Award No. 5585
Docket No. 5322
2-SLSW-CM-'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. 45, RAILWAY EMPLOYES' DEPARTMENT, AFL-CIO (Carmen)

ST. LOUIS SOUTHWESTERN RAILWAY COMPANY

DISPUTE: CLAIM OF EMPLOYES:

1. That under the rules of the current agreement, the Carrier improperly compensated Carman J. H. Von Tungeln, Pine Bluff, Arkansas, for his Birthday Holiday, June 13, 1965, while on his assigned vacation period, June 2 through 13, 1965.

2. That accordingly the Carrier be ordered to additionally compensate the aforesaid employe for an additional twelve hours for June 13, 1965.

EMPLOYES' STATEMENT OF FACTS: Carman J. H. Von Tungeln, hereinafter referred to as the Claimant, with seniority date as of June 30, 1956, was regularly employed as Car Inspector at Pine Bluff, Arkansas in the Gravity Yard of the St. Louis Southwestern Railway Co., hereinafter referred to as the Carrier. Claimant was regularly assigned on second shift, working 3:00 P. M. to 11:00 P. M., Wednesday through Sunday, with Monday and Tuesday rest days when his regular scheduled vacation started on June 2, running through June 13, 1965. His assignment was filled for the entire period by vacation relief employes, one of whom was Carman J. M. Russ, who filled the assignment from June 9 through June 13, and he worked the assignment on Claimant's birthday holiday which fell on the last day of the vacation period, June 13. Proof of this fact is furnished by affidavit signed by Carman Russ, attached hereto and identified as Exhibit No. 1. Claimant was only allowed eight hours at the pro rata rate for his Birthday Holiday and vacation day, and claim was subsequently made for an additional twelve hours for that date.

After discussion of the claim in the office of the General Car Foreman by General Chairman Lewis F. Wood, the Local Chairman's letter of July 30, 1965 was returned to Mr. Wood with the following Note:

"Per conversation. Herewith your copies returned. This add. 12 hrs for 6/13/65 being allowed on first period August 65 roll."

were car inspectors in the Pine Bluff train yard. Award 3866 held that work on a holiday under Rule 3 constituted casual or unassigned overtime. Since Section 6(a) provides that 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", and since Section 6(g) provides that existing rules and practices govern whether an employe works on a holiday and payment for work performed on a holiday, it is evident that the November 21, 1964 Agreement would not enlarge on the claimant's right to work on his birthday holiday. To the contrary, the express provisions that the employe shall be given the day off on his birthday holiday indicates he would have lesser right rather than greater right to work on his birthday as compared with other holidays. Clearly the conditions in Second Division Award 3866 are in point here and should govern in this case.

Carrier respectfully submits that the claim for an additional twelve hours' pay is not supported by the rules and should be denied.

(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 Car Inspector, is entitled to an additional day's pay for his birthday falling on a work day of his work week while he was on vacation, and which assignment was filled by another employe on Claimant's said birthday.

The Organization's position is that Carrier violated Article 7(a) of the Vacation Agreement of December 17, 1941 and its agreed to interpretation dated June 10, 1942, when it failed to pay Claimant the same amount he would have received had he remained at work; that if Claimant had remained at work he would have received 8 hours birthday holiday pay under Article II, Section 6(a) and (g) of the November 21, 1964 Agreement in addition to 8 hours at time and one-half for working the day; that the letter of Carrier's Superintendent of Mechanical Dept., T. W. Bellhouse, to all supervisors instructing them to pay an additional time and one-half pay to employes for a holiday which falls during said employe's vacation if (1) the position was regularly worked on the day on which the holiday falls; (2) the position has always been filled on the holiday; (3) the position was filled on the particular holiday in question is analogous to the situation in this instant claim and therefore the claim should be sustained.

Article 7(a) of the Vacation Agreement and its agreed interpretation provides:

"An employe having a regular assignment will be paid while on vacation the daily compensation paid by the carrier for such assignment.

This contemplates that an employe having a regular assignment will not be any better or worse off, while on vacation, as to the daily compensation paid by the Carrier than if he had remained at work on such assignment, this not to include casual or unassigned overtime or amounts received from other than the employing Carrier."

Section 6(a) and (g) of Article II of the November 21, 1964 Agreement reads:

"(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.

(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."

The Carrier contends that inasmuch as Section 6 of Article II of the November 21, 1964 Agreement gives Claimant the day off with pay, Claimant did not have an assignment to work on his birthday; that Rule 3–1 and 3–2 and the "Note" thereto give Carrier the right to determine the number of employes to be worked on any holiday and therefore such work performed on such a holiday is unassigned and comes within the exception in the agreed to interpretation of Article 7(a) of the Vacation Agreement.

