



Award Number 5877

Docket Number 5628

2-GN-CM-'70

NATIONAL RAILROAD ADJUSTMENT BOARD

SECOND DIVISION

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

PARTIES TO DISPUTE:

**SYSTEM FEDERATION NO. 101, RAILWAY EMPLOYEES'
DEPARTMENT, AFL-CIO (Carmen)**

GREAT NORTHERN RAILWAY COMPANY

DISPUTE: CLAIM OF EMPLOYEES:

1. That under the current Agreement, Carrier refused to allow Carman Francis Biver the right to work his rest day October 29, 1966.
2. That the Carrier violated the controlling Agreement when they filled the employee's regular assignment and denied him the right to work his birthday-holiday October 29, 1966.
3. That accordingly, Carrier be ordered to compensate Carman Francis Biver in the amount of eight (8) hours at the time and one-half rate account of not allowed to work his rest day; and eight (8) hours at the time and one-half rate account of not allowed to work on his birthday-holiday October 29, 1966.

EMPLOYEES' STATEMENT OF FACTS: Car Inspector Francis Biver, hereinafter referred to as the Claimant, is a regularly assigned employee at the Superior, Wisconsin Mechanical facilities of the Great Northern Railway Company, hereinafter referred to as the Carrier.

Claimant has a regular assignment on the 4:00 P.M. to 12:00 Midnight shift, with Saturday and Sunday as rest days.

Saturday, October 29, 1966, was not only the claimant's birthday-holiday, a holiday recognized by the applicable Agreement, but was also the Claimant's regularly assigned rest day. He was compensated eight hours at the pro rata rate for his birthday. On the afternoon of October 29, 1966 the Car Foreman called the Claimant at his home and told him to report for work on his job and on his regular shift. Later, before claimant had left home, the Car Foreman called again and told Claimant not to report for work that this day being the Claimant's birthday he should not report to work. The Car Foreman then called employes from the preceding shift to report for work and not being successful in getting an employee from this shift for overtime, went to the following shift and was successful in getting an employee to fill the assignment from this overtime list.

On November 1, 1966, a claim was filed on behalf of the Claimant requesting eight (8) hours pay at time and one-half rate account Carrier had

7. On the contrary, Rule 16 specifically provides that "Service performed on employee's assigned rest days and . . . legal holidays . . . shall be paid for at the rate of time and one-half." (Emphasis supplied)

8. The Organization's representatives have admitted in testimony before various Presidential Emergency Boards that an employee working on a holiday-rest days paid only once at the time and one-half rate.

9. The several unsuccessful national negotiations engaged in by the Organization to obtain penalty payments greater than the time and one-half rate for working on a holiday-rest day is strong evidence that the existing rules and agreements contain no penalty such as claimed in this case.

10. Employees represented by the petitioning Organization on this property have not received the damages rate demanded in this case even though the schedule rule in question has existed in its present form for many years. This is illustrated by the overwhelming past practice evidence attached hereto as Carrier's Exhibits 8, 9, 9A, 10, 11, 12, 13, 14, 17, 18, 19 and 20.

11. Second Division Awards 5317, 5318 and 5319 have already specifically repudiated the same basic contention for damages advanced by the petitioning organization in this case.

12. Additionally, the various divisions of the National Railroad Adjustment Board have consistently rejected claims demanding duplicate payments and penalties for a single period of service.

For the foregoing reasons, the Carrier respectfully requests that the claim of the employees be denied.

All of the evidence and data contained herein has been presented to the duly authorized representative of the Organization.

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 respectfully 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 was regularly assigned to the 4 P.M.—Midnight shift with Saturdays and Sundays off. Saturday, October 29, 1966, was his rest day and his birthday-holiday. A Carman was needed that day on the 4 P.M. shift. Claimant was first out on the overtime list on that shift but was not used. Instead another Carman from the following shift (Midnight to 8 A.M.) was called and used.

The claim is based upon the premise that the Claimant had a contract right to perform the service here involved on his combined rest day and birthday holiday; that having been denied that right he is entitled to compensation in the amount of eight hours at the time and one-half rate for the rest day and another eight hours at that rate for the birthday holiday.

Applicable rules of that basic Agreement (Rule 16 and Memo. No. 29) and Article II of the November 21, 1964 Agreement read as follows:

"Rule 16. Overtime on REST DAYS and HOLIDAYS.

"Service performed on an employee's assigned rest days and the following legal holidays, namely: New Year's Day, Washington's Birthday, Decoration Day, Fourth of July, Labor Day, Thanksgiving Day and Christmas shall be paid for at the rate of time and one half."

