



Award No. 5949

Docket No. 5843

2-MP-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. 2, RAILWAY EMPLOYEES'
DEPARTMENT, A. F. of L. - C. I. O.
(CARMEN)**

MISSOURI PACIFIC RAILROAD COMPANY

DISPUTE: CLAIM OF EMPLOYEES:

1. That the Missouri Pacific Railroad Company violated the Agreement of November 21, 1964, when they deprived Carman E. O. Marlin the right to work his regular assignment on Wednesday, February 15, 1967.
2. That accordingly, the Missouri Pacific Railroad Company be ordered to compensate Carman Marlin in the amount of eight (8) hours at the punitive rate for Wednesday, February 15, 1967.

EMPLOYEES' STATEMENT OF FACTS: E. O. Marlin, hereinafter referred to as the claimant, is employed by the Missouri Pacific Railroad Company, hereinafter referred to as the carrier, at Little Rock, Arkansas. Claimant is assigned to relief position on Jobs Nos. 11, 12 and 13, hours 7:00 A.M. to 3:00 P.M., Monday through Friday, rest days Saturday and Sunday.

The claimant's birthday occurred on Wednesday, February 15, 1967 and his regular assignment on that date was filling Job No. 12, however, the claimant was advised not to report for work on that day, but the carrier found it necessary to fill this position on this date (February 15, 1967) but failed to comply with the rule and past practice, i.e., filling the job the same as other holidays and working the incumbent, which constitutes the basis of the claim.

This case was progressed on the property in line with Rule 31 of the controlling agreement of June 1, 1960, and the carrier and employees agreed to hold this case in abeyance pending decision from your Honorable Board in a similar case referred to as Docket 5152. Decision was handed down in this case by your Honorable Board in Award 5523 sustaining the employees' entire claim, i.e., eight (8) hours at the punitive rate, however the carrier has refused to honor the provisions of this award in the instant case and is the reason the employees have brought this case before your Honorable Board for adjudication.

dispute, Rule 5 in the agreement on this property including the Note thereto is "highly irrelevant" for the same reasons that reference to the train yard holiday board was highly irrelevant in the case before your Board in Award 5321.

In the instant claim the note to Rule 5 would come into play only if the force assigned to work was inadequate and the employee who had the birthday was also needed. On the date of claim, the men assigned at the North Little Rock train yard included approximately 50 carmen on running repairs and on servicing freight cars, 68 car inspectors, and 20 carmen on heavy repairs. All assigned on February 15, 1967, worked their regular shift except claimant. The force was adequate to perform the work. The carrier had no need to resort to the procedures set forth in the note to Rule 5 and did not do so. The regular force was not augmented or increased. The regular force simply worked one man short that day deferring, if necessary, any of the repairs which would not delay the operation of the trains.

The claimant in this dispute enjoyed his birthday off with pay. The Carrier was not obligated to call claimant under the provisions of the note to Rule 5. The carrier fully complied with the birthday holiday rule by giving Claimant the additional day off with pay.

For the reasons fully set forth herein, the claim in this docket is not supported by the rules cited and should be declined.

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 were given due notice of hearing thereon.

Claimant's birthday occurred on one of his regularly assigned work days, Wednesday, February 15, 1967. He was told not to report for work on that day. Claimant is contending that Carrier violated Article II, Section 6(g) of the November 21, 1964 Agreement and the note to Rule 5 of the Agreement by failing to call him for work on said day.

It is Claimant's position that inasmuch as Claimant's job was worked on his birthday, Carrier was required to call him for work on such day because of aforesaid rule requirements.

As this Board said in Award 5948, the determination of this dispute hinges on whether or not Claimant's position was worked on the date in question. Carrier had the right to blank Claimant's position on said birthday-holiday, but if it was filled by another employee, then we must sustain the claim in accordance with the decisions reached by this Board in Awards 5236 and 5523, when it found:

"A birthday holiday differs from others in that it relates only to an employee whose birthday anniversary it happens to be. However, under the provisions of the note to Rule 5 of the current Agreement, and Article II, Section 6(g) of the Agreement of November 21, 1964, he must work on that holiday and protect the work if his position is worked on that day."

Claimant is employed as a relief employee in the train yards at North Little Rock, Arkansas. Approximately 140 carmen, 19 carmen helpers and 20 carmen apprentices work at the repair car facility and train yard. Claimant was regularly scheduled to work Monday through Friday, 7:00 A.M. to 3:00 P.M., filling in for other carmen on their days off. Claimant states that his regular assignment for February 15, 1967, his birthday, was filling "Job #12", not otherwise identified in the record.

Carrier asserts that Claimant fills rest days of other car inspectors in the train yard three days a week and rest days of car repairers on the repair track two days a week. Carrier's Exhibit "1" shows Claimant's assignment as Car Inspector Job #E, starting point Rip and North end.

The Organization categorically states that Claimant's job was worked on February 15, 1967 and the Carrier categorically states that it was not worked on said date. The disagreement appears to stem from what can be implied from the meager record: (a) that car inspections that Claimant would have performed had he worked were performed by other Carrier inspectors, and (b) that no extra employee was called in to do this work on Claimant's birthday.

