Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD
SECOND DIVISION

Award No. 13509
Docket No. 13351
00-2-98-2-38

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

(Brotherhood Railway Carmen Division
(Transportation Communications International Union
PARTIES TO DISPUTE: (
(Grand Trunk Western Railroad Incorporated

STATEMENT OF CLAIM:

"Claim of the Committee of the Union that:

1. That the Grand Trunk Western Railroad Company/CN violated the terms and conditions of the current Agreement on December 31, 1996 and January 1, 1997 when Carman Ken Thomas was not properly compensated for the Holidays, New Year's Eve and New Year's Day.

2. That accordingly, the Grand Trunk Western Railroad Company/CN now be ordered to provide the following relief: That Carman Ken Thomas be compensated for these two (2) holidays (New Year's Eve and New Year's Day), by paying him two (2) days pay, sixteen (16) hours, at the regular straight time rate of pay."

FINDINGS:

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

The carrier or carriers and the employee or employees involved in this dispute are respectively carrier and employee 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 were given due notice of hearing thereon.

Up to the time of his resignation on January 22, 1997, the Claimant had been a regularly assigned Carman at the Carrier's Detroit, Michigan, facilities, where his duties involved inspecting, repairing and related work on Grand Trunk's property and fleet of freight cars at that location. This claim, filed February 17, 1997, raises the issue of his entitlement to holiday pay under the Agreement for New Year's Eve and New Year's Day in the circumstances surrounding his final weeks of employment.

The record reflects that the Claimant's normal workweek during calendar year 1996 was Monday through Friday. He worked on Monday, December 30, 1996, but not on either of the following two days, New Year's Eve and New Year's Day, both paid holidays. He took personal leave days on Thursday and Friday, January 2 and 3, then began four weeks of scheduled vacation starting Monday, January 6, 1997. Although due to return on Monday, February 3, 1997, the Claimant resigned while in vacation status effective January 22, 1997 and received the remainder of his unused vacation in a lump sum.

The Organization contends on the Claimant's behalf that the Carrier's refusal to compensate him for the two holidays at issue offends the provisions of Rule 3, Section 1, and the parties' December 12, 1991 Agreement:

"RULE 3
REST DAY AND HOLIDAY WORK
(b)ARTICLE III – Holidays
National Agreement dated August 19, 1960

Section 1. Subject to the qualifying requirements applicable to regularly assigned employees contained in Section 3 hereof, each regularly assigned hourly and daily rated employee shall receive eight hours' pay at the pro rata hourly rate of the position to which assigned for each of the following enumerated holidays when such holiday falls on a workday of the workweek of the individual employee: [Holidays omitted]

Subject to the qualifying requirements applicable to other than regularly assigned employees contained in Section 3 hereof, all others who have been employed on hourly or daily rated positions shall receive eight hours' pay at the pro rata hourly rate of the position on which compensation last accrued to him for each of the above identified holidays if the holiday falls on a work day of the work week as defined in Section 3 hereof, provided (1) compensation for service paid him by the carrier is credited to 11 or more of

the 30 calendar days immediately preceding the holiday and (2) he has had a seniority date for at least 60 calendar days or has 60 calendar days of continuous active service preceding the holiday beginning with the first day of compensated service, provided employment was not terminated prior to the holiday by resignation, for cause, retirement, death, non-compliance with a union shop agreement, or disapproval of application for employment."

"December 12, 1991 Agreement

B. Amend that part of Rule 3 - Rest Day and Holiday Work . . . as follows:

Time actually worked in excess of forty (40) straight time hours per work week shall be considered overtime and paid on the minute basis at the rate of time and one-half. In the application of this overtime provision, holiday, vacation, personal leave and bereavement pay shall be considered time actually worked. . . ."

From the Organization's perspective, the Claimant met all requirements under Section 1 of the Rule to qualify for holiday pay: he had been compensated for more than 11 days immediately preceding the holiday, had in excess of 60 days of seniority prior to the holidays, and did not terminate his employment with the Carrier prior to the holidays. Accordingly, pursuant to Section B of the above amendment defining personal leave and vacation pay as time worked, he was entitled to eight hours pay for both New Year's Eve and New Year's Day.