"A. When the same number of employees are worked on holidays as are assigned to work that same day of each week, the regularly assigned men will work the holidays (Observed by State, Nation or proclamation) falling on that day of the week. In all cases of reduced holiday forces, employes will be called on the basis of being first out on the established call list of the shift involved.

B. Employes for overtime service will be obtained first by calling the employes who are on rest days **on the shift involved**. Additional employes, if needed, will be called first from the overtime list of the preceding shift; and if still more employes are needed, they will be called from the overtime list of the following shift." (Emphasis ours)

"Article II—Holidays.

Section 6 (a):

(a) For regularly assigned employes, if an employes birthday falls on a work day of the workweek of the individual employee he shall be given the day off with pay; if an employee's birthday falls on other than a work day of the workweek of the individual employee, **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.**"

and:

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

From the foregoing it is clear that (a) the rate of pay for work performed on a holiday or a rest day is time and one-half; (b) when the work force is not reduced an employe regularly assigned to work the day upon which the holiday falls has a preferential right to work it; (c) employes on the overtime list (available for overtime service) who are on the rest days of the shift involved have a preferential right to be called for such service; (d) when the birthday-holiday of a regularly assigned employe falls on a day other than a work day he is entitled to eight hours pay at the pro rata rate in addition to such other compensation, if any, to which he is entitled for that day; and (e) if an employe is permitted or required to work on a holiday his compensation will be governed by existing rules and practices on the property.

The record of the handling of this dispute on the property shows that the Employes alleged as one of the bases of the claim that the Carrier violated the agreement because it failed to call the Claimant. In its Submission to the Board, however, the Employes alleged for the first time that the Claimant was called on October 29, 1966, but that the call was rescinded when Carrier realized it was his birthday. Under established rules of procedure, the Board may not properly consider the latter allegation and we, therefore, decline to do so.

For the purpose of resolving this dispute, however, the foregoing is not material because the substantive issue here is whether or not Claimant had a contract right to be called and used to perform the service on his rest day. We find that he did have that right for reasons which follow.

Memorandum 29, paragraph B is controlling on the facts. Claimant was on one of his rest days of the shift involved (4 P.M.—Midnight) on October 29, 1966, and was on the overtime list. Accordingly, he had a preferential right to work that day vis-a-vis the employe who was called from the following shift. Whatever may have been the practice at the point, as alleged by the Carrier, it may not be held to prevail in the face of the clear provisions of the rule. And we are not persuaded of the validity of Carrier's argument that Memorandum 29 (B) is subject to the general provisions of Rule 19 (b) governing equalization of overtime. This dispute does not involve questions of overtime equalization, as such. Rule 19, therefore, is not applicable here. Accordingly, we find that the Claimant's contract right to be called and used to perform the involved service on his rest day was violated.

The question remaining is the matter of proper compensation. Under the make whole doctrine of the common law the Claimant is entitled to be paid what he would have earned had he been called and used on his rest day as provided by the basic agreement (Rule 16). That means a payment to him of eight hours at the time and one-half rate. He was paid eight hours at the pro rata rate as compensation for the holiday-birthday. Whether he is entitled to an additional eight hours at the time and one-half rate, as claimed, for not having been permitted to earn that amount by working his birthday must be decided in the light of Section 6 (g) of the 1964 Mediation Agreement. Insofar as pertinent here that rule means that existing practices on this particular property governing payment for work performed on holidays shall apply to birthdays. There is concrete and uncontroverted evidence in this record that the parties hereto (and other Shop Craft organizations) have agreed that for service performed on a holiday which is also the employe's rest day, only eight hours at the time and one-half rate is payable. The evidence consists of more than 1000 instances in the period 1964-1966 where claims filed with this Carrier by the Shop Craft Organization, including the Carmen, for double time and one-half as a result of service performed on a holiday-rest day were withdrawn or settled on the basis of a single time and one-half payment of the employes involved. As has been said, Section 6 (g) applies the same rules or practices to birthday-holidays as it does to the other holidays listed in Article II of the 1964 Mediation Agreement. Accordingly, the practice followed on this particular property as demonstrated by the aforesaid evidence, is applicable and controlling here. Therefore, Claimant is not entitled to the additional compensation claimed for work which he was not permitted to perform on his birthday-holiday.

In view of the foregoing, the Board finds Claimant is entitled to a single payment of eight hours at the time and one-half rate in addition to compensation heretofore paid him.

A W A R D

Claim sustained to extent shown in Findings.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Second Division

ATTEST: E. A. Killeen
Executive Secretary

Dated at Chicago, Illinois, this 9th day of April 1970.