Award No. 5898
Docket No. 5789
2-RDG-CM-'70

NATIONAL RAILROAD ADJUSTMENT BOARD

SECOND DIVISION

The Second Division consisted of the regular members and in addition Referee Harold M. Gilden when award was rendered.

PARTIES TO DISPUTE:

SYSTEM FEDERATION No. 109, RAILWAY EMPLOYES' DEPARTMENT, A.F.L.-C.I.O. (CARMEN)

READING COMPANY

DISPUTE: CLAIM OF EMPLOYES:

1. That the Reading Company violated Article II, Section 6, paragraph (a) of the November 21, 1964 Agreement.

2. That accordingly, the Reading Company compensate Car Inspector C. Naugle (8) hours at the straight time rate of pay, for his birthday while on vacation, which was denied.

EMPLOYES' STATEMENT OF FACTS: Car Inspector Claude D. Naugle, hereinafter referred to as claimant was regularly employed by the Reading Company, hereinafter referred to as carrier, at Rutherford Yards, Pennsylvania, with workweek Sunday thru Thursday, rest days Friday and Saturday.

Claimant's birthday holiday occurred while he was on vacation November 19, 1967 for which he was paid a day's vacation pay. However, carrier failed to allow him birthday holiday compensation for the day.

Claim for the additional (8) hours pay was filed with the proper officers of the carrier up to and including the highest officer so designated to handle such claims, all of whom declined to make satisfactory adjustment.

The agreement effective January 16, 1940 as subsequently amended particularly by the agreement of November 21, 1964 is controlling.

POSITION OF EMPLOYES: It is respectfully submitted that the carrier erred when it failed and refused to allow claimant (8) hours birthday holiday pay for his birthday November 19, 1967, in addition to vacation pay allowed for the day.

Article II of the November 21, 1964 agreement, reads in pertinent part as follows:

"ARTICLE II—HOLIDAYS

Article II of the Agreement of August 21, 1954, as amended by the Agreement of August 19, 1960, insofar as applicable to the employees covered

ered by the same labor agreement would not be afforded the benefit of equal treatment and equal protection under the law. Moreover, general adherence to previous rulings, except where deviation therefrom is warranted on the basis of the above indicated exceptions, signifies that our rulings are based on reason and intended to exclude further litigation. . . ."

Carrier submits that there is both a theoretical and practical imperative warranting a dismissal of the instant claim. It is obvious from a review of the record that the instant claim was denied expressly upon the authority of **Award 5230**, which was a property award. If carrier can be compelled to adhere to the demands of a sustaining award, then surely it must be allowed a similar privilege of following the principles and factual content of a denial award on the property. Referee Weston's Award is as follows:

"Dispute: Claim of Employee:

1—That the Reading Company violated Article II, Paragraph (a), of the November 21, 1964 Agreement.

2—That accordingly the Reading Company compensate Carman James McCauley, eight (8) hours at the straight time rate of pay or an additional day off with pay, for his birthday while on vacation, which was denied.

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 disputed involved herein.

Parties to said dispute were given due notice of hearing thereon.

Claimant, a car packer with a Wednesday through Saturday workweek, took January 13 through 17 as his 1965 vacation. He received his regular pay for each of these vacation days. The gist of the present claim is that, under Article II Section 6 of the November 21, 1964 Agreement, he is entitled to an additional day's pay for Thursday, January 14, since his birthday fell on a vacation day. Article II Section 6 reads as follows in pertinent part:

'ARTICLE II—HOLIDAYS

Article II of the Agreement of August 21, 1954, as amended by the Agreement of August 19, 1960, insofar as applicable to the employes covered by this Agreement is hereby further amended by the addition of the following Section 6:

" 'Section 6. Subject to the qualifying requirements set forth below, effective with the calendar year 1965, each hourly, daily and weekly rated employee shall receive one additional day off with pay, or an additional day's pay, on each such employee's birthday, as hereafter provided.

(a) For regularly assigned employees, if an employee's 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.