The record fails to disclose with preciseness what particular work Claimant would have performed had he been called to work on his birthday and the extent, if any, that the work was performed by other employees, and the extent, if any, that his work was not performed on said day.

Therefore, it is our opinion that the Organization failed to meet its burden of proving in this instance that Claimant's job was worked on his birthday, and we are thus compelled to deny the claim.

A W A R D

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Second Division

ATTEST: E. A. Killeen
Executive Secretary

Dated at Chicago, Illinois, this 19th day of June, 1970.

LABOR MEMBERS' DISSENT TO AWARD 5949

The dispute in this claim reads:

"1. That the Missouri Pacific Railroad Company violated the Agreement of November 21, 1964, when they deprived Carman E. O. Marlin the right to work his regular assignment on Wednesday, February 15, 1967."

The Employees state the following on Page 2 of their Submission:

"The Claimant's birthday occurred on Wednesday, February 15, 1967 and his regular assignment on that date was filling Job No. 12, however, the Claimant was advised not to report for work on that day, but the Carrier found it necessary to fill this position on this date (February 15, 1967) but failed to comply with the rule and past practice, i.e., filling the job the same as other holidays and working the incumbent, which constitutes the basis of the Claim."

Article II, Section 6(g) of the November 21, 1964 Agreement reads:

"(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."

The Note to Rule 5 reads:

"NOTE: Notice will be posted five (5) days preceding a holiday listing the names of the employees assigned to work on the holiday. Men will be assigned from the men on each shift who would have the day on which the holiday falls as a day of their assignment if the holiday had not occurred and will protect the work. * * *"

Carrier states the following on Page 2 of their Submission:

"* * * A copy of Bulletin No. 32 assigning Claimant to the position of Car Inspector, Job No. E, the position he held on the date of claim, is attached as Carrier's Exhibit '1'."

Carrier states the following on Page 3 of their Submission:

"In handling the claim on the property, the Employee referred to upgraded Carman Apprentice C. V. Waddle. * * *. An apprentice who is set up does not acquire seniority rights as a mechanic and cannot exercise seniority as a mechanic but is permitted to apply for all car inspector and car repairer positions in accordance with his standing on the list of apprentices when no bids are received from mechanics. In this case, no bids were received from mechanics on Job No. 62 and Carman Apprentice Waddle was permitted to apply for the position. As the apprentice highest on the apprentice list, he was permitted to fill the position. Job No. 62 became his position."

Carrier states the following on Page 10 of their Submission:

"We have given an example of a recent holiday where the heavy repair track and the cleaning track were shut down on the holiday. The force in the train yard and at the spot repair track were required on the holiday. This is typical of terminals where through freight and local trains operate on holidays in the same volume as on other days. The force required to keep the trains moving is required on the holiday but work not directly related to the movement of trains is deferred. In this case only one car inspector was absent on date of claim, the date being the car inspector's birthday holiday. Since the entire heavy repair track can be shut down on the seven recognized holidays, it is apparent that the force can work one man short by reason of the birthday holiday. In this case, Carman Apprentice Waddle who had been upgraded and was filling a carman's position was regularly assigned to work on the date of claim. * * *"

Carrier states the following on Page 17 of their Submission:

"* * * The regular force was not augmented or increased. The regular force simply worked one man short that day deferring, if necessary, any of the repairs which would not delay the operation of the trains."

**LABOR MEMBERS' DISSENT
TO AWARD 5949.**

As quoted above, the Carrier clearly confirms the Employees position that the Claimant's position as Car Inspector in the train yards was filled on his birthday—by Carman Apprentice Waddle, whose regular assignment was filling Job No. 62 on the car repair track.

The Referee states the following in the last three paragraphs of his Findings:

“The Organization categorically states that Claimant's job was worked on February 15, 1967 and the Carrier categorically states that it was not worked on said date. The disagreement appears to stem from what can be implied from the meager record: (a) that car inspections that Claimant would have performed had he worked were performed by other Carrier inspectors, and (b) that no extra employee was called in to do this work on Claimant's birthday.

The record fails to disclose with preciseness what particular work Claimant would have performed had he been called to work on his birthday and the extent, if any, that the work was performed by other employees, and the extent, if any, that his work was not performed on said day.

Therefore, it is our opinion that the Organization failed to meet its burden of proving in this instance that Claimant's job was worked on his birthday, and we are thus compelled to deny the claim.”

It is unbelievable that a Referee professing the competence to act as a Referee could be so derelict in his responsibilities as in the instant Award.

The Labor Members' dissent.

/s/ D. S. ANDERSON
D. S. Anderson

/s/ E. I. McDERMOTT
E. J. McDermott

/s/ O. L. WERTZ
O. L. Wertz

/s/ R. E. STENZINGER
R. E. Stenzinger

/s/ E. H. WOLFE
E. H. Wolfe

**LABOR MEMBERS' DISSENT
TO AWARD 5949.**