Award No. 15398
Docket No. CL-16000

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

(Supplemental)

Daniel House, Referee

PARTIES TO DISPUTE:

BROTHERHOOD OF RAILWAY AND STEAMSHIP CLERKS, FREIGHT HANDLERS, EXPRESS AND STATION EMPLOYES

CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood (GL-5878) that:

(1) Carrier violated the Clerks' Agreement when it refused to permit C. Dwitis, employed in its Freight House No. 10 in Chicago, Illinois, to work on Sunday, February 28, 1965, a regularly assigned rest day which was also his birthday.

(2) Carrier shall now be required to compensate C. Dwitis for his wage loss on February 28, 1965, or eight (8) hours at time and one-half for the birthday holiday, and eight (8) hours at time and one-half for the rest day — a total of $69.32.

EMPLOYES' STATEMENT OF FACTS: There is in force and effect a collective bargaining agreement by and between the parties bearing effective date of August 14, 1950 (revised as of January 1, 1963), a copy of which is on file with the Board, and by reference is made a part of this submission. This agreement was amended by the Mediation Agreement dated November 20, 1964.

The claim was handled on the property, in the usual manner, through the highest designated officer of the Carrier to handle such matters, and the dispute was not resolved.

The claimant was not permitted to work on Sunday, February 28, 1965, which was his rest day and also his birthday, even though he was available and willing to do so.

Mr. C. Dwitis, who has a seniority date of 8/21/34, is employed as a supervisor at House No. 10 in Chicago, Illinois, with a work week Monday to Friday. He signed up for overtime work for Saturday, February 27 and Sunday, February 28, 1965. He was not permitted to work on Sunday, February 28 because it was his birthday. He was paid eight hours' pro-rata birthday pay.

Claim was filed by Local Chairman S. Graff on March 11, 1965, (Employes' Exhibit No. 1), in behalf of Mr. C. Dwitis in the amount of $69.32, which represents eight hours at time and one-half because he was not permitted to work his rest day, and eight hours at time and one-half because he was not permitted to work his birthday, both occurring on February 28, 1965.

Reply was received from Superintendent M. L. Zadnichek, in which he declined the claim on the grounds that the November 20, 1964 Agreement provides that employes shall be given their birthday off with pay. (Employes' Exhibit No. 2.)

The claim was appealed by Vice General Chairman L. L. Zych on April 8, 1965 to Mr. J. D. Dawson, the highest officer of the Carrier to whom appeals may be made. (Employes' Exhibit No. 3.) Mr. Dawson replied to Mr. Zych on April 21, 1965, (Employes' Exhibit No. 4), and declined the claim.

Conference to discuss the claim was held on May 6, 1965 with Mr. Dawson, Staff Officer for the Carrier, and again on June 24, 1965. After the May 6th meeting, the Carrier did agree to permit employes whose birthday fell on a rest day to work in seniority order in the future, but would only pay them time and one-half for working on their rest day, plus pay at pro-rata for the birthday. (Employes' Exhibit No. 5.)

(Exhibits not reproduced.)

CARRIER'S STATEMENT OF FACTS: The Claimant in this case was regularly assigned to a Supervisor position, rate $23.10 per day, at Freight House 10, Chicago, Illinois, where work is performed for The Universal Carloading and Distributing Company, Incorporated, by the employes of this Carrier. This position was assigned Monday through Friday and the claim date, Sunday, February 28, 1965 was a rest day for this assignment and was also the Claimant's birthday.

Claimant Dwitis was notified in advance of this date that he would be given the day off with pay because it was his birthday, even though the freight house was going to be in operation on a partial basis in order to clear up a backlog of work. He received eight hours' pay at the pro rata rate exactly as provided in Article II, Section 6(a) of the November 20, 1964 National Agreement, but has claimed two (2) additional days' pay at the time and one-half rate based on the contention that he should have been worked on the claim date along with other employes, even though the aforementioned Agreement provision clearly provides that an employe should be given his birthday off with pay.

The Schedule of Rules Agreement effective August 14, 1950 and revised as of January 1, 1963 covering employes who perform work of The Universal Carloading and Distributing Company, Inc., represented by the Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employes, who are employed at Chicago Freight House No. 10 and the Universal Freight House at Minneapolis, Minnesota, is on file with the Board and by this reference is made a part of this submission.