(c) A regularly assigned employee shall qualify for the additional day off or pay in lieu thereof if compensation paid him by the carrier is credited to the work days immediately preceding and following his birthday, or if employee is not assigned to work but is available for service on such days. If the employee's birthday falls on the last day of a regularly assigned employee's workweek, the first work day following his rest days shall be considered the work day immediately following. If the employee's birthday falls on the first work day of his workweek, the last work day of the preceding workweek shall be considered the work day immediately preceding his birthday. (f) If an employee's birthday falls on one of the seven holidays named in Article III of the Agreement of August 19, 1960, he may, by giving reasonable notice to his supervisor, have the following day or the day immediately preceding the first day during which he is not scheduled to work following such holiday considered as his birthday for the purposes of this Section.'

Article II Section 6(a) expressly provides for two separate and distinct situations. The first concerns a birthday that occurs on a work day of the employe's workweek; Claimant's case clearly comes within that category for his birthday fell on Thursday, a work day of his assigned workweek. As to the first situation, Section 6(a) stipulates that the employe will be given the day off with pay, one of the two alternatives mentioned in the first sentence of Section 6.

The second situation is where an employe's birthday occurs on other than a work day of his workweek; there he is entitled to "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 day, if any." From an examination of the language, punctuation and construction of Section 6(a), it is entirely clear that the clause just quoted does not apply to the first situation.

There is no sound basis for treating a birthday that falls on a work day of the employe's assigned workweek differently than any of the seven other recognized holidays insofar as the question at issue is concerned. "This is true because of the language of Article II Section 6 and its history which relates back to the National Agreements of August 31, 1954 and August 19, 1960. Article II , Section 6, added an eighth contractually recognized holiday pursuant to the recommendation of October 20, 1964 of Presidential Emergency Boards 161, 162 and 163 that an additional holiday be agreed upon to conform to "prevailing industry practice". The Emergency Board left it to the parties to decide which holiday should be added. The parties to the November 21, 1964 Agreement then agreed that the eighth holiday would be the employe's birthday.

Nowhere in Article II Section 6 is there a requirement 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 workweek. The absence of such a provision from the 1964 Agreement is particularly significant, for by the time it had been negotiated, prior awards, interpretations and Emergency Board reports had made it abundently

clear that in the railroad industry employes will not receive additional pay when a holiday occurs during their vacation on what ordinarily would be a work day. See Second Division Awards 2277, 2302, 3477, 3518 and 3557 as well as Awards 9640 and 9641 of the third Division.

Presidential Emergency Board No. 106 considered the question in 1954 and expressly recommended "that the vacation period not be increased by allowing additional vacation days where holidays fall in the base vacation period and that when a holiday falls on what would have been a work day of the employe's regularly assigned workweek, such holiday shall be considered as a work day of the period for which he is entitled to vacation".

In 1960 the question again arose, this time before Presidential Emergency Board 130. That Board had this to say:

> 'Holiday pay for these employees, first established after the report of Emergency Board No. 106, was premised on a doctrine of maintenance of take-home pay. Thus, unlike many employees in other industries that also recognize a fixed number of holiday,s nonoperating employees in the railroad industry are paid only for those holidays which fall on a scheduled work day of the work week. This doctrine explains why employees on vacation are not entitled to additional pay for holidays falling during a vacation period, since their vacation pay already covers the day on which the holiday occurs. The Organization's proposal for additional pay for holidays falling during a vacation is inconsistent with the doctrine of maintenance of take-home pay.'

In 1964, just prior to the consummation of the present Agreement, Presidential Emergency Boards 161, 162 and 163 considered the question again, reaffirmed the "maintenance of take-home pay" concept and observed that both Emergency Boards 106 and 130 had "concluded that it would be inconsistent with the maintenance of take-home pay theory of paid vacations to provide additional pay on vacation for holidays falling during vacation." Boards 161, 162 and 163 then decided that "there have been no significant developments with respect to holidays during vacations which justify any further recommendations by the Board at this time."

