



Award No. 5760

Docket No. 5538

2-N&W-EW '69

NATIONAL RAILROAD ADJUSTMENT BOARD

SECOND DIVISION

The Second Division consisted of the regular members and in addition Referee A. Langley Coffey when award was rendered.

PARTIES TO DISPUTE:

**SYSTEM FEDERATION NO. 16, RAILWAY EMPLOYES'
DEPARTMENT, AFL - CIO
(ELECTRICAL WORKERS)**

NORFOLK & WESTERN RAILWAY COMPANY

DISPUTE: CLAIM OF EMPLOYES:

1. That the Norfolk and Western Railway Company violated the current agreement when it failed and refused to properly compensate Electrician R. A. Babcock for work performed on his birthday holiday, February 14, 1966.
2. That accordingly, the Norfolk and Western Railway Company be ordered to additionally compensate Electrician R. A. Babcock in the amount of eight (8) hours at time and one-half rate of pay for work he performed on his birthday holiday.

EMPLOYES' STATEMENT OF FACTS: Electrician R. A. Babcock, hereinafter referred to as the claimant, is regularly employed as such at the Diesel Repair Facility at Bellevue, Ohio located on the former New York, Chicago and St. Louis Railroad, which has since been merged into the Norfolk and Western Railway Company, hereinafter referred to as the Carrier, with a seniority date of June 22, 1961.

On February 14, 1966, which was Claimant's birthday and also his rest day, he was requested to and did work eight (8) hours on this date. The Carrier compensated the Claimant in the amount of eight (8) hours at time and one-half rate for service performed on his rest day as provided under Rule 5 of the current agreement, and eight (8) hours pay at straight time rate for his birthday holiday as provided under Article 2, Section 6(a) of the Mediation Agreement of February 4, 1965.

The Carrier refused to additionally compensate the Claimant in the amount of eight (8) hours at time and one-half rate of pay for work performed on his birthday holiday as provided for, under Article 2, Section 6(g) of the Mediation Agreement of February 4, 1965.

This dispute has been handled with all officers of the Carrier up to and including the highest officer designated to handle such matters and all have declined to make a satisfactory settlement.

Throughout all of their testimony in each and every one of these Board hearings, the Employees have stated that they were not asking for anything more than to permit their people "to live as other men" and that they should have holidays off without loss of pay. They have emphasized that their requests were not designed as wage increase requests, and they have agreed that there should not be any pyramiding of one overtime payment upon another.

In addition to all of the Emergency Board proceedings mentioned above as to holidays, the question of overtime payments was dealt with in the Forty-Hour Week case, heard by Emergency Board No. 66. Agreement of March 19, 1949, which was patterned upon the Recommendations of that Emergency Board, stated in Article II, Section 3(a): "There shall be no overtime on overtime; * * *."

Thus, we find that in all previous proceedings the impartial Boards have always followed and recommended the principle that there should be no pyramiding of one penalty upon another. In his testimony before Emergency Board No. 130, as quoted above, Mr. Leighty admitted that there was no double penalty involved for work on a rest day which also happened to be a holiday.

This Carrier now has approximately 6000 Shop Craft employees. It is aware of only two (2) claims ever having been presented asking for two time and one-half payments for one act of service. One of the claims is herein under consideration and the other was presented at approximately the same time and is presently being considered by your Board. Carrier states that no such payment has been made to its Shop Craft employees in at least the last thirty years and perhaps never, and other than the two recent claims mentioned, the employees have not requested such payment. Certainly, this long history reflects the parties understanding of the rules.

For reasons set forth herein, there is no basis for this claim, and it should, therefore, 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.

Claimant herein was employed and regularly assigned as Electrician on February 14, 1966 at Carrier's Diesel Repair Facility, Bellevue, Ohio, 11:00 P.M. to 7:00 A.M., Wednesday through Sunday, rest days Monday and Tuesday.

He celebrates his birthday on February 14 which is a holiday for him in terms of Article II, Section 6, Mediation Agreement of February 4, 1965. (Cases A-7127, A-7128, IAM, SMWIA and IBEW.)

