Award No. 3
CL-16510

P. L. Board No. 3

Parties: Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employees
and
The Western Maryland Railway Company

Statement of Claim: "Claim of System Committee of the Brotherhood (GL-6046) that:

(a) Carrier violated the rules agreement when it failed to call the following listed employees to perform service on their regular assignment on their birthday-holiday, and

(b) D. R. Cameron, N. Diseati, F. Q. Hoover, L. J. Nutter, O. H. Spoonire, R. M. Suder, R. M. Powell, shall now be allowed pay claimed as shown below on dates indicated which was their birthday-holiday:

Claimant	Date of Birthday Holiday Claimed	Rate of Pay and Hours Claimed
D. R. Cameron	April 6, 1965	8 hours at time and one half rate reg. assignment
N. Diseati	Feb. 15, 1965	8 hours at time and one half rate reg. assignment
F. Q. Hoover	April 26, 1965	8 hours at time and one half rate reg. assignment
L. J. Nutter	May 12, 1965	8 hours at time and one half rate reg. assignment
O. H. Spoonire	May 24, 1965	8 hours at time and one half rate reg. assignment
R. M. Suder	May 29, 1965	8 hours at time and one half rate reg. assignment
R. M. Powell	May 10, 1965	8 hours at time and one half rate reg. assignment."

Discussion: The claims arise out of a controversy as to what is the proper construction that should be placed on the relevant provisions of the November 20, 1964, National Agreement pertaining to Birthday-Holidays, which Agreement was executed by the Carriers represented by the National Railway Labor Conference and the Labor Organizations represented by the Employes' National Conference Committee-

Five Cooperating Railway Labor Organizations.

The relevant provisions of said Agreement which are in issue state:

"Article II - Holidays

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, 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 the week 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.

(g) Existing rules and practices thereunder governing whether an employee works on a holiday and the payment for work performed on holidays shall apply on his birthday."

The Claimants were regularly assigned employees whom the Carrier did not call for service on their respective birthday-holidays, but instead utilized extra board employees to perform the duties of the Claimants' positions on the days in question.

Organization's Position

The main thrust of the Organization's argument is that under Article II, Section 6(g) birthday holidays must be treated in exactly the same fashion as the other seven standard holidays. The right of the employees to work this holiday and the kind of compensation received when he works the birthday holiday is exactly the same as on the other seven holidays applicable to this Industry.

The Organization states that the practice of working on holidays on this property is governed by Rule 41(H) of the Schedule which states:

> "Where work is required by the management to be performed on a day which is not part of any assignment, it may be performed by an available extra or unassigned employee who will otherwise not have 40 hours of work that week; in all other cases by the regular employee."

The Organization maintains that it is well established by Interpretation and awards that a holiday is an "unassigned day." Therefore, the Carrier may reduce the work week of the regularly assigned employee below five days in a week in which the holiday occurs within the five days constituting the work week, and have the holiday considered to be an unassigned day and subject to the provisions of Rule 41(H). The Organization concedes that if the Carrier "blanks" the employee's position on his natal day, then the employee will have no claim for not being used. However, in the event the Carrier works the regular position, the Article II, Section 6(g) governs, whether the regularly assigned employee will be used on his birthday holiday.

The Organization also cites its own Interpretation contained in Circular No. 22-65, dated February 15, 1965, as well as the Interpretations of the National Railway Labor Conference contained in its Circulars Nos. 46-5, 46-6-1, and 45-6-2, all of which hold that whether a regularly assigned employee will work and receive premium pay on his birthday-holiday is governed by the same rules and practices on the property which apply to the other seven standard holidays.

The Organization points out that the Carrier has admitted in Exhibit J of its Submission that:

> "... on national holidays when all service is on overtime basis, the incumbent is called before an extra employee."

The Organization further denies that there is any merit to the Carrier's defense in invoking the Memorandum of Agreement, effective October 1, 1958, because said Memorandum has only been used to fill vacancies in a certain preference when extra employees were not available, but is had not been so construed, as suggested by the Carrier, in the filling of holiday vacancies. The Organization also denies that Rule 22 is a valid defense because this Rule governs the Extra Board, and it is not used to fill a regularly assigned position on a holiday when the incumbent of the post is available to work his job.

Carrier's Position

The Carrier contends that the whole purpose and thrust of the basic Holiday Agreement of 1954 as well as the November 1964 Birthday-Holiday Agreement was to give the affected employee the holiday period in order to relax and associate with his friends and family without having to suffer any diminution of regular income. The rationale underlying the holiday agreements was that it should be an income maintenance, but not an income supplementing, device. The Carrier cites such Third Division Awards as 11253 and 9217 as standing for the propostion that the position in question could be "blanked" and employees of another craft could be used to perform all or part of the work of the "blanked job." The Carrier states that it logically follows that if the work could be done by employees of another craft, it could also properly be done by employees of the same craft who were on an extra board maintained for the purpose of performing such work. The Carrier cites another analogy to the present situation is the practice of using available relief extra board men to provide relief on work days pursuant to the Five-Day-Week, where no regular relief position is established, rather than using the incumbent of the regular position.