In view of the parties' failure to deal specifically and unambiguously with the subject in the 1964 Agreement in the face of the compelling history of denial awards and Emergency Board opinions referred to above, it is our conclusion that this claim for additional payment for a birthday-holiday that fell on a Thursday, one of Claimant's work days must be denied. In reaching this decision, we carefully distinguish the present case from the situation where a birthday occurs on other than a work day of an assigned workweek.

AWARD

Claim denied."

(See also Second Division Awards 5230, 5231, 5232, 5328, 5329, 5330, 5233, 5310.)

III THAT THE CLAIM OF THE ORGANIZATION IS WHOLLY LACKING IN MERIT AND IS WITHOUT CONTRACTUAL FOUNDATION

The fortuitous occurrence of a holiday during an employe's vacation has engendered continuous controversy. Carrier submits that the emergent principles of the previous disputes and the instant language of the November 21, 1964 agreement compel the denial of the brotherhood's claim.

ARTICLE I—VACATIONS—Section 3 of the August 21, 1954 Agreement provides:

> "Section 3. When, during an employee's vacation period, any of the seven recognized holidays (New Year's Day, Washington's Birthday, Decoration Day, Fourth of July, Labor Day, Thanksgiving Day and Christmas) or any day which by agreement has been substituted or is observed in place of any of the seven holidays enumerated above, falls on what would be a work day of an employee's regularly assigned work week, such day shall be considered as a work day of the period for which the employee is entitled to vacation."

The August 21, 1954 agreement was adopted pursuant to the recommendations of Presidential Emergency Board No. 106 which specifically considered the peculiarities of the vacation-holiday issue as applied to the rail industry. The board expounded the "maintenance of take-home pay" theory of vacation-holiday remuneration:

> "The Board notes at this point that under Issue 7 of the vacation proposal, the Organization urge that vacations be extended 1 day for each holiday occurring within the vacation period. As indicated in connection with Issue 7 the Board is recommending against such a plan . . ." (Page 34)
>
> "The fourth of the numbered sections of the Organization's proposals concerning vacations follows:
>
> 4. If a paid holiday shall fall during the employe's vacation period he shall be granted 1 additional day of vacation for each such holiday.
>
> Issue 7 proposes to increase the vacation period by allowing additional vacation days where holidays fall in the base vacation period. (Issue 1(b) in Carrier's analysis)
>
> The proposal to allow an additional vacation day where a holiday falls in the base vacation period cannot be considered without reference to the Board's recommendations concerning paid holidays. As indicated under 'Holidays' the Board recommends payment for certain holidays when they fall on a work day of an assigned work week. The Board bases such recommendation primarily on the maintenance of take-home pay.
>
> Assuming the adoption of its recommendations on paid holidays, the Board feels that it is not appropriate to recommend extension of the vacation period when a holiday falls in the base vacation period. The Board reaches this conclusion with respect to both holidays falling on a work day and holidays falling on a rest day during the vacation period in question.
>
> "The Board proposes that when, during the vacation of an employe, a holiday falls on what would have been a work day of his regularly assigned work week, he shall not be entitled to an additional vacation day

because thereof, but such holiday shall be considered as a work day of the period for which he is entitled to vacation. When, during the vacation of an employe, a holiday falls on what would have been a rest day he shall not be entitled to an additional vacation day because thereof." (Pages 35-36)

"Issue 7.—Because of the reasons set forth in our discussion, including the interrelation of this issue to other issues, the Board recommends that the vacation period not be increased by allowing additional vacation days where holidays fall in the base vacation period and that when a holiday falls on what would have been a work day of the employe's regularly assigned workweek, such holiday shall be considered as a workday of the period for which he is entitled to vacation." (Page 51)

Consistent with the Emergency Board's "maintenance of take-home pay theory" and the language of the August 21, 1954 Agreement, the decisions of the National Railroad Adjustment Board denied claims for extra compensation when a holiday arose during an employe's vacation. (Third Division Awards 9640, 9641; see also Third Division Awards 10593, 10940, 11642, 12335; Second Division Award 2277). Award 9640 concludes:

"Claimant's vacation period included a holiday and under Section 3 of Article I of the August 21, 1954 National Agreement, the holiday was properly considered a workday of the period for which Claimant was entitled to vacation. Accordingly, the claim must be denied."