He stood to celebrate his February 14, 1966, birthday by the observance of Monday as the holiday which, as a scheduled rest day, was "other than a work day of the workweek of the individual employee." He worked that day and was paid the punitive rate of time and one-half. This payment is not in dispute. Additionally he received "eight (8) hours pay at the pro rata rate of the position to which assigned," as holiday premium. This is in dispute. He claims "eight (8) hours at the time and one-half rate of pay for work performed on his birthday-holiday."

The language of Article II, Section 6(a), Mediation Agreement, is found to be abundantly clear for expressing the real intent of the contracting parties. Nevertheless, we have been called upon to examine and review prior awards of this Division and the Third Division in the matter of holiday premium pay. We distinguish the awards of the Third Division on the basis of the separation of powers, authority and jurisdiction as conferred by the Railway Labor Act, as amended, over class and craft employments which differ between Divisions.

The awards of this Division preponderate in favor of a separate day at the time and one-half rate of pay for the same service performed on the individual employee's rest day of his regular assignment which was also a legal holiday.

But, the birthday-holiday is special and is peculiarly personal to the individual employee which is to say that the birthday-holiday is not to be celebrated by nor shared with other employees in common as are the legal holidays recognized by the terms of Rule 5 on the property. Therefore, we think a distinction can be drawn between a legal-holiday and a birthday-holiday, and that the contracting parties had some such distinction in mind when they wrote a new rule in such great detail for giving special recognition to a birthday-holiday independent of the observance of a recognized legal holiday and under a variety of circumstances not covered by existing rules for recognition and observances of legal holidays.

Awards 5331, 5332, 5401, 5402, 5543 are among those which do sustain claims for a separate day at the time and one-half rate of pay for the same service performed on a rest day which was also a birthday-holiday.

Awards 5331, 5332 follow Award 5217, same Referee. Award 5217 sustained the claim for a separate day at the time and one-half rate of pay for working on a rest day which was also a legal holiday, Thursday, November 26, 1964 Thanksgiving Day. Third Division awards are cited and followed in principle in Award 5217. The Mediation Agreement with which we are concerned was not at issue before the Third Division; nor was it at issue as the basis for claim sustained by Award 5217, this Division.

Award 5401 cites Awards 5331, 5332 with apparent approval and as precedent. Award 5402, same Referee, follows his Award 5401.

Award 5543 cites Awards 5331, 5332, 5401, 5402 with apparent approval and as precedent.

Award 5598 sustains the claim of an employee for the time and one-half rate of pay for working on a birthday-holiday during his vacation and is not in point.

Our attention also has been invited to Second Division Awards 5218 (Firemen & Oilers), 5259 (Carmen), 5317 (Firemen & Oilers), 5318 (Firemen & Oilers), 5319 (Machinists), 5497 (Sheet Metal Workers), all denying claims under the applicable Agreements account the employee worked on a legal holiday which was a rest day of his regular assignment as well as a legal holiday. Award 5452 (Carmen) denied a claim for a rest day-birthday made under Article II, Section 6(a) and (g) of the Agreement here in dispute.

Article II, Section 6(g) that applies to existing rules and practices thereunder governing whether an employee works on a holiday and the payment for work performed upon holidays is not found to be pertinent. The parties to the dispute only confuse the issue by the reference made thereto in their separate submissions.

On the basis of Article II, Section 6(a), supra, and the entire record, we find that Claimant was properly paid and has no cause to grieve. He received the time and one-half punitive rate for his rest day as the "other pay to which he was otherwise entitled for that day, if any." Provision is made in Article II, Section 6(a) for an additional day's pay at the "pro rata" rate in addition, not an additional day's pay at the time and one-half rate as claimed.

A W A R D

Claim (1) denied;

Claim (2) denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Second Division

ATTEST: Charles C. McCarthy
Executive Secretary

Dated at Chicago, Illinois, this 30th day of June, 1969.