We do not agree with the contention of the Organization that the last portion of Section 6(a) of Article II of the November 21, 1964 Agreement, namely: ". . . in addition to any other pay to which he is otherwise entitled for that day, if any", together with Superintendent T. W. Bellhouse's letter of April 19, 1965 containing the statements that such time and one-half payment shall be made to a vacationing employe for a holiday falling within his vacation period if the position regularly works and has always been filled and was filled on the particular holiday in question guarantees that when it becomes necessary to work a job on an employe's birthday holiday he will be given the opportunity to work his birthday at penalty rate. The latter part of said Section 6(a) of Article II of the November 21, 1964 Agreement, this Board has previously held, applies to a fact situation where an employe's birthday occurs on other than a work day of his work week. See Award 5230 (Weston). Therefore, inasmuch as Claimant's birthday fell on a work day of his work week while on vacation, this latter sentence of said Section 6(a) of Article II of the November 21, 1964 Agreement does not apply in this situation but rather the first part of said Section 6(a) applies herein, and it so provides that Claimant shall be given the day off with pay. It does not mean that Claimant is guaranteed that he will work that day and therefore the Organization's argument that Claimant shall be given the opportunity to work his birthday and receive an additional day's pay at penalty rate is without merit.

Further, Superintendent Bellhouse's letter dated April 19, 1965 refers to Section 3 of Article II of the November 21, 1964 Agreement involving 7 enumerated holidays, not including birthday holiday as herein and therefore said letter of April 19, 1965 cannot be applied as a proper guide to be used in support of the Organization's contention that said Superintendent Bellhouse's letter of April 19, 1965 together with Section 6(a) of Article II of the November 21, 1964 Agreement guarantees an additional day's pay to Claimant herein at penalty rate. On the contrary, the Organization submitted a letter of Superintendent Bellhouse dated March 11, 1965, addressed to General Chairman L. F. Wood in regard to birthday holiday, which specifically refers to his instructions given after reaching an understanding in conference with the General Chairman that: ". . . when it becomes necessary to work a job on an employe's birthday holiday the employe will be given the opportunity to work his birthday and will be paid an additional day at penalty rate **if he elects to do so.**" (Emphasis ours.) Here, Claimant did not elect to work his birthday and therefore the letter of April 19, 1965 of Superintendent Bellhouse is not applicable herein and thus not controlling in deciding the dispute.

This Board has held that Article II, Section 6 of the November 21, 1964 Agreement does not require that an extra day's pay be given for a birthday or other holiday that falls within the vacation week on a day that is a work day of the employe's regular work week. Award No. 5230. See also Award Nos. 5414, 5454 and 5468. With the conclusions reached in said Awards, we concur.

Therefore, for the aforesaid reasons, it is the opinion of this Board that the Agreement was not violated and the claim must 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 26th day of November, 1968.

LABOR MEMBERS' DISSENT TO AWARD NO. 5585

The majority asserts that:

"This Board has held that Article II, Section 6, of the November 21, 1964 Agreement does not require that an extra day's pay be given for a birthday or other holiday that falls within the vacation week on a day that is a work day of the employe's regular work week. Award 5230. See also Awards Nos. 5414, 5454 and 5468. With the conclusions reach in said Awards, we concur.

Therefore, for the aforesaid reasons, it is the opinion of this Board that the Agreement was not violated and the claim must be denied."

The record does not support such a conclusion.

Awards 5230, 5454 and 5468 referred to by the majority deal with employes whose birthday fell on one of their regular assigned vacation days, however their regular assignments were not filled on their birthdays — in most cases the shops were closed during the claimant's entire vacation.

The assignment of the claimant in Award 5585, including his birthday, was filled by a vacation relief employe. The claimant should have been paid under Article 7(a) of the Vacation Agreement and the interpretation agreed to by the participating carriers and participating labor organizations, signed at Chicago, Illinois, June 10, 1942. Article 7(a) provides:

> "An employe having a regular assignment will be paid while on vacation the daily compensation paid by the carrier for such assignment.
>
> This contemplates that an employe having a regular assignment will not be any better or worse off, while on vacation, as to the daily compensation paid by the carrier than if he had remained at work on such assignment, this not to include casual or unassigned overtime or amounts received from others than the employing carrier."

If the majority had applied the rule properly as they should have, the inescapable conclusion would have been a proper sustaining award. They did not, therefore the award is palpably erroneous and we dissent.

O. L. Wertz
D. S. Anderson
E. H. Wolfe

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