The Carrier argues that the Organization's case is based upon a confused reading of the Rules. In the first instance, the above-quoted provisions of Section 1 are inapplicable to the Claimant, a regularly assigned employee, and not an unassigned or extra employee. As such, his eligibility for vacation pay is governed by Rule 3, Section 3 of the "National Holiday Provisions" which the Carrier reads to require that a regularly assigned employee must work both the day before and the day after the holiday to qualify for holiday pay. The pertinent portions of those provisions read as follows:

"NATIONAL HOLIDAY PROVISIONS
REST DAY AND HOLIDAY WORK

"Section 3. A regularly assigned employee shall qualify for the holiday pay provided in Section 1 hereof if compensation paid him by the carrier is

> credited to the workdays immediately preceding and following such holiday or if the employee is not assigned to work but is available for service on such days. If the holiday falls on the last day of a regularly assigned employee's workweek, the first workday following his rest days shall be considered the workday immediately following. If the holiday falls on the first workday of his workweek, the last workday of the preceding workweek shall be considered the workday immediately preceding the holiday."

Secondly, the Carrier maintains that the December 12, 1991 Agreement applies not to holiday pay, but solely to the calculation of overtime pay, and thus does not support the Claimant's argument.

In support of its position, the Organization cites a number of prior Second and Third Division Awards sustaining or denying purportedly analogous claims.[1] The Carrier

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[1] The Organization relies upon nine prior Awards. As we read them, two support its position; the remainder are either adverse or unavailing. In Second Division Award 10033, involving other parties and a substantially similar Rule, the claimant used a paid personal leave day on his first assigned work day following the Good Friday holiday. In what is characterized as a case of first impression, the Board concluded that "...a personal leave day [is] a work day and because this employe did receive compensation for it, he is entitled to the holiday pay." Second Division Award 11198 also involved different parties. That case addressed a holiday pay claim declined on grounds that the claimant had taken a personal leave day on the previous day. The Board, finding that the carrier had failed to bear its burden of establishing the existence of an agreement on the issue posed at a meeting between the parties, and relying on Award 10003, sustained the claim.

The following authority does not appear to stand for the proposition for which cited. Second Division Award 8843 dealt with a slightly different Rule and another carrier. The issue was whether the claimant performed any service on his first workday following his return from vacation so as to qualify for pay for Veterans Day. The Board sustained the claim on grounds that the carrier failed to overcome prima facie evidence that he worked, but the principle upon which the Board ruled disfavors the Organization's position in this claim. Likewise, Award 28 of Public Law Board No. 5449, as with Award 8843, *supra,* sustained the claim but on grounds that lend support to the Grand Trunk's position in our dispute. There the Board found that a letter from Conrail's then Vice President, Labor Relations to the TWU had amended the Rule to make it clear that "an employee may qualify for holiday pay if he is 'available for service' on the day preceding and following the holiday even though he performs no work. Third Division Award 20608 addresses an entirely different issue and is inapposite. Neither Second Division Award 6474 nor Third Division Award 24429 addressed the issue now before the Board, and neither is on point. In Second Division Award 8014, an IAM-represented Machinist Apprentice for the Houston Belt and Terminal Railway claimed and was awarded pay for the Christmas Eve, Christmas Day and New Year's Day holidays under the applicable Agreement. The case was argued and disposed of solely on procedural grounds; it does not reveal the Rule at issue or the positions of either party on the merits. For that and other reasons, it affords no guidance on the dispute before us. Second Division Award 11308 concerned a different carrier and slightly different Rule. This brief Award, holding the claimant qualified

responds in kind.[2] Because the precedent relied upon is extensive, and in view of the

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for holiday pay, is also of doubtful value in the context of this dispute because it does not indicate the basis on which the claimant was compensated for the day preceding New Year's Eve.