OPINION OF BOARD: Rest days of Claimant's position were Saturdays and Sundays. Claimant signed up for work for Saturday, February 27 and Sunday, February 28, 1965. He was permitted to work February 27 but Carrier

substituted a junior employe for him on February 28, informing him that it was because February 28 was his Birthday-holiday under Section 6 of Article II of the November 20, 1964 National Agreement.

Carrier does not agree with Employe's contention that under the terms of Rule 7 of the basic Agreement between the parties Claimant was entitled to preference over the junior employe in being assigned to the work on February 28. Carrier argues that Section 6(a) of Article II requires that an employe be given his birthday off with pay unless he has to be used because there is no other qualified employe available.

Employes contend that compensation for work on a day which is both an employe's Birthday-holiday and the rest day of his position, should be, in addition to eight hours' straight time pay he gets without working, two payments at time and one-half for the work, as decided in the series of our awards starting with Award 10541 (Sheridan) in cases of work on a day which was simultaneously a designated (legal) holiday and a rest day. Carrier was simultaneously a designated (legal) holiday and a rest day. Carrier disagrees, arguing that "the instant case is **not** the same as a legal holiday — rest day case." The argument in behalf of Carrier is that, where the legal holiday-rest day cases involved only an interpretation of existing rules in schedule agreements, the birthday-rest day case arises under and involves an interpretation of the November 20, 1964 National Agreement; that no other rules (than Section 6 of Article II of the November 20 Agreement) deal specifically (or even by implication) with the subject.

The involved rules are:

"RULE 7.

Employes notified or called for work not continuous with, before or after the regular work period, or on either of the two consecutive rest days or on any of the holidays specified in Rule 8 shall be allowed a minimum of four (4) hours for two (2) hours' work or less and if worked in excess of two (2) hours, time and one-half will be allowed on the minute basis for time worked in excess of the first two hours."

"Employes worked full day on rest days or holidays, will be paid under the terms of Rule 8.

Senior employes ordinarily performing type of work to be performed, shall be given preference over junior employes in assignment of work under this rule."

"RULE 8.

Work performed on the two consecutive rest days each week and the following Legal Holidays, namely, New Year's Day, Washington's Birthday, Decoration Day, Fourth of July, Labor Day, Thanksgiving Day, and Christmas, (provided when any of the above holidays falls on Sunday, the day observed by State, Nation or by Proclamation, shall be considered the holiday) shall be paid at time and one-half time."

ARTICLE II.

"Section 6(a). For regularly assigned employes, if an employe's birthday falls on a work day of the work week of the individual employe he shall be given the day off with pay; if an employe's birthday falls on other than a work day of the work week of the individual employe, 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.

(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."

WAS CLAIMANT ENTITLED TO WORK ON FEBRUARY 28?

Nothing in Section 6 or elsewhere in the Agreement forbids employes working on their Birthday-holidays. Article II, Section 6(g) explicitly provides that whether an employe works on his Birthday-Holiday is determined by application of rules and practices governing the question for holidays (i.e. holidays under Section 1(a) of Article II and referred to in Rules 7 and 8). Thus, by applying the last paragraph of Rule 7, we find that Claimant was entitled to the assignment on a seniority basis in preference to the junior employe who was substituted for him.

PREMIUM PAY ONCE OR TWICE?

The core of argument in behalf of Carrier's contention that work performed on a Birthday-holiday which is also a rest day is properly paid by one payment of premium pay is that Section 6(g) provides "in plain and unambiguous language . . . that the rule governing the payment for work on holiday, and that rule alone, applies to work performed by an employe on his birthday — this regardless of the day of the work week on which employe's birthday falls. In other words, all work on birthdays, regardless of the day of the work week on which the birthday falls, is treated as work on holidays, no more, no less. If more had been intended, more language than can be found in paragraph (g) would be required since paragraph (g) is the only provision in Section 6 relating to work performed on birthdays."

