



Award No. 6180
Docket No. 6059
2-MP-CM-'71

NATIONAL RAILROAD ADJUSTMENT BOARD
SECOND DIVISION

The Second Division consisted of the regular members and in addition Referee Jesse Simons when award was rendered.

PARTIES TO DISPUTE:

**SYSTEM FEDERATION NO. 2, RAILWAY EMPLOYEES'
DEPARTMENT, AFL-CIO (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. R. Blackwell, Wichita, Kansas, the right to work his regular assignment on August 28, 1969.

2. That accordingly, the Missouri Pacific Railroad Company be ordered to compensate Carman Blackwell in the amount of eight (8) hours at the punitive rate for August 28, 1969.

EMPLOYEES' STATEMENT OF FACTS: Carman E. R. Blackwell, hereinafter referred to as the claimant, is employed by the Missouri Pacific Railroad Company, hereinafter referred to as the carrier, at Wichita, Kansas. Claimant is assigned by bulletin to the rip track as welder and torch man, work week Monday through Friday, hours 7:30 A. M. to 4:00 P. M., rest days Saturday and Sunday.

The claimant's birthday occurred on Thursday, August 28, 1969, and he was instructed to remain at home on this date account it being his birthday holiday. However, the carrier found it necessary to fill this position on this date (August 28, 1969) and Carman C. F. Doll, who is assigned by bulletin to the rip track, work week Monday through Friday, rest days Saturday and Sunday, assigned hours 7:30 A. M. to 4:00 P. M., was moved from his regularly assigned job to fill the claimant's job on this date, and to substantiate this fact, the Employees herewith submit as Exhibit A, attached, copy of letter dated December 10, 1969, addressed to General Chairman, Mr. W. H. Smith, signed by former Local Chairman of Carmen, Mr. T. R. Howland, wherein he clearly sets out that Carman Doll's job was blanked on the holiday. Additionally, the carrier officers during the handling on the property have stated that Carman Doll did without question fill the Claimant's position and perform the Claimant's duties, and for your ready reference we are below quoting the pertinent part of Assistant Vice President Engineer's letter of December 22, 1969.

case the Board found that neither the rules nor the practice gave the claimant the right to work on the seven recognized holidays, and concluded, either on the basis of the rules and practice submitted or the lack of proof of such practice, that the claimant had no right to work on his birthday holiday.

In Award 3563, your Board held, "A contractual undertaking to pay a penalty rate for a holiday not worked should be clear and unmistakable." Where your Board found an absence of a clear and unmistakable contractual understanding, your Board denied the claim. For example, your Board stated in Award 5534, one of the birthday holiday awards mentioned above, that:

"Petitioners' Submission primarily consists of interpretations and conclusions not proven by substantial evidence of probative value or otherwise to support their position. Furthermore, the employes have not even contended that another employe was 'called in' to work in place of claimant on his birthday. Under these circumstances your Board should follow the decisions in Awards 5424, 5534, 5639 and 5844, and either dismiss the instant claim or, in the alternative, deny the claim for failure to prove that Carrier is required under existing rules and practices 'to compel Carrier to work on birthday days.'" (Award 5534)

In the docket leading to Award 5236, the first Award by your Board on this property in this series of birthday claims, the carrier stated that:

"The Local Committee then determines who is entitled to work on the basis of the holiday overtime board and the men so designated are required to work on the holiday. This is the procedure set forth in the Note to Rule 5."

In preparing the docket in that case the carrier did not realize that there would be a dispute between the parties as to the practice of selecting an employe to work on the seven recognized holidays for the 20 years since the Note to Rule 5 became effective on September 1, 1949. The carrier offered no proof of the statement quoted above in the docket which resulted in Award 5236. Your Board would not accept the above quoted statement as factually correct, and based its decision on the allegations of fact by the employes. We have now offered proof in this docket that the statement quoted above is correct. Since Award 5236 is based on incorrect facts, the carrier is entitled to reconsideration of the merits of the dispute based on the correct facts. The carrier, therefore, urges your Board to reconsider the issues in dispute based on the facts as proven by the carrier in this docket. We believe your Board will then come to the same conclusion that was reached in Awards 5424, 5534, 5639 and 5844, and dismiss or deny the claim.

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.

In the interests of economizing, the Board, with the consent of the parties, is combining Dockets 6057, 6058, 6059 and 6061. For the reason that while the claimants are different, their grievances are the same. It is further noted that in these four dockets the same carrier and organization are involved, and that the same clauses, rules and issues are presented for decision.

Because the fact situation, clauses, rules and issues are the same as Award 6113, and because Award 6113 is controlling, the Board is sustaining the grievances.

AWARD

Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of SECOND DIVISION

ATTEST: E. A. Killeen
Executive Secretary

Dated at Chicago, Illinois, this 29th day of October, 1971.