In sum, Awards 10033 and 11198 support the Organization's position; Awards 8843 and Award 28 of Public Law Board No. 5449 inferentially support the Carrier's position; reliance on Awards 20608, 6474 and 24429 is misplaced; and neither Award 8014 nor Award 11308 sheds any light on the issue.

2 Carrier cites 20 cases in support of its position, two of which cite additional authority that we have considered. From our reading of those 22 cases, seven support its position; 13 are of no value as precedent, and two are adverse, one with misgivings with respect to deferring to Seecond Division Award 10033, *supra.*

Second Division Awards 10534 and 10112; Award 3 of Public Law Board No. 3305; Second Division Awards 9977 and 9908; Third Division Awards 25391 and 23821 adopt the Carrier's position.

In the first of those matters, the Board denied a claim by this Organization and another carrier involving the identical Rule which sought holiday pay where the employee had been on vacation immediately preceding the holiday, concluding that "...a vacation day is not considered a workday under Section 3...." In Second Division Award 10112 involving this Organization and the Burlington Northern, the Board denied a claim for holiday pay because the claimant did not work on the day immediately preceding his vacation as a result of a strike. "Holiday pay, like vacation pay," the Board concluded, "is a benefit for services rendered...In order for a regularly assigned employee to qualify for holiday pay, compensation must be credited to him by the Carrier to workdays immediately preceding the holiday." In support, the Board cited Award 3 of Public Law Board No. 3305 ("A vacation day is clearly not a workday in the railroad industry.") as well as Second Division Award 9977 ("[Vacation dates] were vacation days, not work days.) In negotiating Section 3, the parties chose their words carefully. They mandated that compensation be credited for a 'work day' and not any other kind of day. Clearly, a 'vacation day' is not a 'work day' even though an employee is compensated ....") Second Division Award 9908, addressed a similar issue with the same Organization arising under a slightly different Rule and concluded that despite having been paid for two days immediately preceding the holiday at issue, his failure to perform actual service was fatal to his claim for holiday pay. In Third Division Award 25391 involving the same Organization and another carrier, the Board rejected the claim of an extra employee for holiday pay when the claimant marked off for a portion of the day before the holiday. In Third Division Award 23831 involving different parties but the same Rule, the Board denied the claim of a regularly assigned employee for holiday pay when he failed to work on the day after the holiday.

The Board finds the following 13 Awards to have no precedential value. Second Division Award 10423, involving different parties, denied a claim for holiday pay when the claimant refused to cross the picket lines of a sister union following his vacation. The Board's conclusion was based upon a Rule other than those involved in this dispute. Second Division Award 9307 involved entirely different parties and denied a claim for holiday pay substantially on equitable grounds in light of special circumstances. Third Division Award 31135 dealt with other than regularly assigned employees. Third Division Award 31132 involved this Organization and another carrier; denied a claim for holiday pay under a different Rule on grounds that the claimant "was not performing services on the day after Thanksgiving." Third Division Award 28514 involved different parties, but addressed the same Rule as involved in this dispute. Two claimants absent without authority on the workday prior to Thanksgiving were denied holiday pay on grounds that "they did not qualify under the provisions of Section 3."

emphasis both sides place upon the importance of the issue, a summary of that authority- which successfully defies compression - is provided in the footnotes hereto.

Based upon a careful reading of this record, the arguments of the Parties and the precedent supplied, the Board finds that the Claimant was not entitled to be paid for the New Year's Eve and New Year's Day holidays in 1996. Our reasons follow.

The threshold question is which of the competing holiday provisions invoked is controlling on the question before us. The Rules themselves are complicated, and the Board notes that the issue is somewhat further obscured by the fact that two different versions of them are relied upon by the Parties. That discrepancy is neither debated nor explained in the record, but in view of the fact that the edition of the National Holiday Provisions supplied by the Carrier in its Submission purports to be complete and incorporates revisions up to and including November 8, 1982, while the Organization relies