The "maintenance of take-home pay" theory of vacation-holiday compensation was, however, further refined by the various divisions of the National Railroad Adjustment Board. (See Third Division Awards 11976, 11827, 11113, 10550; Second Division Award 2566; S.B.A. No. 239, BRC v. Missouri Pacific, Awards 4, 23; S.B.A. No. 306, ORT v. Missouri Pacific, Awards 4, 5; and S.B.A. No. 170 BRC v. Illinois Central, Award 63.) These awards concluded that the "maintenance of take-home pay theory" supported the payment of pro rata vacation day and punitive holiday pay if a holiday occurred during an employe's vacation period. The qualifying criteria for such remuneration is iterated in Third Division Award 13278; namely, (1) if the position regularly works 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 for which claim is made.

The recommendations of Presidential Emergency Board 130, prior to the adoption of the August 19, 1960 National Mediation agreement, reveal that the above interpretation of the August 21, 1954 agreement is aberrant to its concept of "maintenance of take-home pay":

"**Holidays During Vacation Period.** The inter-industry comparison with respect to holidays occurring during a vacation period is not a valuable guide for nonoperating railroad employees. **Holiday pay for these employees, first established after the the report of Emergency Board No. 106, was premised on a doctrine of maintenance of take-home pay. Thus, unlike many employees in other industries that also recognize a fixed number of holidays, nonoperating employees in the railroad industry are paid only for those holidays which fall on a scheduled work day of the work week. This doctrine explains why employees on vacation are not entitled to additional pay for holidays falling during the vacation period, since their vacation pay already covers the day on which the holiday occurs. The Organizations' proposal for additional pay for holidays falling during a vacation is inconsistent with the doctrine of maintenance**

of take-home pay. The Board believes that this doctrine should not be abandoned with respect to only one feature of holiday pay; any such change would affect all aspects of holiday pay equally. Accordingly, although the Board has grave doubts as to the wisdom of this doctrine, it recommends no change in the existing rules with respect to payment for holidays during a vacation period. (Emphasis added, Pages 28-29 of the Report)

"(3) **Holidays in the Vacation Period**

Under the present agreement employees on vacation do not receive extra pay for holidays. The Organizations propose that if, during an employee's vacation, a holiday falls on a work day of the position, and the position is worked that day, he be paid for the day at double time and one-half; and that if the holiday falls on the rest day of the position, or if the position is not worked that day, it will not be counted as a day of his vacation and he will also be paid for that day at straight time.

A review of the material submitted in the BLS Bulletin No. 1233 indicates that the prevailing practice in other industries is to grant an additional day's pay or an additional day of vacation when a holiday falls in a vacation period. **The rules presently applicable in the railroad industry, however, are based on the doctrine of maintenance of take-home pay. A change in the rules regarding holidays in the vacation period would therefore have much broader implications than a consideration of this particular issue would at first seem to suggest."** (Emphasis added, Pages 97-98 of the Report.)

The vacation-holiday issue received further analysis by Presidential Emergency Boards 161, 162 and 163 prior to the adoption of the November 21, 1964 National Mediation agreement herein at issue. It is significant to note that the doctrine of "maintenance of take-home pay" was again accepted as the determinative concept of vacation-holiday disputes. It appears, however, that necessity compelled the Board's acceptance of the refinement advanced in awards 11976, 11827, 11113; namely, that if the employe's position is assigned to work on the holiday, the employe on vacation receives an additional punitive day's compensation:

"(3) **Holidays during vacations**

Under the present agreement, if a holiday occurs during an employee's vacation period, he gets neither additional pay nor an additional day of vacation if the holiday falls on one of the rest days of his position; or if his position is not assigned to work on the holiday. If the employee's position is assigned to work on the holiday, the employee on vacation receives an additional day's pay at time and one-half for the holiday.

