



Award Number 17428

Docket Number TE-16399

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

James R. Jones, Referee

PARTIES TO DISPUTE:

**TRANSPORTATION-COMMUNICATION EMPLOYES UNION
CHICAGO, MILWAUKEE, ST. PAUL AND PACIFIC
RAILROAD CO.**

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 improperly relieved Telegrapher L. E. VanHorn on January 12, 1965, his birthday.
2. Carrier shall, because of the violation set forth above, compensate L. E. VanHorn for eight (8) hours pay at the time and one-half rate.

EMPLOYEES' STATEMENT OF FACTS: An Agreement between the Chicago, Milwaukee, St. Paul & Pacific Railroad Company, hereinafter referred to as Carrier, and its employees 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 question at issue here is the right of an employee to fill his position on a work day thereof which is his birthday, as against the filling of said position by monthly rated agent who performed the work of said position in addition to his own.

L. E. VanHorn, hereinafter referred to as Claimant, is a regular occupant of a regular rest day relief position, which performs relief work on certain days, and such types of other work on other days as may be assigned under the Agreement. (Rule 11 (e) Regular Relief Assignments). His work week is Sunday through Thursday, Friday and Saturday rest days. On Sunday he relieves the monthly rated agent's position at Montevideo, Minnesota, assigned hours 7:45 A.M.-3:45 P.M. On Monday and Tuesday he works the same hours at Montevideo on such type of other work as may be assigned under the Agreement. On Wednesday and Thursday he relieves the telegrapher at Montevideo, assigned hours 10:00 P.M.-6:00 A.M.

Tuesday, January 12, 1965, one of the days on which Claimant performs such type of other work as may be assigned under the Agreement, was Claimant's birthday. Pursuant to the terms of Mediation Agreement A-7127

be given their birthday off, claimant VanHorn was, on his birthday, i.e., January 12, 1965, given the day off for which he was allowed, also in accordance with the provisions of the aforementioned and having otherwise qualified therefor, 8 hours pay at the pro rata rate.

On Tuesday, January 12, 1965, one of Agent Parker's regularly assigned work days, he (employee Parker) spent approximately 30 to 45 minutes copying train orders, clearances, lineups and messages which was and is entirely proper in view of the fact that said work is assigned to him and regularly performed by him.

Attached hereto as Carrier's Exhibits "A" through "O" are copies of the entire exchange of correspondence between the parties during the handling of the instant claim on the property.

(Exhibits not reproduced)

OPINION OF BOARD: Claimant L. E. Van Horn contends that Carrier violated his contractual rights in refusing to allow him to work during regular assigned hours on January 12, 1965, his birthday. The relevant, material, and competent evidence is not in dispute.

Claimant occupied, on the date in question, a Relief Position at Montevideo, Minnesota. The position was assigned to work on Sunday, 7:45 A.M. to 3:45 P.M., rest day of the Agent, a monthly rated position. On Monday and Tuesday the position was assigned to work 7:45 A.M. to 3:45 P.M., performing "such types of other work on other days as may be assigned under this agreement" in accordance with provisions of Rule 11, Section 1(e). On Wednesday and Thursday the position was assigned to work 10:00 P.M. to 6:00 A.M., relieving on rest days of Operator position. Friday and Saturday were assigned rest days.

Claimant was reasonably notified not to work on his birthday, and was paid a pro rata day as holiday pay under provisions of Article II, Section 6(a) of November 20, 1964 Agreement. He contends, however, that the Agent performed work normally performed on his position, Tuesday, January 12, 1965, and consequently he should have been allowed to work and be paid therefor under provisions of Rule 11, Section 2.

It is agreed that the Agent, who has the same assigned hours as the Claimant on Monday and Tuesday, performed all the services rendered at Montevideo during these hours on Tuesday, January 12, 1965. Further, it is agreed that no other employee was used during these hours, and the record does not show that the Agent worked any time outside his regular hours—7:45 A.M. to 3:45 P.M., on this date. It is further agreed that Tuesday, January 12, was a regular assigned work day for the Agent.

The Organization bases its claim that the Agent performed work of the Claimant primarily on the fact that the Agent handled train orders and other communication work. It is also contended that Claimant worked on other holidays in 1965. However, this evidence is objected to by Carrier on the ground that the statement of Claimant was not exhibited to Carrier during the handling of the claim on the property as required under Circular No. 1. We find this objection well taken and Organization's Exhibit 1 will not be considered. The difficulty with Organization's reliance on the handling of train orders, etc., by the Agent is that the Agent admittedly performs this

identical work by himself on Wednesday, Thursday, Friday, and Saturday of each week. Further, there is no evidence that such work was "assigned" to the Claimant. We assume, however, that as a matter of convenience and efficiency the Agent does direct the Claimant to perform the same or similar work on each Monday and Tuesday. If this assumption be correct still the Claimant does not have a contractual claim to any particular work on these days. The very nature of his assignment is to "assist" the Agent.

As shown in Award 17427, adopted this date, involving the same parties and the same rules, we are well aware of the line of awards holding that where work is required to be performed on a holiday the regular incumbent is entitled to perform it. Further, our attention has been directed to a line of awards holding that the Carrier has the right to "blank" a position on a holiday, Second Division Award 2325; Third Division Awards 8539, 9577, 10166, 10594, 11079, 11253, 11433, 12392, 13259, 13277, 13386, 13843, 14585, 14597, 15436, 15472, 15731, 15732, 16317, 16318, 16319, 16320.

We agree with both lines of awards. The distinguishing feature to be observed is that on the one hand work is required to be performed on the position while on the other no work is performed. In the instant case it does not follow as a matter of course that because the Agent worked, work was performed on Claimant's position. A somewhat similar situation was involved in a recent award (No. 17057) involving this Carrier, but another Organization, and the identical rules. In that case there were four Assistant Cashiers in the same office. On claimant's birthday he was given the day off and no additional employee was called in. The Referee concluded that his position was "blanked". In so holding it was stated: "To hold otherwise would require Carrier to close an entire office or call the Birthday-holiday celebrant in on every Birthday-holiday at time and one-half. It is well settled that Carrier is not compelled to work an employee on his Birthday-holiday."

For the foregoing reasons we will deny the claim.

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 Employees involved in this dispute are respectively Carrier and Employees 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 not violated.

A W A R D

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 11th day of September 1969.

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