Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD Award No. 11139
SECOND DIVISION Docket No. 10880
2-PFE-CM-'87

The Second Division consisted of the regular members and in addition Referee Marty E. Zusman when award was rendered.

(Brotherhood Railway Carmen of the United States
(and Canada
Parties to Dispute: (
(Pacific Fruit Express Company

Dispute: Claim of Employes:

1. That the Pacific Fruit Express Company violated the controlling agreement, particularly Appendix "B" of Rule 7, when they denied thirty-nine (39) carmen employed at their Tuscon, Arizona Shop holiday pay for New Year's Day, January 1, 1983.

2. That accordingly, the Pacific Fruit Express Company be ordered to compensate the following carmen for the January 1, 1983 holiday.

J. D. Solano	M. D. Alvarado	H. S. Duarte
A. C. Muniz	J. E. Romero	A. T. Begay
R. L. Curry	B. W. Wright	J. W. Campbell
E. M. Castano	T. D. Salas	J. P. Dodd
F. A. Lopez	H. G. Aguilar	P. C. Templeton
R. C. Alvarez	R. T. Martinez	W. Y. Tang
R. R. Robles Sr.	N. J. Francisco	A. Pitts
R. R. Gonzales	J. D. Graham	T. N. Ochoa
R. G. Aguilar	G. F. Martinez	J. L. Brunson
R. G. Gutierrez	M. P. Rojas, Jr.	S. R. Samorano
E. T. Tadeo	B. S. Laturco	M. M. Enos
A. A. Vega	B. Y. Alegria	M. J. Rivera
C. F. Hubbard	F. G. Ruiz	F. F. Carley

FINDINGS:

The Second Division of the Adjustment Board, upon the whole record and all the evidence, finds that:

The carrier or carriers and the employe or employes involved in this dispute are respectively carrier and employes within the meaning of the Railway Labor Act as approved June 21, 1934.

This Division of the Adjustment Board has jurisdiction over the dispute involved herein.

Parties to said dispute waived right of appearance at hearing thereon.

At issue is the Organization's Claim for Holiday pay for thirty-nine (39) Carmen who were furloughed effective December 31, 1982. By letter of February 11, 1983, the Organization filed claim that the Company violated Rule (7) Appendix B when it denied each Claimant Holiday pay for January 1, 1983.

It is the Organization's basic argument that although each Claimant was furloughed effective December 31, 1982, they were due Holiday pay under the provisions of the Agreement, specifically Section (c), in that they were "other than regularly assigned employees," had been compensated for "11 or more of the 30 calendar days immediately preceding the holiday" and had appropriate seniority or continuous service to qualify. As for the furloughed status the Organization notes in its December 4, 1984, letter quoting Appendix "B" of Rule 7, Section (c) that in addition to the above, holiday pay for "other than regularly assigned employees" requires that "employment was not terminated prior to the Holiday by resignation, for cause retirement, death, noncompliance with a union shop agreement, or disapproval of application for employment." As furloughed employees are not excluded therein, the Organization maintains that the Company violated the Agreement in denying Holiday pay.

It is the Company's position that each of the Claimants was not qualified under the Agreement to receive Holiday pay because they were furloughed personnel. Under Rule 7, Appendix "B", Section 3, it states in part that "if the employee is not assigned to work but is available for service" that Holiday pay is due. The Company maintains that the furloughed Claimants were not available for service as none of the Claimants "were on Extra Board, a surplus list, nor did they make themselves available per the August 21, 1954 Agreement as they left on furlough on December 31, 1982. The Company argues that to qualify the Claimants had to work into the New Year or under other Agreement provisions the Claimants had to "maintain the 'umbilical connection' of an availability slip on file" to be considered "other than regularly assigned employees." As they failed to do so, they were not due Holiday pay.