The Organizations propose no change in the method of payment for holidays during vacation on which an employee's position is assigned to work. In either of the other situations—holidays on rest days or position not assigned to work on the holiday—it is proposed that the employee receive holiday pay for the holiday and an additional day of paid vacation.

The present treatment of holidays during vacation periods grows out of and in consistent with the doctrine that the justification for paid holidays is the maintenance of take-home pay. Thus, under present practice, the employee receives exactly the same pay during a vacation in which a holiday falls as he would receive if he were not on vacation but

working at his regular position. Both Emergency Boards 106 and 130 concluded that it would be inconsistent with the maintenance of take-home pay theory of paid vacations to provide additional pay or vacation for holidays falling during vacation.

Essentially the same evidence is presented and the same arguments are advanced by the Organizations in support of the present proposal as to holidays falling during vacations as in the case before Emergency Board 130. As the Board concluded in connection with the proposals to change the eligibility rules for paid holidays, there have been no significant developments with respect to holidays during vacations which justify any further recommendations by the Board at this time." (Emphasis added, Pages 39-40 of the Report.)

Carrier submits that the "maintenance of take-home pay" doctrine, consistently propounded by Presidential Emergency Boards 106, 130, 161, 162, 163, warrants the denial of the organization's claim. Moreover, the peculiarities inherent in the application of the birthday-holiday provisions of the November 21, 1964 agreement rendered even the refinement of the theory (as advanced in awards 11976, 11827, 11113 and 13278 supra) inapplicable to the instant dispute.

It is further significant to note that the language of the November 21, 1964 agreement is substantively distinct from that employed in the prior agreements:

"ARTICLE II—Holidays, Section 1 of the August 21, 1954 Agreement and

ARTICLE III—Holidays, Section 1 of the August 19, 1960 Agreement, respectively provide:

"ARTICLE II—Holidays

"Section 1. Effective May 1, 1954, each regularly assigned hourly and daily rated employes **shall receive eight hours' pay at the pro rata hourly rate of the position to which assigned** for each of the following enumerated holidays when such holiday falls on a workday of the workweek of the individual employee: (Emphasis added)

New Year's Day
Washington's Birthday
Decoration Day
Fourth of July
Labor Day
Thanksgiving Day
Christmas

"ARTICLE III—Holidays

"Article II, Sections 1 and 3 of the Agreement of August 21, 1954, are hereby amended, effective July 1, 1960, to read as follows:

"Section 1. Subject to the qualifying requirements applicable to regularly assigned employees contained in Section 3 hereof, each regularly assigned hourly and daily rated employees **shall receive eight hours' pay at the pro rata hourly rate of the position to which assigned** for each of the following enumerated holidays when such holiday falls on a workday of the workweek of the individual employee. (Emphasis added)

Labor Day
Thanksgiving Day
Christmas Day."
Fourth of July
New Year's Day
Washington's Birthday
Decoration Day

The language of the previous holiday provisions is hence reflective of the exigencies of the rail industry. The prior agreements mandate only the payment of "eight hours' pay at the pro rata hourly rate" for each enumerated holiday rather than the day off with pay as is customary in most industries. The experienced signatories were obviously cognizant of the fact that the railroad employe labors while others reap the joys of holiday leisure. Hence, if a shop craft employe must, of necessity, work on a holiday he receives a punitive day's pay plus eight hours holiday pay. Moreover, the previous agreements were intended to correct a pre-1954 injustice that an employe might enjoy the holiday but suffer the loss of a day's pay. Thus, consistent with the doctrine of "maintenance of take-home pay", the 1954 and 1960 Agreements insured the vacationing employe of a full week's income.

