

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Award Number 20269
Docket Number MW-20119

Frederick R. Blackwell, 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 (ii) 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 term 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.

In 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. Paulos
Executive Secretary

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