The immediately apparent difficulty with this reasoning is that Section 6(g) does not provide "in plain and unambiguous language" that pay for work on a birthday is governed by the rule (Rules 7 and 8 in this case) governing payment for work on a holiday — **regardless of the day of the work week on which the employe's birthday falls.** The emphasized meaning is neither explicit in the language of paragraph (g), nor is it unambiguously implied by the language of the paragraph or of the entire section. Examination of the circumstances at the time Section 6 was agreed upon indicates that the parties did not intend that such an implied meaning be read into the section.

Paragraph (g), written after Awards 10541 (Sheridan), 10679 (Moore), 11454 (Miller), 11899 (Hall), 12453 (Sempliner) and 12471 (Kane), must be presumed to have been written with the understanding that the rules governing payment for work on a holiday had by those awards (and with no contrary awards at that time) been found to intend work on a holiday which was coincidentally also a rest day of the employe involved be treated for pay purposes as two separate employment situations and be paid at premium

payments twice — once as work on the holiday and once as work on the rest day. Had the parties intended, as contended in behalf of Carrier here, that pay for work on a Birthday-holiday which coincidentally was also a rest day of the involved employe be treated differently than pay for work on a designated holiday which coincidentally was also a rest day, such an intention, under the circumstances, should and could (and, we believe, would) have been explicitly and clearly stated; that no such clear and explicit statement appears in Section 6 indicates that the parties did not intend such a distinction.

Paragraph (g) refers to "rules and practices" (emphasizing by Referee); by November 1964, when paragraph (g) was agreed upon, it must have been known to both parties that practices had been developing on the basis of applying Referee Sheridan's construction of the rules in Award 10541 which had been adopted 2½ years previously: it was intended, then, that paragraph (g) adopt those practices to govern payment for work on Birthday-holidays.

Awards 14921, 14922 (Zumas) and 15013 (Dorsey) cited in support of Carrier's position do not support Carrier's position. These awards — dealing with pay for work on simultaneously occurring birthday and designated holidays were distinguished from, and not in contradiction to, the series starting with Award 10541 (Sheridan) dealing with pay for work on simultaneously occurring rest days and designated holidays. In the simultaneous Birthday and designated holiday cases we decided that because the simultaneity had been adopted by the involved employe (by his choosing not to elect a different day for his Birthday-holiday under the provisions of Section 6(f)), the employe's work on that day should be treated as a single employment situation, whereas in the rest day — holiday series the simultaneity did not result from the choice of the involved employe but resulted from pure coincidence of the designated holiday with the rest day and we treated it as two distinct employment situations. If we apply the approach to construction of the labor agreement used in these awards, as we should if they are not palpably in error, to the problem of pay for work on a Birthday holiday which is coincidentally a rest day of the involved employe, we must treat the situation as involving two distinct employment situations, each of which entitles the involved employe to pay according to the rule governing that employment situation even if the governing rules are headed by the same number.

Thus, we conclude that had Claimant been permitted to work as he should have been, he would have been entitled to premium pay twice for working February 28 — once for the employment situation of working on his Birthday holiday and once for the employment situation of working on his rest day. We are of the opinion that Claimant should be paid what he would have been paid had Carrier not violated the Agreement and will therefore 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 Employes involved in this dispute are respectively Carrier and Employes 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

That Carrier violated the Agreement.

AWARD

Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 10th day of March 1967.

DISSENT TO AWARD 15398 (DOCKET CL-16000)
(Referee House)

But for Section 6 under Article II of the November 20, 1964 National Agreement the instant case could not have arisen. No other rules dealt specifically, even by implication, with the matter and the claim had to stand or fall under that Section of that Agreement because it not only covered the payment due an employe for his birthday, whether or not work is performed, whether it falls on a work day of his work week or on other than a work day of his work week, but also the basis on which an employe would be paid should he work on his birthday.

The Majority's conclusions regarding Section 6, and paragraph (g) thereof in particular, are in derogation of the plain language of the provision. In sum, the Majority not only refused to read, and apply, paragraph (g) as written, but attributes an intent thereto not founded on its plain language with the result this award exceeded the authority of this Board and is for naught. An application of elementary principles of contract law, which the Majority disregarded, discloses the patent error in this award.

One elementary principle of contract law is that an instrument is to be interpreted and applied as written. Another, is that the meaning and intent of an instrument is to be ascertained from its four corners. This award ignored these elementary principles of contract construction.

