



Award Number 17586

Docket Number CL-18027

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Gene T. Ritter, Referee

PARTIES TO DISPUTE:

**BROTHERHOOD OF RAILWAY, AIRLINE AND STEAMSHIP
CLERKS, FREIGHT HANDLERS, EXPRESS AND
STATION EMPLOYEES**

ERIE-LACKAWANNA RAILWAY COMPANY

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood (GL-6499) that:

1. Carrier violated the rules of the Clerks' Agreement at Taylor Yard on January 4, 1967, when it refused to allow A. Connor to work position of Chief Clerk, hours 8:00 A.M. to 4:00 P.M. on that day because it was Mr. Connor's birthday and instead, worked a junior employee.
2. Carrier shall now compensate A. Connor for eight (8) hours at time and one-half for January 4, 1967 at Chief Clerk's rate in addition to the eight (8) hours pay he received as birthday holiday for that day. (Claim No. 1867)

EMPLOYEES' STATEMENT OF FACTS: Claimant A. Connor is an extra employe at Scranton, Pa., whose birthday holiday fell on Wednesday, January 4, 1967. The fact that Mr. Connor qualified for the holiday is not in dispute as he was paid eight (8) hours Holiday Pay at pro rata rate in accordance with the provisions of Rule 30 of the Agreement.

Employe J. F. Dunn is a regular incumbent of position of Chief Clerk, Taylor Yard, assigned hours 8:00 A.M. to 4:00 P.M., rest days, Saturday and Sunday. Commencing January 3, 1967, Chief Clerk Dunn placed himself on the 11:00 P.M. Yardmaster's position at Taylor Yard, thereby creating a temporary vacancy on position of Chief Clerk.

Claimant A. F. Connor, an extra employe, was called to fill the temporary vacancy on the Chief Clerk's position. He worked as Chief Clerk January 3, 1967; however, as January 4, 1967 was A. F. Connor's birthday, Division Chief Clerk T. Gabler conferred with Trainmaster W. J. Sweeney on January 3, 1967, following which he informed Mr. Connor that he would receive eight (8) hours pro rata holiday pay for his birthday holiday but would not be permitted to work the Chief Clerk's position on that day because it would cost the Carrier an additional eight (8) hours at time and one-half. Mr. Connor was informed that if Mr. Beckendorf, a junior employe was available on January 4, 1967, the Carrier intended to work Beckendorf on the Chief Clerk's position on that day; however, if he was not available, Mr. Connor would be permitted to work.

Under date of April 30, 1968, the Organization furnished the following letter (Carrier's Exhibit B) addressed to the Local Chairman by the claimant:

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Scranton, Pa., April 22, 1968

Mr. Thomas A. Gavin
Local Chairman

Dear Sir:

Referring to my claim of January 4, 1967, concerning time and one half account being denied the privilege of working my Birthday.

I contacted Mr. T. Gabler on January 3, 1967, and inquired if I could work my Birthday, he said he would have to talk to Trainmaster W. J. Sweeney. After this conversation took place Mr. T. Gabler informed me that Trainmaster Sweeney said that if I could get Mr. Beckendorf to cover Chief Clerk position I would not be able to work, however, if Mr. Beckendorf was not available I could perform.

Thank you for your kind consideration.

/s/ A. F. CONNOR
A. F. Connor

Witnessed
/s/ T. GAVIN
T. Gavin

Subsequent exchange of correspondence is attached as Carrier's Exhibits C and D.

(Exhibits Not Reproduced)

OPINION OF BOARD: Employee, J. F. Dunn, Chief Clerk, Taylor Yard, placed himself on the Yardmaster position at Taylor Yard on January 3, 1967. Claimant Conner, an extra employee at Scranton, Pa., was called to fill the temporary vacancy of the Chief Clerk's position on January 3, but did not work on January 4, Claimant's birthday. An employee, junior in seniority to Claimant, worked the Chief Clerk's position on January 4. Rule 7(g) provides that the extra qualified employee will be given preference in filling vacancies of three days or less duration. It, therefore, follows that Claimant was entitled to work his birthday holiday in preference to the junior employee.

However, there appears in this case an irreconcilable conflict of facts concerning the question of whether or not Claimant waived his right to work on his birthday holiday. Employee's Exhibit "J-2", executed by Claimant Conner, recites that this Claimant contacted Mr. T. Gabler and that Mr. Gabler informed Claimant that if the junior employee was available to cover the Chief Clerk's position, this Claimant would not be able to work; however, if the junior employee was not available, Claimant would be allowed to work. If the contents of employee's Exhibit "J-2" remained un rebutted, then Claimant's right to a sustaining award in this case would be undisputed. However, employee's Exhibit "J-2" was rebutted by Carrier's Exhibit "A" wherein Mr. T. C. Gabler stated that Claimant had advised him that he (Claimant) would just as soon be off on his birthday, January 4, 1967. If such a statement was made by Claimant, then Claimant waived his right to work on his birthday holiday.

The above two statements, Employee's Exhibit "J-2" and Carrier's Exhibit "A", present to this Board an irreconcilable conflict of facts. It is well established that the burden of proof rests with Claimant. This Board can not resolve the factual questions of whether or not this Claimant waived his right to work on his birthday holiday. Therefore, this claim must be denied. See Awards 16152 (Ives), 9390 (Rose), 10924 (Hall), and 12222 (Dolnick).

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

That the Agreement was not violated.

A W A R D

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 25th day of November 1969.