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Third Division Award 28027, in a dispute between other parties under an identical Rule found the claimant on medical leave status on the scheduled workday immediately prior to holiday not qualified for holiday pay. The Claimant's pay status is unclear. Third Division Award 27020, involving different parties, sustained a claim for an employee who received compensation for a personal leave day abutting a holiday. Neither the claim in this instance nor the Award itself identifies what Rule is being construed. In Third Division Award 23487 involving the same Organization, the Board dealt with issues concerning an other than regularly assigned employee, denying holiday pay on the basis of a different Rule. In Third Division Award 23221 involving different parties, the Board denied a claim for holiday pay while the claimant was on paid bereavement leave on grounds that such leave did not constitute a work day under the parties' Memorandum Agreement on that subject. In Award 8 of Public Law Board No. 343 the Board denied the claim for holiday pay where the claimant did not work on the day prior to the holiday, but the precise terms of the Rule involved are not set forth. Award 19 of Public Law Board No. 86 addressed and denied a claim for holiday pay involving different parties when the regularly assigned employee did not work on the day after the holiday. The Rule on which the findings are based is not set forth. Award 114 of Public Law Board No. 37, also involving different parties, rejected a claim for holiday pay on grounds other than the Rule implicated here. Award 1559 of Special Board of Adjustment No. 894 denied a claim for holiday pay in a dispute involving different parties and different Rules.

Third Division Award 26305 sustained a claim for holiday pay involving a paid personal leave day immediately prior to Thanksgiving, giving deference to Second Division Award 10003, *supra,* but noting in dicta: "Indeed, in the Referee's opinion there is persuasive value to the Carrier's interpretation of the Holiday Agreement as it relates to [personal days.]...if this were a case of first impression, [this Referee] would not necessarily have dismissed these understandings as an unmeaningful reflection of the Parties' intent as to the status of personal leave days as qualifying days for holiday pay purposes."

Lastly, Award 3 of Public Law Board No. 5336 involving the same Organization and another carrier sustained a claim for holiday pay under the same Rule when the claimant was off on a paid personal leave day immediately after the holiday, a position tracking Second Division Awards 10033 and 11198 , *supra.*

upon an excerpted version dated August 19, 1960, the Board's analysis is based upon its reading of Carrier Exhibit B.[3]

As indicated, for its criteria the Organization points to the terms of the National Agreement dated August 19, 1960, Rest Day and Holiday Work Rule 3, Article III – Holidays, Section 1 (b), quoted above and the December 12, 1991 Amendment. In doing so, the Organization apparently has misread the Rules. Because it is undisputed that the Claimant was a regularly assigned employee on the date giving rise to the claim, his entitlement to holiday pay is governed by Section 3 of the Rule, as argued by the Carrier. As such, he was required to work on the workdays immediately before and after the holiday in order to receive holiday pay, subject to the exception carved out for "personal leave days," suggested by Second Division Award 10033. The tests outlined in Section 1, upon which the Organization relies, although obviously satisfied, are expressly applicable to "other than regularly assigned employees."

The Board reaches that conclusion recognizing that the Rule is not entirely free of ambiguity, and that the Organization's reading of it, while contorted, is not difficult to come by. From our vantage point, however, examination of the text of Rule 3 and prior Board decisions discussing it suggests that there is no repugnancy of clauses within the Rule that cannot be resolved through normal rules of contract interpretation. In this instance, there are general conditions expressed in Section 1 that are "subject to," i.e., expressly limited or qualified by, the provisions of Section 3. Under those circumstances, the general references in Section 1 yield to the specific reference in Section 3. Any other construction would rob Section 3 of all meaning and negate the substantive terms governing regularly assigned employees. Thus, the Rule here can and has been consistently interpreted to apply to regularly assigned employees, and occasionally even to require that they actually perform

