Award No. 6087
Docket No. 5899
2-MP-CM-'70

NATIONAL RAILROAD ADJUSTMENT BOARD

SECOND DIVISION

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

PARTIES TO DISPUTE:

SYSTEM FEDERATION NO. 2, RAILWAY EMPLOYES' DEPARTMENT, A. F. of L. — C. I. O. (Carmen)

MISSOURI PACIFIC RAILROAD COMPANY

DISPUTE: CLAIM OF EMPLOYES:

1. That the Missouri Pacific Railroad Company violated the Agreement of November 21, 1964, when they deprived Car Inspector R. T. Moore, Little Rock, Arkansas, the right to work his regular assignment on October 29, 1968.

2. That accordingly, the Missouri Pacific Railroad Company be ordered to compensate Car Inspector Moore in the amount of eight (8) hours at the punitive rate for October 29, 1968.

EMPLOYES' STATEMENT OF FACTS: Car Inspector R. T. Moore, 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 by bulletin to job #26 as car inspector on the north end of the train yard, work week Monday through Friday, rest days Saturday and Sunday, hours 3:00 P. M. to 11:00 P. M.

The claimant's birthday occurred on October 29, 1968 and he was instructed by bulletin that his job would not work on this date account it being his birthday holiday. However, the carrier found it necessary to fill this position on this date (October 29, 1968) and moved Carman C. G. Davidson from his regularly assigned job to fill the claimant's job on this date. Carman Davidson is assigned by bulletin to Job #66, work week Tuesday through Saturday, rest days Sunday and Monday, hours 3:00 P. M. to 11:00 P. M.

When the carrier failed to comply with the rule and practice, i.e., filling the job the same as other holidays and working the incumbent, the agreement was violated.

This matter has been handled up to and including the highest designated officer of the carrier who has declined to adjust it.

heavy repairs. All assigned on date of claim 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.

The issue in this docket has now been resolved by your Board in **Award 5844**. A car inspector was absent on his birthday holiday. His position was not filled but a man was sent from the repair track to assist with the train yard work. Your Board denied the claim on behalf of the absent car inspector. The facts in this docket are identical and call for a similar denial award.

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 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 were given due notice of hearing thereon.

Claimant is assigned by bulletin to job #26 as Car Inspector on the North end of the train yard, work week Monday through Friday, rest days Saturday and Sunday, hours 3:00 P. M. to 11:00 P. M.

Claimant's birthday occurred on Tuesday, October 26, 1968 and he was instructed by bulletin that his job would not work on this date because it was his birthday holiday. However, the Carrier on this date moved Carman C. G. Davidson from his regularly assigned job to fill the Claimant's job on this date. Carman Davidson is assigned by bulletin to job #66, work week Tuesday through Saturday, rest days Sunday and Monday, hours 3:00 P. M. to 11:00 P. M.

It is the position of the Organization that Article II of Section 6 (g) of the Agreement of November 21, 1964 and the Note to Rule 5 of the basic agreement are controlling in this case, both of which provide:

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

Note to Rule 5

"Note: Notice will be posted five (5) days preceding a holiday listing the names of the employes 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. Local Committee will be advised of the number of men required and will furnish names of the men to be assigned but in event of failure to furnish sufficient employes to complete the requirements, the junior men on each shift will be assigned beginning with the junior man."

It is the Organization's position that Article II Section g states that the birthday holiday will be worked the same as any other holiday and that Note 5 establishes the procedure for Carrier to request that the local Committee furnish the name of the man to work the holiday. They are not contending that the Carrier had to work the Claimant's job on his holiday, but since they did, the rule provides that the man will work who would have worked had the holiday not occurred — in this case, the Claimant. They further state that the local Committee would be obligated under the rule to select that man unless for some reason he did not want to work or was not available; that the rule and practice regarding working birthday holiday is the same as other holidays and is controlling; that is, if the job is worked it is to be worked in line with other holidays governed by rules and practice. They rely on Award 5523 to support their contentions.

The Carrier disputes the Organization's contention that the Note to Rule 5 was violated and insist that it had no applicability because no employe was called in to work on October 29, 1968, and that under the provisions of Article II, Section (g) it is permissible to re-arrange forces to fill the birthday of an employe.

