



Award No. 5764
Docket No. 5597
2-SP-(PL)-CM '69

NATIONAL RAILROAD ADJUSTMENT BOARD
SECOND DIVISION

The Second Division consisted of the regular members and in addition Referee John H. Dorsey when award was rendered.

PARTIES TO DISPUTE:

**SYSTEM FEDERATION NO. 114, RAILWAY EMPLOYEES'
DEPARTMENT, AFL-CIO (Carmen)**

SOUTHERN PACIFIC COMPANY (Pacific Lines)

DISPUTE: CLAIM OF EMPLOYEES:

1. That the Southern Pacific Company violated Article II, Section 6, of the November 21, 1964 Agreement.
2. That accordingly, the Southern Pacific Company be ordered to compensate Freight Car Painter J. E. Varnell eight (8) hours at the straight-time rate of pay for his birthday, November 22, 1966, while on vacation, which was denied.

EMPLOYEES' STATEMENT OF FACTS: Freight Car Painter J. E. Varnell, hereinafter referred to as the Claimant, was regularly employed by the Southern Pacific Company (Pacific Lines), hereinafter referred to as Carrier, as such at Los Angeles Car Repair Plant, Los Angeles, California, with workweek Monday through Friday, rest days of Saturday and Sunday and holidays off.

Claimant took, with Management consent, an instalment of his 1966 vacation, November 21 through November 25, 1966, both dates inclusive, returning to service Monday, November 28, 1966. Claimant's birthday was Tuesday, November 22, 1966, a vacation day of his vacation period, for which he was paid a day's vacation pay; however, Carrier failed to allow him birthday-holiday compensation for the day, Tuesday, November 22nd.

Claim was filed with proper officer of the Carrier under date of January 7, 1967, contending that Claimant was entitled to eight (8) hours' birthday-holiday compensation for his birthday, November 22nd, in addition to vacation pay received for that day, and subsequently handled up to and including the highest officer of Carrier designated to handle such claims, all of whom declined to make satisfactory adjustment.

The Agreement effective April 16, 1942, as subsequently amended, particularly by the Agreement of November 21, 1964, is controlling.

POSITION OF EMPLOYEES: It is respectfully submitted that the Carrier erred when it failed and refused to allow Claimant eight (8) hours' birthday-holiday compensation for his birthday, November 22, 1966, in addition to vacation pay allowed for the day.

“. . . he shall receive eight hours' pay at the pro rata rate of position to which assigned in addition to any other pay to which he is otherwise entitled for that day, if any." (Emphasis supplied)

As stated above, the quoted portion of the latter rule is not applicable in the instant case since (a) the birthday involved did not fall on other than a workday of the claimant's workweek, and (b) the claimant would not have been entitled to any other pay for that day under any other agreement, practice or understanding in effect on this property. Petitioner's position with respect to the above-quoted portion of Section 6(a), Article II, has been specifically rejected by Award 5230 of this Division quoted above—see first two paragraphs immediately following quotation of Section 6 of Article II in this Division's FINDINGS in that Award quoted above.

Under date of May 17, 1966, prior to submitting the instant claim to the Board, the Organization represented by Petitioner, jointly with all other affiliated Organizations of System Federation No. 114, gave notice under the Railway Labor Act, as amended, of their desire to supplement existing agreements in accordance with the proposals accompanying said letter. One of the proposals, concerning the identical factors involved in this Docket, reads in pertinent part as follows:

"Section 2. Section 3 of Article 1 of the Agreement of August 21, 1954, is hereby further amended effective January 1, 1967, to read as follows:

"When any of the recognized holidays, as defined in Article III of this notice, occurs during an employe's vacation period, the following shall apply:

"(a) If the holiday falls on a work day of the employe's job assignment in the case of an employe having a job assignment, or on a work day of the position on which the employe last worked before the holiday in the case of an employe not having a job assignment, then:

"(1) If such employe is not assigned in any manner to work on the holiday, the holiday shall not be considered as a vacation day of the period for which the employe is entitled to vacation, such vacation period shall be extended accordingly, and the employe shall be entitled to his holiday pay for such day."

(Article III, referred to above, includes "Employe's Birthday".)

The proposal quoted above sought to secure the same additional pay for claimant that Petitioner seeks in the instant claim, proving beyond any doubt that existing Agreement rules do not provide for said payment and that Petitioner is fully aware of the fact. Any other determination places Petitioner in the pointless position of seeking something already possessed.

CONCLUSION: Carrier asserts the instant claim is entirely lacking in agreement or other support and requests that it 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's birthday was Tuesday, November 22, 1966, a vacation day of his vacation period. For that day he was paid a day's vacation pay. The Claim is that Carrier violated Article II of the November 21, 1964 Agreement by failure and refusal to pay Claimant an additional day's pay as birthday-holiday compensation.

The issue has been before this Division many times and conflicting Awards have issued—the history of which is sketched in our recent Award Nos. 5751 through 5757, June 30, 1969. (NOTE: The cited Awards interpret and apply Article II of the February 4, 1965 Agreement which is identical to Article II of the November 21, 1964 Agreement.)

In our consideration of the instant case we have analytically reviewed the prior Awards. We have concluded that the instant case should be decided on a determination as to whether the most recent cases—Award Nos. 5751 through 5757—are palpably wrong, instead of treating the issue as though it was before us *de novo*—a procedure which would compound the existing conflicts which it appears must ultimately be resolved by the parties through collective bargaining.

We find, in the most recent cases: no error in legal principles relied on or logic of their application; and, the facts therein, as here, are undisputed. We, therefore, will sustain the Claim.

A W A R D

Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Second Division

ATTEST: Charles C. McCarthy
Executive Secretary

Dated at Chicago, Illinois, this 10th day of September, 1969.

DISSENT OF CARRIER MEMBERS TO AWARDS 5764 AND 5765

The findings merely note, without analysis, that there are conflicting awards on this subject and then embrace the result in recent Awards 5751 through 5757.

In point of fact, ninety-two awards had been rendered by eight different Referees denying similar claims; twenty-nine decisions by three Referees had resulted in sustaining awards.

In such circumstances, the weight of authority is certainly substantial. The Referee did not merely choose between balanced lines of authority; he

opted for what can only be characterized as the distinctly minority view of the subject.

The majority view is not invariably right; but it appears to us that when a Referee departs from the weight of authority he has an obligation to explain his reasoning in so doing. He has not done so here; and the sole awards he relied on specifically disclaimed any effort to even comment on the prior Awards. (See Award 5751)

The findings leave the impression that only Awards 5751 through 5757 were examined; that the prior awards representing the serious and substantial views of a number of Referees were ignored; and merely the awards most recent in time were casually followed. It is difficult to see how this approach will avoid the compounding of "existing conflicts", the professed purpose of the Referee's decision.

The Awards are contrary to the great weight of authority on the subject and we dissent.

/s/ W. R. HARRIS
W. R. Harris

/s/ H. S. TANSLEY
H. S. Tansley

/s/ H. K. HAGERMAN
H. K. Hagerman

/s/ H.F.M. BRAIDWOOD
H. F. M. Braidwood

/s/ P. R. HUMPHREYS
P. R. Humphreys