

 Award No. 18561
Docket No. MW-18835

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Gene T. Ritter, Referee

PARTIES TO DISPUTE:

**BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES
CHICAGO & ILLINOIS MIDLAND RAILWAY COMPANY**

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

(1) The Carrier improperly counted Section Foreman B. H. Lindsay's birthday as a work day when it computed the monthly pay allowed to Mr. Lindsay for June 1969. (System Case No. MP-BMWE-24).

(2) Section Foreman B. H. Lindsay now be allowed the difference between what he was paid for the month of June 1969 on the basis of 18/21 of his monthly rate and what he should have been paid at the rate of 18/20 of the monthly rate of pay.

EMPLOYEES' STATEMENT OF FACTS: The claimant occupied a monthly rated position. He was regularly assigned to work Monday through Friday of each week except for the eight (8) holidays designated by agreement which includes the claimant's birthday (June 27, 1969).

Birthday holiday pay is provided for within Article II of the November 20, 1964 Agreement which reads:

"Article II of the Agreement of August 21, 1954, as amended by the Agreement of August 19, 1960, insofar as applicable to the employees covered by this Agreement, other than employees represented by the Hotel & Restaurant Employees and Bartenders International Union, is hereby further amended by the addition of the following Section 6:

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 work week of the individual employee he shall be given the day off with pay; if an employee's birthday falls on

and 26, however you cannot withhold pay for June 27th, which is birthday (holiday). We are requesting this pay.

We ask that you give this your attention and trust that you will arrange to imburse Mr. Lindsay for that day * * *

Cnoference between the Manager of Personnel and General Chairman was held on August 29, 1969 at which time the request for pay on June 27th to Mr. Lindsay was discussed and the decision of the Manager of Personnel rendered under date of September 24, 1969, copy of which is attached as "C&IM EXHIBIT-A", reading in pertinent part as follows:

"(FACTS)—Holiday pay to monthly rated employes is pro-rated to all the working days in a year. Monthly compensation is calculated on the basis of working days credited to a section foreman for days worked or days available for work, including holidays falling on a work day. No work day credit is given to a section foreman who is not available, including working days preceding or following a holiday as well as the holiday work day. Consequently, claimant Lindsay was not credited with a work day on June 25, 26 or 27, 1969 as he was laying-off due to illness on Wednesday, the 25th and did not report for work until Monday, the 30th. Mr. Lindsay was paid 10/21 for the first half of June 1969 and 8/21 for the last half of June 1969.

(DISPOSITION) — Claim declined as being without merit under the availability and pay provisions for monthly rated employes in the current HMWE agreement, particularly Appendix No. 4 (as revised by Appendices No. 6 and 8), and the long established existing local practices thereunder."

(Exhibits not ours).

OPINION OF BOARD: The question to be resolved in this dispute is:

Should a holiday that falls on a normal work day be treated as a work day when computing the daily pay of a monthly rated employe?

Carrier defends this claim on Awards 10081 (Begley) and 12324 (Seff) which are contrary to the overwhelming majority of awards which hold that "holidays are not considered working days" and that "holidays are considered as unassigned days." See Awards 5668, 7033, 7136, 7294, 11552, 12292 and 16252. Also Rule 38, Appendix No. 1 excludes seven (7) holidays and all rest days in the calendar year when computing monthly rates of pay. Also, Awards 10681, 10682, 10816, 11041, 11552, 12220, 13026, 11973, 11977, and 17255, this Board has held that Carrier may not consider a holiday as a work day in the basic month. Carrier contends that it has in the past always considered a holiday a work day in computing the daily pay of a monthly rated employe. However, this Board has held in Award 18345 (Dolnick), "A mistaken rate application, no matter for what period of time, does not supersede a fixed agreed to contract. Past practice may not change or alter a clear and unambiguous contract provision."

The awards cited by the Organization have been carefully studied and are found not to be in palpable error, and are, therefore, found to be controlling in this dispute.

Carrier has argued that the claim submitted to this Board has been changed from that claim submitted on the property. The claim on the property and the claim before this Board have been compared. This comparison reveals the claim before this Board is substantially the same as the claim on the property; that Carrier has not been misled in Claimant's basic contention; and that the claim before this Board has not been enlarged. Therefore, Carrier's request for dismissal is overruled. See Awards 14246 (Dorsey), 18373 (Dorsey) and 13229 (Hall).

For the foregoing reasons, this Claim will be sustained.

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 Employee involved in this dispute are respectively Carrier and Employee 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 violated.

AWARD

Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: E. A. Killeen
Executive Secretary

Dated at Chicago, Illinois this 13th day of May 1971.