In direct contrast with the previous holiday provisions, the dominent theme of the November 21, 1964 agreement emphasizes the "day off with pay" rather than the sole payment of eight hours pay:

"ARTICLE II—Holidays

Article II of the Agreement of August 21, 1954, as amended by the Agreement of August 19, 1960, insofar as applicable to the employees covered by this Agreement is hereby further amended by the addition of the following Section 6:

Section 6. Subject to the qualifying requirements set forth below, effective with the calendar year 1965 each hourly, daily and weekly rated employee shall receive one additional **day off with pay**, or an additional day's pay, on each such employee's birthday, as hereinafter provided. (Emphasis added)

(a) For regularly assigned employees, if an employee's 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." (Emphasis added)

The expressed intent of the above provision is to utilize the peculiar nature of the birthday-holiday to insure the employe of a paid, work free holiday impossible with the other uniform and national holidays. Hence, for the first time in any holiday agreement, the parties have employed the language "day off with pay". This language can only signify the parties' recognition of the fact that carrier's employes would be entitled to a birthday-holiday along a 365 day continuum without prostrating its services. The choice of the phrase "day off with pay" is especially significant when it is considered that the signatories had the language of the 1954 and 1960 agreements before them. This deliberate and intentional deviation from the previous holiday provisions is reflective of the innovative purpose of the November 21, 1964 birthday holiday provision.

Moreover, the parties to this agreement have employed the phrase of art "work day of the workweek". With unanimous consistency, the awards and Presidential Emergency Boards have interpreted a holiday falling within an employe's base vacation period as a "work day of the workweek". (See ARTICLE I—VACATIONS—Section 3 of the August 21, 1954 Agreement; Emergency Board No. 106 pp. 35-36, 51; Emergency Board No. 130 pp. 28-29, 97-98; Emergency Board 161, 162, 163 pp. 39-40; and Third Division

Awards 9640, 9641, 10550, 10593, 10940, 11113, 11827, 11642, 11976, 12335, 13278, Second Division Awards 2277, 2566.) As applied to the claimant, his birthday was a holiday within his base vacation period and hence article II, section 6(a) of the November 21, 1964 agreement governs, ". . . if an employee's birthday falls on a work day of the workweek of the individual employee he shall be given the day off with pay; . . ."

When the expressed purpose of the birthday-holiday provision, the interpretation of "work day of the workweek", and the doctrine of "maintenance of take-home pay" are correlated with the peculiar application of the birthday-holiday, reason demands the denial of the brotherhood's claim. First, the claimant was accorded the "day off with pay" as mandated by article II, section 6(a). Second, the doctrine of "maintenance of take-home pay" has meaningful application since the claimant would not have worked on this date, even if he had not been on vacation. Hence the claimant received that very amount which is ". . . exactly the same pay during a vacation in which a holiday falls as he would receive if he were not on vacatiton but working at his regular position." (Emergency Board 161, 162, pp. 39-40, Award 13278) Had the claimant not been on vacation during this period, he still would not have worked on the date of his birthday.

While the brotherhood's inconsistency in presenting this claim on the property and to your board causes difficulty in understanding its position, it appears that the brotherhood objects to the established doctrine that a holiday falling during the vacation period is regarded as a work day of the work week. Further, the brotherhood apparently regards the birthday-holiday as a "guaranteed" benefit. Assuming that the above misconceptions provide the basis for the brotherhood's claim, carrier then submits that the brotherhood is endeavoring to utilize the decisional process to achieve a result properly subject to further negotiation. On May 17, 1966 the brotherhood presented a Railway Labor Act section 6 notice requesting negotiation of the very right alleged to be embodied in article II, section 6(a) of the November 21, 1964 agreement. The brotherhood submitted the following proposal for negotiation:

> "Section 2. Section 3 of Article I 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."

While this proposal has never been accepted, it is obvious that the brotherhood was seeking to abolish the "maintenance of take home pay" doctrine. Carrier can readily accept the brotherhood's desire to eliminate the principle by the negotiative process; however, such a result is not properly achieved by prostituted interpretation of accepted principles embodied in

existing agreements or by the allegation of nonexistent rights. Moreover, ARTICLE III—HOLIDAYS of the brotherhood's section 6 proposal of May 17, 1966 utilized for the first time in a holiday provision, the expression ". . . guaranteed 8 hours' pay . . .":

"ARTICLE III—HOLIDAYS

Article II of the Agreement of August 21, 1954, as amended by the Agreement of August 19, 1960, and the Agreements of November 20, 1964, and February 4, 1965, is hereby amended to read as follows:

Section 1. (a) Effective January 1, 1967, each hourly, daily or weekly rated employe shall be guaranteed 8 hours' pay at the pro rata hourly rate of the position on which he last worked before the holiday in addition to any other payments required for each of the following nine enumerated holidays . . .

