# Award Number 17366
# Docket Number TE-16707

## NATIONAL RAILROAD ADJUSTMENT BOARD

## THIRD DIVISION

Louis Yagoda, Referee

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## PARTIES TO DISPUTE

## TRANSPORTATION COMMUNICATION EMPLOYEES UNION

## CHICAGO, MILWAUKEE, ST. PAUL AND PACIFIC RAILROAD COMPANY

STATEMENT OF CLAIM: Claim of the General Committee of the Transportation Communication Employees Union on the Chicago, Milwaukee, St. Paul & Pacific Railroad, that:

1. Carrier violated the terms of an agreement between the parties hereto when it failed and refused to compensate E. L. Zeiser eight (8) hours at the time and one-half rate for work performed on August 17, 1965, his birthday, when his position worked while he was on vacation.

2. Carrier shall, because of the violation set out above, compensate E. L. Zeiser eight (8) hours at the time and one-half rate of his position in addition to payment he has already received.

EMPLOYES' STATEMENT OF FACTS: An Agreement between the Chicago, Milwaukee, St. Paul & Pacific Railroad Company, hereinafter referred to as Carrier, and its employees in the classes specified therein, represented by the Transportation-Communication Employees Union (formerly The Order of Railroad Telegraphers), hereinafter referred to as Employees and/or Union, effective September 1, 1949, as amended and supplemented, is available to your Board, and is, by this reference, made a part hereof.

The relevant and material facts in this case are simple and undisputed. E. L. Zeiser, hereinafter referred to as Claimant, was the regular occupant of the agent's position at Maxwell, Iowa on the date upon which the incident which precipitated this dispute occurred. His work week was Monday through Friday, Saturday and Sunday rest days.

Pursuant to the provisions of the National Vacation Agreement, Claimant was, on Tuesday, August 17, 1965, on his vacation. Tuesday, August 17, 1965, was a regular work day of his position. His position, while he was on vacation, was filled by an extra employee. Claimant claimed eight (8) hours at the pro rata rate as a vacation allowance, and in addition, he claimed eight (8) hours at the time and one-half rate because his position worked on Tuesday, August 17, 1965, which was his birthday. Carrier allowed Claimant eight (8) hours at the pro rata rate as a vacation allowance, but failed and refused to allow his claim for additional

Attached hereto please find Carrier's Exhibits "A" and "B".

(Exhibits not reproduced)

**OPINION OF BOARD:** At the time of the incidents which gave rise to the instant claim, Claimant was the regularly assigned occupant of the position of agent at Maxwell, Iowa. His work week was Monday through Friday, Saturday and Sunday rest days.

On Tuesday, August 17, 1965, Claimant was on vacation as part of a twenty (20) consecutive work day vacation running through the five working days of each of four weeks commencing Monday, August 2, 1965 and ending at the end of working day, Friday, August 27, 1965.

Tuesday, August 17, 1965 was Claimant's birthday as well as vacation. Pursuant to Article II of the November 20, 1964 National Agreement a birthday is a holiday for employes who otherwise qualify.

Claimant's position was filled during these vacation days, including his birthday, by an extra employe.

Compensation was given Complainant of eight hours at his pro rata rate for August 17, 1965, the same as for the other nineteen (19) days of his vacation. He contends that he should have received additional compensation for eight hours at the time and one-half rate for said day.

Employes advance the following contentions on behalf of this claim: Article II of the November 20, 1964 Mediation Agreement provides that the birthday of qualifying employees shall be a holiday. Employes contend that the birthday-holiday is no different than the other seven holidays provided by previous agreements and, when the birthday-holiday falls within a vacation period, must be treated the same as far as payment is concerned.

Employes also cite following Rule from the December 17, 1941 Vacation Agreement and Interpretation, June 10, 1942, which, it is contended, apply to birthday-holidays:

> "Article 7(a): An employe having a regular assignment will be paid while on vacation the daily compensation paid by the Carrier for such assignment."

> "INTERPRETATIONS, JUNE 10, 1942

> (Organization and Carrier Conference Committees):

> This contemplates that an employe having a regular assignment will not be any better or worse off, while on vacation, as to the daily compensation paid by the carrier than if he had remained at work on such assignment, this not to include casual or unassigned overtime or amounts received from other than the employing carrier."

Employes contend that inasmuch as Claimant's position was filled by an extra employe on Claimant's birthday-holiday-vacation, he was "worse off" by being on vacation and should be made whole by additional compensation of eight hours at the penalty rate.

Carrier's position is that if Claimant had not been on vacation on the birthday, he would have been given the day off as required by Agreement, and eligible for eight hours pay at straight time for said absence. There is no basis for his getting more from the fact that he was on vacation and enjoyed the same absence. Furthermore, the employe utilized to fill Claimant's position on August 17, 1965, was entitled to and received the straight time rate for that day. Therefore, looked at either as a comparison with himself as a non-vacationer or with the employe who substituted for him, Claimant was not "worse off" by the payment received.

There can be little doubt that a holiday resulting from the fact that it is an employe's birthday is no less a holiday for the considerations here involved than any other holiday. This is assured by Article II(a) and (g) of the November 20, 1964 Agreement.

This leaves two key considerations for determination of this matter.

One of these is whether Article 7(a) and Article 12(a) of the Vacation Agreement intend to protect employes to the extent of compensation paid to their substitutes or to the extent of compensation the vacationer himself would have earned if he had not been on vacation. Our opinion is that in the light of the Interpretation of June 10, 1941, these provisos must be read as an assurance that the compensation paid to vacationers must be no less and no more than that which would have been earned by the same individual as a non-vacationer if he had stayed on the job.

We must then turn to determination of the question of what the subject Claimant would have earned on August 17, 1965 if (his vacation not having then occurred), he had remained at work during the week in which that birthday fell.

Would he have worked on his birthday. If so, he would have been paid twenty hours' pay for that day. If he would not have, his compensation for that day (enjoyed as a recess) would have been eight hours' pay.

For the instant circumstances, in view of the fact that Carrier had decided work was necessary for the day in question (evidenced by use of a relief employe), we must conclude that Claimant's equivalent pay for that day should include the additional 8 hours' at time and one-half which he would have earned by working.

This follows our reasoning in Award 15722 involving same carrier, similar rules and similar fact situation. We sustained claim for additional eight hours at premium rate, stating, in part:

> ". . . Claimant would have been properly paid had her position not been filled on her birthday while she was on vacation. It is well settled that, circumstances permitting, Carrier can blank the assignment of a vacationing employe, either in whole or in part. In this case, and particularly as concerns the day which was her birthday, the Carrier chose to fill Claimant's position. If she had not been on vacation Claimant would have had the right to fill the position on her birthday (Award 15227). Since Carrier chose to fill the position, the claim is meritorious under the agreed-upon interpretations dated June 10, 1942, to Article 7(a) of the National Vacation Agreement."

FINDINGS: The Third Division of the Adjustment Board, upon the whole record and all the evidence, finds and holds:

That the parties waived oral hearing;

That the Carrier and the Employes involved in this dispute are respectively Carrier and Employes within the meaning of the Railway Labor Act, as approved June 21, 1934;

That this Division of the Adjustment Board has jurisdiction over the dispute involved herein; and

That the Agreement was violated.

AWARD

Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 1st day of August 1969.

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