

The Second Division consisted of the regular members and in addition Referee John J. Mikrut, Jr. when award was rendered.

Parties to Dispute: (International Brotherhood of Firemen and Oilers
(Burlington Northern Railroad Company

Dispute: Claim of Employees:

1. That in violation of the current Agreement, Mr. G. Tweten, Laborer, Mandan, North Dakota, was denied holiday pay for December 24, and 25, 1981.

2. That accordingly, the Carrier be ordered to compensate Mr. G. Tweten for sixteen (16) hours pay at the pro rata rate.

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 employees 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.

On December 14, 1981, Claimant was furloughed from a Laborer's position at Carrier's Mandan, North Dakota Car Shop. Two (2) days later, Claimant was offered and refused a ten (10) days temporary Day Laborer's assignment at that same facility. As a result of Claimant's refusal, Carrier considered him unavailable for service and denied Claimant's Claim for sixteen (16) hours of holiday pay for December 24 and 25.

Organization argues that Rule 12(a-1) of the applicable Agreement gives Claimant the option of refusing a temporary assignment without forfeiting his seniority right. Said Rule, in pertinent part, reads as follows:

"... if it is necessary to call furloughed employees other than those making requests under Rule 21 for temporary vacancies, it is understood that inability to accept the proffered employment shall not constitute a forfeiture of seniority rights."

According to Organization, given that Claimant was not obligated to accept Carrier's temporary work offer, he qualified for "other than regularly assigned employees holiday pay" as per Section 1(c) of the parties' August 21, 1954 National Holiday Agreement by working eleven (11) of the thirty (30) days preceding the holiday. The significant provisions of said Agreement are as follows:

"Section 1.

Subject to the qualifying requirements contained in Section 3 hereof, and to the conditions hereinafter provided, each hourly and daily rated employee shall receive eight hours' pay at the pro rata hourly rate for each of the following enumerated holidays:

* * *

(c) Subject to the applicable qualifying requirements in Section 3 hereof, other than regularly assigned employees shall be eligible for the paid holidays or pay in lieu thereof provided for in paragraph (b) above, 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.

* * *

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.

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 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.

For the purposes of Section 1, other than regularly assigned employees who are relieving regularly assigned employees on the same assignment on both the work day preceding and the work day following the holiday will have the workweek of the incumbent of the assigned position and will be subject to the same qualifying requirements respecting service and availability on the work days preceding and following the holiday as apply to the employee whom he is relieving."

Carrier concurs with Organization's assertion that except for refusing the ten (10) days temporary assignment, Claimant would otherwise have qualified for Christmas holiday pay. Carrier further posits that the gravamen of the instant dispute is whether Claimant was available for service as defined in the Note to Section 3 of the National Holiday Agreement. According to Carrier, said Note does not address an employee's choice to decline a temporary assignment, but rather excludes an employee's right to holiday pay when the employee fails to respond to a call to work. According to Carrier, in order to be considered available for service, and, consequently, qualify for holiday pay on December 24 and 25, Claimant should have accepted the December 16 call.

In support of their respective position, both parties cite the following portions of Second Division Award No. 5061:

"Further, Carrier was free to call Claimants for service inasmuch as there is nothing in said Section 3, Article III of the 1960 Agreement that prevented or hindered Carrier from calling them for service after the Labor Day holiday. If Carrier had called Claimants and they had failed to respond to a call, then the result herein would be different. However, since the Carrier failed to call Claimants for service on the day immediately following said Labor Day holiday, Carrier cannot now complain that Claimants were not available within the scope of applicable provisions of Article III of the '60 Agreement."

Organization contends that the aforestated portion of Award 5061 supports its position in the instant Claim. Carrier on the other hand, distinguishes the cited Award by noting the Board's reservation therein which allegedly justified Carrier's denial of holiday pay in situations where the employee (Claimant) is called to perform an assignment but refuses to accept the assignment.

The Board has carefully read, studied and considered the complete record in this case, and agrees with the parties that the instant dispute centers upon Claimant's availability, as per the National Holiday Agreement, to work the days preceding and following the 1981 Christmas holiday. Though this be true, however, neither side, in its argumentation, has presented an interpretation of Claimant's "availability" based upon the specific facts which are before the Board in the instant case. Consequently, we must interpret Claimant's availability based upon a plain reading of the Note to Section 3 of the applicable Rule. Given this determination, it must be noted that the qualifying language of Section 3 speaks only to the day preceding and the day following the holiday. As Carrier contends in its Submission, the parties carefully chose their words when negotiating the qualifying provisions of the National Holiday Agreement. This Board agrees with Carrier's contention regarding this particular point; however, the fact that Claimant refused a temporary call without detriment to his seniority ten (10) days prior to the holiday is found to be irrelevant to his availability for service on the day immediately preceding and subsequent to the disputed Christmas holiday.

As the Board noted in Second Division Award 5061, "... since the Carrier failed to call Claimants for service on the day immediately following the said ... holiday, Carrier cannot now complain that Claimants were not available...."

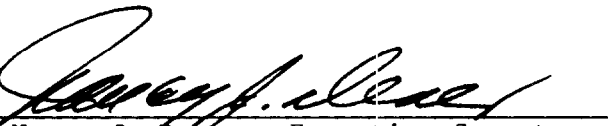
Given the above, merely because Claimant refused a call to work a temporary assignment ten (10) days prior to the Christmas holiday does not establish his unavailability to work the day preceding or following said holiday. Absent proof of Claimant's unavailability to work on the days in question, other than that which has been proffered by Carrier, we must conclude that Claimant was available for service and qualifies for the Christmas holiday pay as claimed.

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 22nd day of April 1987.

