NATIONAL RAILROAD ADJUSTMENT BOARD

Award Number 26305

THIRD DIVISION Docket Number MW-26222

Gil Vernon, Referee

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employes
(
(Spokane International Railroad Company

STATEMENT OF CLAIM: "Claim of the System Committee of the Brotherhood that:

(1) The Carrier violated the Agreement when it failed and refused to allow Carpenter D. R. Friesen holiday pay for Thanksgiving Day and the day after Thanksgiving Day (November 24 and 25. 1983 (System File S-I-115C/013-210-SI-20).

(2) The claimant shall be allowed sixteen (16) hours of pay at the carpenter's rate in effect on the claim dates because of the violation referred to in Part (1) above."

OPINION OF BOARD: The basic facts are not in dispute. The Claimant, assigned Monday through Friday, observed his rest days on Saturday and Sunday, November 19 and 20. He laid off Monday and Tuesday, November 21 and November 22. Next, he requested and received, pursuant to Article X of the December 11, 1981, National Agreement, a personal leave day for Wednesday, November 23. Thursday and Friday, November 24 and 25, were holidays (Thanksgiving and the day after Thanksgiving) pursuant to the National Holiday Agreement. The Claimant again observed Saturday and Sunday as rest days. He worked on Monday.

A payroll form was submitted claiming holiday pay for November 24 and 25. The Carrier did not pay the Claimant for the holiday and a grievance was filed.

Article X - Personal Leave states:

"ARTICLE X - PERSONAL LEAVE

section 1

A maximum of two days of personal leave will be provided on the following basis:

Employees who have met the qualifying vacation requirements during eight calendar years under vacation rules in effect on January 1, 1982 shall be entitled to one day of personal leave in subsequent calendar years;

Employees who have met the qualifying vacation requirements during seventeen calendar years under vacation rules in effect on January 1, 1982 shall be entitled to two days of personal leave in subsequent years.

Section 2

(a) Personal leave days provided in Section 1 may be taken upon 48 hours' advance notice from the employee to the proper carrier officer provided, however, such days may be taken only **when** consistent with the requirements of the carrier's service. It is not intended that this condition prevent an eligible employee from receiving personal leave days except where the request for leave is so late in a calendar year that service requirements prevent ehe employee's utilization of any personal leave days before the end of that year.

(b) Personal leave days will be paid for at the regular rate of the employee's position or the protected rate, whichever is higher.

(c) The personal leave days provided in Section 1 shall be forfeited if not taken during each calendar year. The carrier shall have the option to fill or not fill the position of an employee who is absent on a personal leave day. If the vacant position is filled, the rules of the agreement applicable thereto will apply. The carrier **will** have the right to distribute work on a position vacated among other employees covered by the agreement with the organization signatory hereto.

section 3

This Article shall become effective on January 1, 1982 except on such carriers where the organization representative may elect to preserve existing local rules or practices pertaining to personal leave days and so notifies the authorized carrier representative on or before such effective date."

Section 3 of the National Non-Operating Holiday Provisions states:

> "Section 3. A regularly assigned employee shall qualify for the holiday pay provided in Section 1 hereof if compensation paid 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 work week, 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 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 workday preceding and the workday 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 workdays preceding and following the holiday as apply to the employee whom he is relieving.
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> NOTE: Compensation paid under sick leave rules or practices will not be considered as compensation for purposes of this rule." (Emphasis added)

The Organization contends that the Holiday Agreement provides that an employe will receive holiday pay if he is credited with compensation on the workday before and the workday after the holiday. Since the Claimant's assigned work week is Monday through Friday, it contends Wednesday, November 23 was the "workday" preceding the holiday and since Claimant received compensation on that day in the form of a personal day he should be entitled to holiday pay. In support of this interpretation, it relies heavily on Second Division Award 10033 which involved similar facts under the Holiday and Personal Leave Agreements. The Award read in pertinent part as follows:

> "The Carrier contends that a personal leave day is not a work day and accordingly, the Claimant would not be entitled to compensation for the holiday. The employes contend that a personal leave day is a work day and the Claimant is therefore entitled to compensation for the holiday. Both parties cite Awards from this Board in support of their position, but none of the Awards cited pertain to exactly the rules and conditions as in the instant case. This in fact seems to be a case of first impression. We of course, cannot know what the parties who made the agreement had in mind at the time the holiday Agreement was negotiated, but we cannot see any other meaning to the words "work day" except a day that such employe would normally work on. The Agreement also makes it clear that the employe need not necessarily work the day, but only that he receive compensation for it. A personal leave day would therefore, be a work day and because this employe did receive compensation for it, he is entitled to the holiday pay. We will sustain the claim."
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> (Emphasis added)

The Carrier argues Wednesday, a personal leave day, was not a "workday" for the Claimant. It notes when similar questions have arisen under the Holiday Agreement as it relates to bereavement leave and vacation the Parties have agreed they do not qualify as a workday. In this situation, if Wednesday was missed due to vacation or bereavement leave, even though the employe received compensation, it points out the Parties have agreed such days are not workdays for qualifying purposes under the Holiday Agreement. Instead the Parties have agreed that the workdays immediately previous to the vacation or bereavement leave are the qualifying days. In this case. Tuesday, the workday before the personal leave day, would be the qualifying day and since he did not receive compensation no holiday pay is due. Thus, since the Parties nationally agreed to the bereavement leave questions and answers, the Carrier submits to treat personal leave absences differently than absences due to vacations or- bereavement leave would be nonsensical, inconsistent and in conflict with the intent of the parties signatory to the National Non-Operating Holiday Agreement. With respect to Second Division Award 10033, it considers it palpably erroneous and thus takes the position it should have no bearing on this dispute.

The threshold question facing the Board is the weight to be given to Second Division Award 10033 which is clearly on "all fours" with the instant case. The records of this Division and others are legion with Awards which hold that once a basic interpretative question is answered it should stand. Typical of this line of thinking is Third Division Award 13135 which stated:

> "In order that our awards will be of benefit to the parties, we feel that we should follow precedent cases, wherever and whenever it is possible. The utility of our decisions is lost if we bounce back and forth between various theories on the same general subject."

On the other hand, the Board has overturned Awards that are "palpably erroneous. "

An Award is not palpably erroneous merely because another Referee, when faced with the same question, would have decided the matter differently if it were he who faced the question in the first instance. Indeed, in the Referee's opinion there is persuasive value to the Carrier's interpretation of the Holiday Agreement as it relates to Article X (Personal Days).

However, the Board cannot in good conscience conclude that Second Division Award 10033 cannot be accepted as precedent. The key to the dispute in that case and in this case is the term "workday." The Carrier argued in both cases "workday" is a day on which an employe actually works. This is reasonable enough, but it is not wholly unreasonable to conclude, as did the Board in Award 10033, that "workday" meant a day on which the employe was normally scheduled to work. The Referee then found that since the employe received compensation--albeit in the form of a personal day--on rhe "workday" before the holiday he was entitled to holiday pay. This is not an irrational or nonsensical conclusion. It is not unreasonable and the fact other reasonable interpretations might flow from the language does not make this result clearly erroneous.

The Carrier also argued that Award 10033 was palpably erroneous because It ignored the history of the Holiday Agreement. It contended the Parties' understanding that bereavement leave pay and vacation pay on an otherwise scheduled day of work would not make that a workday for holiday pay qualification purposes. Instead, the Parties agreed the first regularly scheduled workday before vacation or bereavement leave would be the qualifying day. It also noted that the Holiday Agreement excluded sick leave compensation for qualifying purposes.

Again, this Referee, if this were a case of first impression, 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. However, the fact that the other Referee

viewed the situation differently does not make it palpably erroneous. It is a defensible position not to find the bargaining history controlling. The fact that the parties carved out exceptions for vacation pay, bereavement pay and sick leave pay does not necessarily imply other exceptions for personal days. It could be said that had the Parties intended other exceptions they would have, being skilled negotiators, stated them.

In summary, given that the basic question involved in this case has been ruled on in Second Division Award 10033 and in view that this Board cannot conclude it is clearly erroneous, the Claim must be sustained.

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.

A W A R D

Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Attest: Nancy J. Dever - Executive Secretary

Dated at Chicago, Illinois, this 24th day of April 1987.