The facts in this case are that the Claimant Car Inspector was absent on the date of claim because it was his birthday holiday. The Supervisor for the yard however, asked for another Car Inspector. A Car repairer who had reported to the heavy rail was used to assist in the train yard. The Carman selected was a Carman assigned to a relief position whose duties are to work in the place of carmen off sick or for other reasons. These facts are readily admitted by the Carrier in its' submission and clearly place this Claimant in the same position as Claimants were in Awards 5236 and 5523. The contentions by the Carrier that other employes plus the Carman called by the Yard Supervisor together performed all the work required for the day, that none were called on an overtime basis and that as a result none of the rules were violated are not persuasive. The Yard Supervisor requested another Car Inspector. This request was granted. Claimant should have been called. Award 5236 (Johnson) sustained a claim involving the same parties, the same issues, rules and an almost identical set of facts. Award 5523 (Coburn), 5975 (Gilden) and Award 5976 (Gilden) were confronted with the same issue, rules etc. as 5236. We find that Award and the aforementioned subsequent awards to be controlling in this Case. Awards presented to us by the Carrier are clearly distinguishable on a factual situation. We will sustain the claim.

AWARD

Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of SECOND DIVISION

ATTEST: E. A. Killeen
Executive Secretary

Dated at Chicago, Illinois, this 15th day of December, 1970.

CARRIER MEMBER'S DISSENT TO AWARD 6087

The Carrier refused to allow the claims in Awards 6087, 6088, 6089 and 6090 although fully aware of sustaining Awards 5236, 5523, 5975 and 5976. The Carrier requested a reconsideration of the issues in dispute on the premise that the earlier awards are based on allegations of facts advanced by the employes which are false.

The Birthday Holiday Rule became effective January 1, 1965, and the first birthday holiday claims were filed in January of that same year when the Carrier from the start gave shop craft employes their birthday holiday off with pay. The employes cited Section (g) of Article II of the Agreement of November 21, 1964 to the effect that existing rules and practices governing whether an employe works on a holiday shall apply on his birthday. The rule giving the employes the seven recognized holidays (New Year's Day, Washington's Birthday, Decoration Day, Fourth of July, Labor Day, Thanksgiving Day and Christmas Day) had been in effect long before the adoption of a 40-hour week on September 1, 1949. The Note to Rule 5, upon which the employes rely, became effective on September 1, 1949. The whole argument in all of the birthday holiday claims, beginning with the first claim filed in January 1965, was based on allegations as to the "existing rules and practices . . . governing whether an employe works on a holiday . . ." during the sixteen years from September 1, 1949, when the Note to Rule 5 became effective, to January 1, 1965, when the Birthday Holiday Rule became effective.

In the earlier dockets, the Carrier did not anticipate that a dispute would arise as to the existing practices governing whether an employe worked on the seven recognized holidays during the 16-year period from September 1, 1949 to January 1, 1965, and merely made the statement, which the Carrier felt should have been sufficient, that work on holidays was distrubuted on the basis of an overtime board. The employes, on the other hand, made the allegation that during this 16-year period that if a man's job worked, the man worked. These allegations of fact are in direct conflict one with another. Neither party introduced any proof to support their allegations of fact. The referees in the earlier awards chose to believe the employes' allegations of facts and reached sustaining awards.

In the dockets to which this dissent applies the Carrier had an opportunity to submit proof of its allegation of facts that holiday work on this Carrier is distributed from an overtime board, usually a rotating overtime board, although in one case from a seniority overtime board. The Carrier's

Exhibits to its Submissions and Rebuttals in the four dockets to which this dissent applies contained proof of the Carrier's allegation of facts. The Carrier representative in the oral hearing before the referee specifically requested reconsideration of the issues for the reason that the earlier awards were based on the employes' allegation of facts, which were false, and that the Carrier in these dockets has offered proof as to the existing practices governing whether an employe worked on the seven recognized holidays and that the Carrier was entitled to a reconsideration of the issues where it is proven that earlier awards are based on incorrect facts.

Upon examination of the four awards to which we dissent, we find they make no reference whatsoever to the Carrier's argument upon which the request for reconsideration was based. The basis for reconsideration is the practice governing whether an employe worked on any of the seven recognized holidays. The awards are devoid of any finding as to the "existing rules and practices thereunder governing whether an employe works on a holiday," that is, the seven holidays which have been recognized for many years and which is the only matter in dispute in these dockets. The referee chose to ignore the Carrier's sole argument in these dockets apparently for the reason he was not able to refute the proof offered by the Carrier in support of its allegation of fact but was unwilling to overturn the previous awards based on false allegations of facts. Awards which ignore the principal contention of either party have no precedent value and these awards fall in that category.

W. B. Jones

H. F. M. Braidwood

P. C. Carter

R. E. Black

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