Award No. 5520
Docket No. 5340
2-IC-FO-'68

NATIONAL RAILROAD ADJUSTMENT BOARD

SECOND DIVISION

The Second Division consisted of the regular members and in addition Referee Paul C. Dugan when award was rendered.

PARTIES TO DISPUTE:

SYSTEM FEDERATION NO. 99, RAILWAY EMPLOYES' DEPARTMENT, AFL-CIO (Firemen & Oilers)

ILLINOIS CENTRAL RAILROAD COMPANY

DISPUTE: CLAIM OF EMPLOYES:

(1) That under the current agreement J. B. Herring, Stationary Engineer at Paducah, Kentucky was improperly paid for his birthday, August 30, 1965.

(2) That accordingly, carrier be ordered to compensate J. B. Herring three (3) hours at penalty rate in addition to what he has already received for his birthday, August 30, 1965.

EMPLOYES' STATEMENT OF FACTS: Stationary Engineer J. B. Herring, hereinafter referred to as the Claimant, is regularly employed by the Illinois Central Railroad, hereinafter referred to as the Carrier, at Paducah, Kentucky. Claimant is regularly assigned in Carrier's Paducah Power Plant with workweek Monday through Friday, hours 4:00 A. M. to 3:00 P. M. on Monday, and 7:00 A. M. to 3:00 P. M. Tuesday through Friday.

Claimant works eleven (11) hours each Monday, for which he is paid eight (8) hours at straight time rate and three (3) hours at time and one-half rate.

Attached hereto as Exhibit A is copy of Bulletin dated April 8, 1965, which shows that Claimant's job was bulletined to work 4:00 A. M. to 3:00 P. M. on Mondays. Attached as Exhibit B is copy of Shop Superintendent C. T. Eaker's letter dated September 7, 1965 which attests to the fact that Claimant works three (3) hours each Monday at the penalty rate.

Claimant's birthday fell on Monday, August 30, 1965. He was given the day off, but compensated only for eight (8) hours at straight time rate.

In Second Division Award 1771, Referee Carter said:

"The overtime rule has no application to time not worked. . . ."

In Award 2–2956, Referee Burke reaffirmed this principle:

"We have many times held that the overtime rate is applicable to time actually worked. . . ." (Emphasis ours.)

Referee Coburn stated in Award 3–13191:

"Claimant was on his rest day when the work was performed by another employe. Therefore, Rule 25, which clearly contemplates the performance of service by an employe on his rest day, is controlling. Under its terms 'service' must be 'rendered' by an employe to entitle him to the time and one-half rate. . . ."

In Award 3–14149, Referee Coburn rejected the demand of the Telegraphers for eight hours at the penalty rate because the claimant did not work on a holiday:

"Payment of the time and one-half rate under Article V (1) of the Agreement is in order only where it is shown that a Claimant performed work on one of the specified holidays. The rule clearly states 'Work performed on the following legal holidays . . . will be paid for at the overtime rate. . . .' [Emphasis ours.] Claimant here performed no work on the holiday of January 1, 1958, and is not, therefore, entitled to payment at the time and one-half rate as claimed."

See also Awards 2–3405, 2–3406, 2–3410, 2–3868, 2–3873, and many others.

SUMMARY AND CONCLUSION

The company has demonstrated that the Union's demands for penalty pay for time not worked are without any contractual support because "eight hours' pay at the pro rata rate" and "day off with pay" mean the same thing, and employes are not entitled to overtime unless they work overtime.

A sustaining award would, in essence, create a new rule allowing a very small minority of employes the right to overtime compensation when they do not perform service. The new rule would occasionally benefit a very few employes, and, at the same time, conflict with every other provision of the Firemen and Oilers' agreement with the Illinois Central and a well established principle of the Adjustment Board — pay at the penalty rate is only permissible when an employe performs service in accordance with clear and unmistakable contractual terms.

We submit that the only pay due an employe who observes his birthday holiday or any of the other holidays, is eight hours at the pro rata rate.

(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 issue herein is whether or not Claimant, a regularly assigned Stationary Engineer at Paducah, Kentucky, with regularly assigned hours of 4 A. M. to 3 P. M. (8 hours straight time pay and 3 hours overtime pay) is entitled to be paid 8 hours pro rata pay plus the three hours overtime pay for his birthday-holiday.

Section 6(a) of Article II of the November 21, 1964 Agreement provides:

> "(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 Organization's position is that the intent of the words in said Agreement, namely, "he shall be given the day off with pay", is that an employe shall have his workday off on his birthday without any loss of compensation, and Claimant, therefore, is entitled to receive the same pay for his regular assignment on his birthday that he would have received had he worked or he is entitled to be made "whole" for the day; that the parties spelled out 8 hours pro rata pay for a birthday falling on a rest day of an employe's workweek, and, therefore, must have been aware of a number of positions of more than 8 hours' work so that the employes occupying such positions would be compensated for their regularly assigned hours for their birthday holiday, if, in such instance, it regularly amounted to more than 8 hours' work.

The Carrier's position is that birthday-holiday pay is the same as for any other holiday, which is limited to 8 hours pro-rata rate of pay, for which Claimant was paid; that overtime is never payable unless service is performed.

A close examination of said Section 6(a), controlling herein, reveals that it is silent as to what constitutes, in this instance, "day off with pay" for a regularly assigned employe whose birthday falls on a work day of his workweek. However, by reading further, we find in regard to an employe's birthday falling on other than a work day of a workweek that the parties herein provided for additional pay to an employe who is qualified by inserting the words, "in addition to any other pay to which he is otherwise entitled for that day, if any". We can, therefore, conclude that if the parties herein intended that "day off with pay" means pay that an employe would have earned had he worked, it would have been provided, as was done in regard to an employe's birthday falling on other than a work day of a workweek.

Therefore, inasmuch as the Agreement fails to specifically provide for "any additional pay" over the 8 hour pro rata rate, then we are compelled to decide that "day off with pay" in this instance means pay for 8 hours at the pro rata rate. Thus, we must deny this claim.

AWARD

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of SECOND DIVISION

ATTEST: Charles C. McCarthy
Executive Secretary

Dated at Chicago, Illinois, this 24th day of July, 1968.

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