Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD Award No. 11138
SECOND DIVISION Docket No. 10881
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 Carman F. F. Carley holiday pay for December 24-25, 1982 and January 1, 1983, Tucson, Arizona.

2. That accordingly, the Pacific Fruit Express Company be ordered to compensate Carman Carley for the holidays enumerated above and in line with Rule 7 - Appendix "B" of the agreement.

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.

In the instant case, the Claimant was on vacation from December 16, 1982 to December 31, 1982. While on vacation, the Claimant was furloughed effective December 31, 1982. Under the terms of the Agreement, Holiday Pay for the Claimant is governed by language which states in pertinent part:

> "Section 3. A regularly assigned employee shall qualify for holiday pay . . . 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. . .
>
> Except as provided in the following paragraph, all others for whom holiday pay is provided in Section 1 hereof shall qualify for such holiday pay if on the day preceding and the day following the holiday they satisfy one or the other of the following questions:
>
> (i) Compensation for service paid by the carrier is credited; or
> (ii) Such employee is available for service."

The Organization maintains that Claimant was due Holiday pay for December 24-25, 1982, because even in furloughed status he was available for service.

The Company argued on property that even if they conceded that the Claimant worked the 11 days (they do not discuss his working the day preceding the vacation) they do not agree that Claimant was available for service when furloughed. Claimant did not maintain an "availability slip on file which is the very minimum [he] should have done . . . "

In a companion case, Award No. 11139, we reviewed such agreement and said that:

> "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 Claimants do qualify for holiday pay irrespective of furlough and irrespective of any additional provision for the filling of short term vacancies."

In that Award, as in this, we find that the Company has violated the Agreement. As for the requested compensation, we are in this case disposing only of Holiday pay for December 24-25, 1982 and considering only that time when the Claimant was regularly assigned and on vacation up until December 31, 1982, when he was furloughed. The Holiday pay for Claimant requested for January 1, 1983, has been disposed of in Award No. 11139. This Award is consistent with a large number of decisions of the National Railroad Adjustment Board (Second Division Awards 10687, 9765, 8014, 7467, 5480, 5102; Third Division Awards 25351, 14816, 14674).

A W A R D

Claim sustained in accordance with the Findings.

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