Section 6 under Article II of the November 20, 1964 National Agreement in pertinent part provides:

> "Section 6. Subject to the qualifying requirements set forth below, effective with the calendar year 1965 each hourly, daily and weekly rated employe shall receive one additional day off with pay, or an additional day's pay, on each such employe's birthday as hereinafter provided:
>
> (a) For regularly assigned employes, if an employe's birthday falls on a work day of the work week of the individual employe he shall be given the day off with pay; if an employe's birthday falls on other than a work day of the work week of the individual employe, 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 entitled for that day, if any.

(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."

It should at once be apparent from a reading of paragraph (a) that an employe will receive pay for his birthday whether it falls on work day of his work week, or on one of his assigned rest days (a day other than a work day of his work week).

In a situation where an employe's birthday falls on a work day of his work week, he is to be given the day off with pay.

In a situation where an employe's birthday falls on one of his assigned rest days, he will 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." In other words, no part of the pay to which he might otherwise be entitled will be, or is to be, used to offset any part of the eight hour pro rata payment. The eight hour payment is made whether or not service is performed.

Nothing in paragraph (a), however, makes reference to an employe performing service on his birthday, whether it falls on a work day of his work week or on other than a work day of his work week, or the pay he may be entitled to for performing service on his birthday. The only provision in Section 6 relating to the payment for service performed on a birthday is paragraph (g) which in pertinent part states:

> "**Existing rules** and practices thereunder **governing . . . the payment for work performed on holidays shall apply on his birthday.**"

Reading this provision as written, as we are bound to do, in plan and ambiguous language it provides that the rule governing the payment for work on holiday, and that rule alone, applies to work performed by an employe on his birthday — this regardless of the day of the work week on which the employe's birthday falls. In other words, all work on birthdays, regardless of the day of the work week on which the birthday falls, is treated as work on holidays, no more, no less. If more had been intended, more language than can be found in paragraph (g) would be required since paragraph (g) is the only provision in Section 6 relating to work performed on birthdays. We, of course, were without authority to supply any additional language.

We are fortified in our position regarding paragraph (g) by a reading of Section 6 in its entirety and paragraph (a) in particular. The negotiating parties recognized that birthdays would fall on work days as well as other than work days and made provisions for the payment for birthdays, all without regard to the performance of work, but, and with this awareness, when it came to negotiating the payment for work performed on birthdays, they, in most plain and unambiguous language, provided it would be treated as work on a holiday and nothing more.

Nothing in Section 6, and paragraph (g) in particular, permitted going outside thereof to determine the basis on which an employe would be paid for work on his birthday. Paragraph (g) as written is conclusive in all respects on that matter. How the Majority got out of paragraph (g), or was able to use it as an avenue or vehicle to bring into play other rules than the holiday

rule alone, is difficult to fathom. And how the Majority was able to attribute the intent they did to the negotiating parties, other than that manifested from a reading of Section 6 in its entirety and as written, is equally difficult to fathom. The Majority was certainly in no position to know what the negotiating parties intended, except from what they reduced to writing, or the circumstances involved in negotiating Section 6. Anything they said in that respect is presumptuous and nothing more than unwarranted speculation, conjecture or surmise. While the Majority refers to "practices" and places their own, and erroneous, interpretation thereon, "practices" in the context of paragraph (g), relates only to practices **under existing rules "governing** whether an employe works on a holiday and the payment for work performed on holidays shall apply on his birthday" and nothing more. The perverted interpretation of "practices" is both unwarranted in the context of paragraph (g) and otherwise not supported by the record.

The Majority's difficulty in reading paragraph (g) as written stems from a strawman they built to avoid and evade applying the provision as written. Section 6 under Article II of the November 20, 1964 National Agreement is special and, applying another elementary principle of contract law, prevailed over general rules. Section 6 not only provided the payment due an employe for his birthday, whether or not work is performed, whether it falls on a work day of his work week or on other than a work day of his work week, but also the basis on which an employe would be paid should he work on his birthday. It is complete in itself and nothing therein supported the additional payment claimed.

This award is erroneous and for these and other reasons, we dissent.

R. A. DeRossett
J. R. Mathieu
C. H. Manoogian
W. M. Roberts
W. B. Jones

Keenan Printing Co., Chicago, Ill. Printed in U.S.A.