The Carrier denies that there is any rule or practice on the property governing the use of an employee on a holiday, other than Rule 48(c). It states that the Carrier's use of a regularly assigned employee, rather than an extra employee, on one of the seven standard holidays, stems not from any rule governing the use of an employee on a holiday per se, but rather from other rules and practices giving regular employees preference for premium pay overtime work, without regard as to whether it is or is not a holiday. This practice has been in effect at least since the institution of the Five-Day-Week in 1949. The Carrier cites the Memorandum of Understanding executed by the Organization and it on October 1, 1958, which states that when no extra employees are available at pro rata rates, regularly assigned employees shall be given preference in filling jobs at overtime rates

The Carrier adds that because the seven standard holidays are premium pay days, they are governed by the general overtime pay rules, and regularly assigned employees are given preference in working on the seven standard holidays. However, in the case in point, the Carrier stresses that a Birthday-Holiday is not general overtime work but is only overtime work for the employee enjoying the given birthday. It is overtime personal only to him. It states that since the given employee's birthday does not come within the purview of the general overtime pay rules, he is not entitled to the preference given to regularly assigned employees over extra board employees, when extra board employees are available to work the job at straight time rates.

The Carrier stresses that the different language used in the Birthday-Holiday Agreement of 1964 from that of the 1954 Holiday Agreement is further evidence that the prime purpose of the 1964 Agreement was to grant the employee a day off rather than to supplement his income. The Carrier notes that

in the 1964 Agreement Article II, Section 6, explicitly states:

> "if an employee's birthday falls on a workday of the work week, the individual employee shall be given the day off with pay"

while in the 1954 Agreement the language read:

> "each regularly assigned...employee shall receive eight hours' pay at the pro rata rate...for each of the following enumerated holidays."

The Carrier insists that the Board is not free to overlook the difference in the language employed in light of the fact that the parties carefully negotiated these agreements.

The Carrier states that it is clear that under the 1964 Agreement it was intended that the affected employee should enjoy his birthday off with pay, and that paragraph (g) modified this arrangement to the extent that, under existing rules and practices on the property, a regularly assigned employee must be given preference to work on his birthday-holiday before any other employee could be utilized for the job at premium pay rates.

Findings: The P. L. Board, upon the whole record and all the evidence, finds that the employees and Carrier are Employees and Carrier within the meaning of the Railway Labor Act, as amended; that the P. L. Board has jurisdiction over the dispute, and that the parties to the dispute were given due notice of the hearing thereon.

When the Board analyzes this nice issue it finds that while the Carrier's position is persuasive on the general aspects of the problem, nevertheless, it must find for the Organization on the specific issue in controversy. The Board agrees with the Carrier's general thesis that the basic purpose of providing for paid holidays was to enable the employees to enjoy rest and

relaxation with their friends and families without diminution of income, but the Board must also acknowledge that this basic purpose has in part been converted into an imcome supplementing device through the devolution of contract interpretation.

The Board states, in all candor, that were it not for the official circulars issued by the Carriers' National Railway Labor Conference, interpreting and applying the Birthday Holiday Agreement, the literal language of the Agreement would compel the Board to favor the Carrier's position on this claim. However, the Board is not at liberty to ignore or to refuse to give weight to the construction of the 1964 Agreement which the Carrier drafters of the said Agreement themselves have placed upon the Agreement.

The Board finds that the specific and precise interpretation of the issue in controversy given in the Carrier Circulars must prevail over the older special agreements executed by the parties to this claim, dealing with the general subject of overtime pay. The Board finds that the Carrier Circulars in no way distinguish or differentiate between Birthday Holidays and the seven standard holidays. The aforesaid Carrier Circulars make it manifestly and specifically clear that if a given Carrier has either the rule or practice, or both, of preferentially using the incumbent of a regular position to work his position on a standard holiday, if in fact the position is worked, then the Carrier must follow the same practice on a birthday holiday. The Circular is quite precise in stating that the same rules and practice which obligate the Carrier to use preferentially the regularly assigned employee on a standard holiday also obligate it to use the regular employee on a birthday holiday. (See Q's and A's Nos. 10 and 15.)

Regardless of how or why a given Carrier evolved its rule and practice for preferentially utilizing a regular employee on a holiday in the event his job was not blanked and was worked, under both Article II, Section 6 (g) of the 1964 National Agreement and the Carrier Interpretations issued pursuant thereto, the Board must conclude that the Organization's position has to be sustained.

The Board is also aware that the prevailing rule of damages is that claimants are not awarded premium pay for time not worked as any sort of penalty. However, the Board must hold that the contract rate of pay, be it for standard holidays or birthday, for work on holidays is time and one-half, and that is the proper measure of damages for claimants whose holiday contractual rights have been breached.

Award: Claims Sustained.

/s/ Jacob Seidenberg
Jacob Seidenberg, Chairman and Neutral Member

/s/ F. B. Plummer
F. B. Plummer, Carrier Member

/s/ R. J. Maher
R. J. Maher, Employee Member

February 21, 1967
Washington, D. C.

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