



Award No. 5942

Docket No. 5842

2-DT&I-CM-'70

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. 16,
RAILWAY EMPLOYES' DEPARTMENT, A.F.L.-C.I.O.
(CARMEN)**

DETROIT, TOLEDO & IRONTON RAILROAD COMPANY

DISPUTE: CLAIM OF EMPLOYES:

1. That the Detroit, Toledo and Ironton Railroad Company violated the Controlling Agreement, particularly, Rule 70, on account of Carman Robert D. Pinkston not being called to perform wrecking service on April 5, 1968 from the hours of 8:00 A.M. to 6:00 P.M., which day was also his birthday.
2. That the Detroit, Toledo and Ironton Railroad Company be ordered to additionally compensate Carman Robert D. Pinkston ten (10) hours at punitive rate of pay on account of the aforesaid violation.

EMPLOYES' STATEMENT OF FACTS: The Detroit, Toledo and Ironton Railroad Company, hereinafter referred to as the carrier, maintains a wrecking outfit at Flat Rock, Michigan and Carman Robert D. Pinkston, hereinafter referred to as the claimant, owns a regular assignment by bid on the wrecking crew, and is recognized as one of the regular assigned wrecking crew members.

His regular assignment on the flat rock repair track is from 7:30 A.M. to 4:00 P.M. Monday through Friday.

The regular assigned wrecking crew members were called, except for claimant, and performed wrecking services with the outfit, outside of the yard limits from the hours of 8:00 A.M. to 6:00 P.M. on April 5th, 1968. The carrier refused to call the claimant for the above wrecking services, on the basis that it was his birthday and carrier was required to give him the day off under provisions of article II, section 6 (a) of the November 21, 1964 agreement which is controlling over the current agreement, revised September 1, 1949, as evidenced by carrier's letter of denial, dated October 29, 1968.

This dispute has been handled with the carrier, up to and including the highest designated officers of the carrier authorized to handle same, with the result that they have declined to adjust it.

any of the above holidays fall on Sunday, the day observed by the State, Nation, or by proclamation shall be considered the holiday) shall be paid for at the rate of time and one-half.

(b) Any shift upon which the starting time begins at or after 12 o'clock midnight of the day preceding rest day of specified holiday and up to 12 o'clock midnight of the rest day or specified holiday, shall constitute the rest day or holiday shift for the purpose or paying overtime."

The above rule only provides for the payment at the time and one-half rate if service is performed on legal holidays. It does not in any way require that employees will work holidays as the employees contend. Carrier states that if that was intended, the rule would state that employees must work holidays and such reasoning is completely contradictory to the express intent and purpose which provides payment for employees on holidays.

The board's attention is also directed to the facts that the carrier cannot anticipate when the wreck crew will be used and that Mr. Pinkston's wrecking assignment position was not filled by another employee.

In support of their contention, the employees have based their position on rule 70, which covers assignment to wrecking crews, on the premise that it controls or supersedes the holiday rule and agreements, as amended. Carrier submits that it has conclusively shown that such contention is erroneous and without foundation or merit for the reasons stated herein and therefore requests that the board so determine.

FINDINGS: The Second Division of the Adjustment Board, upon the whole record and all the evidence, finds that:

The carrier or carriers and the employee or employees involved in this dispute are respectively carrier and employee 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 bases his claim on the alleged violation of Rule 70 of the Agreement by Carrier when it failed to call him for wrecking service on April 5, 1968. Carrier' defense to this claim is that Claimant wasn't called because his birthday occurred on the date in question and therefore Carrier was compelled to give him the day off under the requirement of Article II, Section

6(a) of the November 21, 1964 Agreement.

Rule 70, captioned "Wrecking Crews", the pertinent parts thereof provide as follows:

"(a) Wrecking crews, including wrecking derrick operators and firemen, will be composed of carmen who will be regularly assigned by bulletin and will be paid as per Rule 8.

"(b) When wrecking crews are called for wrecks or derailments outside of yard limits, the regularly assigned crew will accompany the outfit. For wrecks or derailments within yard limits, sufficient carmen will be called to perform the work.

"* * * *"

Article II, Section 6(g) of the November 21, 1964 Agreement provides as follows:

"(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."

Claimant is contending that Rule 70(b) clearly without exception states that the regular assigned crew will accompany the wrecking outfit and inasmuch as it is undisputed that Claimant was a regular assigned member of the wrecking crew, then it was mandatory upon Carrier to have called him for such wrecking duty in this instance.

Claimant further contends that under Article II, Section 6(g) of the November 21, 1964 Agreement, it has been the practice as well as the rule to call the regularly assigned wrecking crew members to work on all holidays, and therefore Claimant had a demand right to be called and work on his birthday-holiday.

Carrier's position is that Section 6(a) of Article II of the November 21, 1964 Agreement intends that employes shall be given their birthday-holiday off with pay and that there is no provision requiring an employee to work on such holiday; that Rule 5 governing Rest Day and Holiday Service does not in any way require that employes must work holidays as the employes contend; that Section 6(a) of Article II of the November 21, 1964 Agreement supersedes Rule 70 insofar as the use of a regularly assigned employee on a Birthday-Holiday is concerned; that Claimant failed to prove that by past practice regular assigned wrecking crew members work on all holidays.

Inasmuch as Rule 70 clearly provides that the regular assigned crew will accompany the wrecking outfit and it being undisputed that Claimant was a regularly assigned wrecking crew member, therefore under Section 6(g) of Article II of the November 21, 1964 Agreement Claimant was entitled to work on his birthday-holiday.

A W A R D

Claim sustained at the pro rata rate of pay.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Second Division

ATTEST: E. A. Killeen
Executive Secretary

Dated at Chicago, Illinois, this 20th day of May, 1970.