

NATIONAL ~~RAILROAD~~ ADJUSTMENT BOARD

THIRD DIVISION

Award Number **20269**
Docket Number **MW-20119**

Frederick R. Slackwell, Referee

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way ~~Employees~~
(Southern Pacific Transportation Company
(Pacific Lines)

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood that:

(1) The Carrier violated the Agreement when it failed and refused to allow Water Service Mechanic W. L. ~~Hinnard~~ and ~~B&B~~ Carpenter E. L. Dean holiday pay for July 26, 1971 (System Files ~~MofW-162-77~~ and ~~162-78~~).

(2) Water Service ~~Mechanic~~ W. L. ~~Hinnard~~ and ~~B&B~~ Carpenter E. L. Dean each ~~be~~ allowed eight (8) hours of pay at their respective straight time rate in effect on July 26, 1971 because of the violation referred to in Part (1) hereof.

OPINION OF BOARD: The two Claimants were regularly assigned to hourly-rated positions when this dispute over birthday-holiday pay arose. As a result of a strike by the United Transportation Union, the Claimants' positions were abolished at the end of work on Friday, July 23, 1971; they were recalled on August 3, 1971. Their birthday fell on Monday, July 26, 1971; they worked on July 23, the last workday preceding their birthday, but they did not receive compensation for Tuesday, July 27, the workday following their birthday. Thus, they were eligible in all respects for birthday-holiday pay, except for not receiving compensation for July 27. The issue here is whether in such circumstances the Claimants qualified for birthday-holiday pay under Article II of the November 20, 1964 Agreement, which, in pertinent part, reads as follows:

"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.

(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.

(b) For other ~~than~~ regularly assigned employees, if an employee's birthday falls on a day on which he would ~~otherwise~~ be assigned to work, he shall be given the day off and receive eight hours' pay at the pro rata rate of the position which he otherwise would have worked. If an employee's birthday falls on a day other than a day ~~on~~ which he otherwise would have worked, he shall ~~receive~~ eight hours' pay at the pro rata hourly rate ~~of~~ the position ~~on~~ which ~~compensation~~ last accrued to him prior to his birthday, 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.

(d) Other ~~than~~ regularly assigned employees shall qualify for the additional day off or ~~pay~~ in lieu thereof, provided (1) compensation for ~~service~~ paid him by the carrier is credited to ~~11~~ or more of the 30 calendar days immediately preceding his birthday, and (2) he has ~~had a~~ seniority date for at least ~~60 calendar~~ days or has ~~60 calendar~~ days of continuous active service preceding his birthday beginning with the first day of compensated service, provided employment was not terminated prior to his birthday by resignation, for cause, retirement, death, non-compliance with a union shop agreement, or disapproval of application for employment, and (3) if on the workday preceding and the workday following the employee's birthday he satisfies one or the other ~~of~~ the following conditions:

- (i) Compensation for service paid by the carrier is credited; or
- (ii) Such employee is available for service.

Note: 'Available' as used **in** subsection **(11)** above is interpreted by the parties to mean that an employee is available unless he lays off of his own accord or does not respond to a call, pursuant to the rules of the applicable agreement, for service." (Emphasis added)

The **Employees' position** is that when Claimants' **positions** were abolished, they were placed in the category of "other than regularly assigned" **employees** as that **phrase** is used **in** the foregoing text of Section 6 (d). Further, the Claimants fulfilled Section 6 (d) (i) by working **on** July 23 and fulfilled Section 6 (d) (ii) by **being** "available" **on** July 27 as such **tens** is defined **in** the underlined text of the **Note** to Section 6 (d) (ii). Contrarily, the Carrier says that Section 6 is not applicable to the Claimants **in** this **case** and that, alternatively, if such section **is** applicable, the **Claimants** have not proved they were "available" **since** picket lines were posted on July 27 and **Claimants cannot** be considered available under such circumstance.