This is not a new issue coming before the National Railroad Adjustment Board. Specific to this case are disputes over whether the Claimants worked the required days, on property differences with the National Agreement and the separate embedded Claim of F. F. Carley which, in addition to Award No. 11138, requests compensation twice for January 1, 1983. Yet the central issue to this dispute has been previously heard and decided in this and other Divisions of the Adjustment Board. The Company's argument that Claimants must make themselves available under other provisions of the Agreement to meet the provisions of Holiday pay is not persuasive. The Claimant's do qualify for Holiday pay irrespective of furlough and irrespective of any additional provision for the filling of short term vacancies.

In Second Division Award No. 10687 the Board stated that:

> "when employees are on involuntary furlough, and when they otherwise qualify for holiday pay they need not also be accountable for compliance with additional contractual requirements regarding extra status employees . . . "

A review of the case at bar provides sufficient probative evidence that Claimants were due Holiday pay. At points the Company suggests that all the Claimants may not have worked the 11 days and at other points concedes that they may have done so. For all Claimants who worked the 11 required days, Holiday pay for January 1, 1983, is due; Claimant F. F. Carley included. This Award is consistent with numerous decisions of this and other Divisions of the National Railroad Adjustment Board (Second Division Awards 10687, 9765, 8014, 7467, 5480, 5102, 5095; Third Division Awards 25351, 14816, 14674).

A W A R D

Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Second Division

Attest: Nancy J. Dever - Executive Secretary

Dated at Chicago, Illinois, this 28th day of January 1987.

DISSENT OF CARRIER MEMBERS
TO
AWARDS 11138 AND 11139
(DOCKETS 10880 AND 10881)
Referee Zusman

The Dispositions made in these Awards are not supported by the facts of record, and therefore require this Dissent.

On the property the Carrier pointed out to the Organization:

> "However, your union's main contention is that they worked eleven (11) out of the previous pre-Holiday thirty (30) days and were 'other than regularly assigned employees' who qualified because allegedly they were available to come in to work if Carrier had called them on the days prior and subsequent to the holidays.
>
> "As explained in our numerous discussions hereof; PFE has found no proof by BRC of their working such eleven (11) days...."

To this the Organization responded that the "Claimants worked until December 31, 1982". Neither on the property nor before this Board has the Organization refuted the Carrier's contention that the Claimants did not work eleven of the prior thirty days. This is a condition precedent which must be fulfilled to warrant entitlement to holiday pay under Rule 7(c). Without regard to any other argument, the Organization's failure to substantiate with evidence that Claimants were compensated "11 or more of the 30 calendar days immediately preceding the holiday..." rendered their claim of holiday pay entitlement defective and the Majority should have so stated.

In the case of Mr. Carley the Organization argued that "....he was on vacation and was compensated for the period from December 16th through December 31st...." Vacation pay is not "compensation for service" required by the Rule. Second Division Awards 10112, 10534.

The Carrier also contends that the Claimants were not available in accordance with a long standing practice on this property. This was stated in the Carrier's letters dated October 18, 1983, January 27, 1984, March 26, 1984 and April 23, 1984.

In the Carrier's letter of December 11, 1984, it was again pointed out that:

> "....ever since 1954, we have had Article IV of the August 21, 1954 Agreement in effect at PFE and Article IV-2 provides employees 'desiring to be considered available....will notify the proper officer of the carrier in writing with copy to the local chairman....' These claimants did not sign the Article IV-2 forms to be so available and indeed declined to do so. Knowing this, how can BRC officials contend that they were available. I cannot accept the theory that if the Shop had called them they would have responded, for the simple reason that under Article IV our supervision was committed to call in seniority order those who filed availability and could only issue such a call to one of the claimants after running off the board, as a last resort. In other words, they put themselves effectively outside the range of being called, unavailable to all intent and purposes! Thus they did not qualify for holiday pay." (Emphasis in original)

The Employees concede that there has been a practice on this property involving availability because it was stated by the Employees in their June 1, 1983 letter that individuals do regularly advise the Carrier of their continuing availability for call.

Therefore, because the Organization did not substantiate with evidence that Claimant had met the required condition or that the availability practice on this property did not exist, the claims should have been denied on the failure of the Organization to prove their claim.

We Dissent.

P. V. Varga

M. W. Fingerhut

R. L. Hicks

M. C. Lesnik

J. E. Yost