Employe's Birthday."

Again, this proposal has never been adopted. Such a proposal to regard birthday-holiday compensation as "guaranteed" and the use of such an unambiguous adjective is reflective of the brotherhood's desire to achieve a right which it does not currently possess.

In view of the analysis and reasoning advanced herein, carrier submits that the claim of the brotherhood should be dismissed or denied in its entirety.

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 instant claim for eight hours birthday pay, in addition to the eight hours vacation pay already allowed, has been previously considered by this Division with rulings going both ways. Typical of the sharply divergent views expressed on this identical dispute is denial Award 5230 (Weston) and sustaining Award 5251 (Dolnick).

The same parties that are involved in the instant case were the litigants in Award 5230, and Carrier argues that the denial of an identical claim on the property should not be overturned where, allegedly, the decision has not been proved palpably erroneous. It is to this question of whether or not the result reached in Award 5230 is the correct answer to the problem, that we now direct our attention.

Claimant was regularly assigned as a Car Inspector at Carrier's Rutherford Yard to work Sunday through Thursday, with rest days Friday and Saturday. His birthday occurred on Sunday, November 19, 1967, while he was on his vacation.

Article II, Section 6(a) of the November 21, 1964 Agreement specifies that if the employee's birthday falls on a work day of his work week, he shall be given the day off with pay. In the instant case, Sunday, November 19, 1967,

was a work day of claimant's regularly assigned work week, and he was given the day off with pay. That suffices to satisfy the requirements of Section 6(a) since said provision does not differentiate vacation pay from any other kind of employee remuneration.

It is something else again when the employee's birthday falls on "other than a work day of his work week". In that event Section 6(a) preserves a birthday holiday increment of eight hours pro rata pay plus any other pay to which the employee may be entitled for that day. Thus, under Section 6(a) separate and different birthday holiday benefits are depicted, depending on which day in the work week the birthday falls. In other words, for purposes of the application of Section 6(a), the phrase "work day of the work week" is a significant criterion. Were a vacation day to be construed as a non-work day, it would render meaningless the distinction made in Section 6(a) between designated work days and rest days of the employees regular assignment.

Noticeably, Article II, Section 6(f) provides for the retention of birthday holiday pay where the birthday falls on one of the seven holidays listed in Article III of the August 19, 1960 Agreement. It stands to reason that if it were intended that a birthday falling on a vacation day should accrue an additional days pay, it should have been stated as clearly and concisely as was expressed in Section Section 6(f).

Considering further that employees in the railroad industry do not receive an extra day's pay in instances where any of the seven contractually recognized holidays falls within his vacation period on what normally would be a work day of the scheduled work week, the birthday holiday cannot be singled out for preferential treatment, unless Article II, Section 6 expressly so provided. The plain fact of the matter is that nothing in the language of Article II, Section 6 serves to place a birthday holiday on a different footing, for vacation pay purposes, than that accorded to the other seven holidays.

Finally, it would appear that the negotiating of the Agreement dated September 2, 1969, (effective January 1, 1968) further amending Article II of the Agreement of August 21, 1954, as amended, (Article II, Section 6 of the Agreement of November 21, 1964) to provide for the payment of holiday pay in addition to vacation compensation whenever the birthday holiday falls during an employee's vacation period, is at least some indication that this increment had not been contemplated by Article II, Section 6 of the November 21, 1964 Agreement.

AWARD

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Second Division

ATTEST: E. A. Killeen
Executive Secretary

Dated at Chicago, Illinois, this 17th day of April, 1970.

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