IB **connection** with its first contention, the Carrier **calls** attention to the **May 16, 1968 amendment** to Article II of the Agreement of August **21, 1954**, which **amendment** concerns holiday pay for birthdays which fall in a vacation period. The argument is that **since** this amendment applies **only** to vacation **absences**, there is a clear **indication** that **no** other reason for being absent from duty is covered by Article II and therefore such **Article** does not cover the instant case. Carrier argues further that the Claimants were neither "regularly assigned" nor "other **than** regularly assigned" **employees** within the meaning of Article II, but rather, were **in** a "suspended" status **since** they continued to hold a "quasi-regular assignment" status peculiar to the unique situation caused by the strike. We find these **arguments** not **convincing**. One **of** the basic qualifying requirements for holiday pay under Article II is **that** the employee must receive compensation for service rendered **on** the workday preceding **and** the workday following his birthday. The **May 16, 1968** amendment to Article II requires that compensation must be received for the workdays immediately preceding

and following the **employees'** vacation, **in** order to qualify an employee for holiday pay for a birthday **falling** in a vacation period. On its face, then, the amendment provides a different qualifying requirement for a particular kind of absence involved **in** the birthday-holiday situation **and, consequently**, there is no basis for concluding that adoption of the amendment constituted **an** implied repeal of Section 6 of Article II **in** respect to other kinds of absences. Similarly, there is no basis for concluding that Claimants had a "suspended" status because they held "quasi-regular assignment" status during the strike. The meaning of these terms is somewhat elusive; however, to the extent that we **understand** their meaning, we believe that they would still be subsumed **in** the phrase "other than regularly assigned" insofar as this dispute is concerned. Award Nos. 15635 and 14515.

We come now to the question of whether the Claimants can prevail in view of the fact that a picket line was posted on July 27. It appears that prior Awards have ruled both for and against the proposition that, in order to be entitled to compensation for work not performed, a Claimant must affirmatively show that he would have worked despite the existence of a picket line. Award Nos. 18715, 19836, 19872, Third Division, 6505, 4494, Second Division, 2824, Fourth Division, and 72, Public Law Board No. 216 have ruled that such a showing must be made. Third Division Award Nos. 14890 and 20115 have ruled contra. We shall not attempt to reconcile the apparent conflict in these prior Awards, but rather, shall confine ourselves to **analyzing** the agreement provisions and facts of this particular dispute. Under the key provision here, Section 6 (d) (ii) and the Note thereto, **an** employee who is properly absent under the provision, i. e., one who did not lay off voluntarily or refuse to respond to a call to work, is treated as "available" for service; in turn, "available" is treated as the equivalent of the employee having received credited compensation for the requisite workday or work-days, thereby qualifying him for birthday-holiday pay. In **applying** this provision to the instant facts, we find from the facts of record that **it** cannot be said that Claimants laid off of their own accord or did not respond to a call. The **Claimants** thus fulfilled the text of Section 6 (d) (ii) and the existence of a picket line, in the facts of this case, does not alter this fact. Award 14890. In addition, the record makes it clear that Carrier abolished Claimants' positions from July 23 to August 3, 1971 and, thus, the work of their positions did not exist on **July 27**. In this circumstance we believe it would be unrealistic to require Claimants to show that they would **have** crossed a picket line to perform non-existent work. See Award 20115 where, because no work was available to Claimants, this Board concluded that "we do not **think** claimants were required to make a **decision regarding** crossing the picket line." We shall sustain the claim.

FINDINGS: The Third Division of the **Adjustment** Board, upon the whole record and **all** the evidence, finds and holds:

That the parties waived oral hearing;

That the Carrier **and** the **Employees** involved in this dispute are respectively Carrier and **Employees** within the meaning of the Railway Labor Act, as approved **June** 21, 1934;

That this Division of the Adjustment Board has **jurisdiction** over the dispute involved herein; and

The Agreement was violated.

A W A R D

Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: A. W. Paulson
Executive Secretary

Dated at Chicago, Illinois, this 14th day of June 1974.