his regular assignment. Had the Claimant been on duty when his birthday occurred, he would have been given the day off with pay under Article II, Section 6(a) of the 1965 Agreement, which is precisely what occurred during his vacation period.

As determined in our Award 5230, the Claimant's case concerns a birthday that occurs on a work day of his work week for which he was entitled to receive the day off with pay. Such finding is consistent with reports of Presidential Emergency Boards which have previously considered this issue.

We differ with the conclusion reached in Award 5251 that the applicable language in Article II, Section 6 of the 1965 Agreement is "clear and meaningful." The parties thereto could have simply stated that when a birthday holiday occurs within an employe's vacation, such employe would be paid for said holiday in addition to his vacation pay, provided he otherwise would have been scheduled to work that particular day. Nowhere do we find such clear and definitive language, and therefore, historic practice, prior interpretations,

Emergency Board reports and earlier Awards become significant and require consideration.

Accordingly, we find that our Awards 5230 (Weston) and 5414 (Ritter) provide persuasive precedent for denying the instant claim.

AWARD

Claim is denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of SECOND DIVISION

ATTEST: Charles C. McCarthy
Executive Secretary

Dated at Chicago, Illinois, this 21st day of June, 1968.

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