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[3] The language identified by the Organization as the second paragraph of Section 1 (b) of Rule 3 is for purposes of this dispute substantially identical to that of Section 1 (c) in the version of that Rule incorporated in Exhibit B of the Carrier's Submission. (The apparently cognate terms of Section 1 (c) in the Rule 3 quoted by the Carrier reads: "(c) Subject to the applicable qualifying requirements in Section 3 hereof, other than regularly assigned employees shall be eligible for the paid holiday or pay in lieu thereof provided for in paragraph (b) above, provided (1)" [provisos omitted].) The Carrier's version is identified as a "synthesis in one document...of the current Holiday provisions of the National Agreement of August 21,1954 and amendments thereto provided in the National Agreements of August 19, 1960, November 20, 1964, April 21, 1969, November 16, 1971, January 29, 1975, June 16, 1976, and January 8, 1982." Its reliance on that version of the Rule was not challenged in case handling on the property. In contrast, the Carrier raised a question—although only in its Submission—concerning allegedly dropped verbiage from the text of the Rule relied upon by the Organization.

services on the days immediately prior to and after the holiday in order to be entitled to holiday pay. The terms of Section 1, in contrast, apply solely to unassigned employees.

The Organization's second contention here is that the December 12, 1991 Agreement dictates that the Carrier must consider personal leave days as workdays, thus entitling the Claimant to pay for the holidays at issue. It is, however, plain and clear that by its own express self-description, that Agreement amends overtime Rules, and as an "overtime provision," it has no bearing on the issues raised by the claim.

That said, the sole remaining issue is whether, under the Claimant's circumstances, the personal leave days he used following the holidays and immediately preceding the vacation from which he never returned should be construed as "workdays" within the accepted meaning of that term as used in the Rule.

The doctrine of stare decisis helps promote stability and predictability by assuring that the same issues are not perpetually re-litigated. In the context of NRAB activity, the Board must be satisfied that the standard of "palpable error" is met before an Award is upended. It is a properly high bar. But as those principles relate to Second Division Award 10033, it is important to note that Award and the cases adhering to it, i.e., Second Division Award 11198, Third Division Award 26305 and Award 3 of Public Law Board No. 5336, examined only the narrow issue of whether personal leave days abutting holidays and followed by a return to work should be considered as workdays. The Board is bound by the cases that conclude they should.

Now a new factor creeps into the calculus. Here holidays are followed by personal leave days, followed in turn by vacation, followed by resignation. At least insofar as the precedent provided on this record reveals, it is well settled that pay for vacation days is not considered compensation for workdays as contemplated by the Holiday Agreement. See, e.g., Second Division Award 10534 et seq., supra. In essence, then, the Claimant never had compensation for workdays - except for that imputed by the above authority - nor performed service following the holidays before terminating his employment on January 22, 1997.

We find no case cited by either party in which holiday pay was awarded to an ex-employee when the claimant utilized personal leave days in conjunction with holidays and then failed to return to work. The purpose of a holiday is traditionally seen as time for rest and rejuvenation prior to resuming work, with pay important but decidedly incidental. In consequence, the Board is reluctant to now extend Second Division Award 10033 with

respect to personal leave days in a manner that would, as in this instance, promote or facilitate the bunching of personal leave days around holidays by terminating employees in order to achieve by indirection that which appears to be both otherwise barred by Agreement and incongruous with the purpose of the holiday benefit. Our rationale gains vigor in the face of a number of more recent decisions either suggesting discomfort with the earlier line of cases, or even expressly conditioning holiday pay on a performance-of-actual-work standard under analogous Rules. Thus, to now amplify the holding of Second Division Award 10033 to situations in which the employee never resumed employment would appear to buck against the latter cases and lose faith with the clear words of the Rule, which contemplate "workdays" on either side of the holidays for regularly assigned employees.

In short, the Board concludes that Second Division Award 10033 is controlling, but that its impact is confined to the type of situations that Board faced on the record before it. On this record, no expansion of the case is warranted, and a personal leave day immediately following a holiday for a regularly assigned employee is considered as a qualifying day for purposes of receiving vacation pay when, as in Second Division Award 10033, it is followed by a return to work.

The Board concludes that the record evidence, the use of conventional rules of contract interpretation and the arbitral authority all support the Carrier's position. The claim must be denied.

AWARD

Claim denied.

ORDER

This Board, after consideration of the dispute identified above, hereby orders that an award favorable to the Claimant(s) not be made.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Second Division

Dated at Chicago, Illinois, this 17th day of April, 2000.