Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 33476
Docket No. MW-32337
99-3-95-3-176

The Third Division consisted of the regular members and in addition Referee Martin H. Malin when award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employes
(Terminal Railroad Association of St. Louis

STATEMENT OF CLAIM:

"Claim of the System Committee of the Brotherhood that:

(1) The Carrier violated the Agreement when it failed and refused to compensate Messrs. L. Gates, C. Jefferson, R. Brown, C. Laden, S. Gray, T. Allan, C. Perkins, R. Stewart, R. McCranie, M. Hudson, E. Myers, C. Perry, A. McCarter, D. Bean, T. Harris, C. Ownes, C. Wicks, R. Kurtz, M. McCann, D. Schindler, R. Van, J. Gatlin, M. Kayser, M. Mitchell, S. Wolf, W. Vickers, A. Smoot, N. Libell, R. Pruitt and S. Millard for the Christmas Day (1993), New Year's Eve (1993) and New Year's Day (1994) holidays (System File 1994-11/013-293-19).

(2) As a consequence of the violations referred to in Part (1) above, the Claimants shall be compensated eight (8) hours' pay at their respective straight time rates, for each of the holidays cited which the Carrier failed to compensate them for."

FINDINGS:

The Third 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 employee 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 were given due notice of hearing thereon.

The Organization is seeking holiday pay for Claimants, employees of the Track Department and B&B Department, who were furloughed at the end of work on December 10, 1993,[1] and who, the Organization contends, should have been allowed to use their vacation to qualify for holiday pay for Christmas, New Year's Eve and New Year's Day. Carrier responds that furloughed employees were not on vacation but, instead, received pay in lieu of unused vacation, and that receipt of such pay does not count in fulfilling the requirements of the holiday pay rule. Carrier relies on Third Division Award 29936 in support of its position. Carrier further maintains that even under the Organization's theory of the claim, several Claimants would not have qualified and several others actually were paid for all or some of the holidays in question.

Rule 29B provides for holiday pay of eight hours at the pro rata rate, provided, "compensation for service paid him by the carrier is credited to 11 of the 30 calendar days immediately preceding the holiday..." Claimants had scheduled vacations during the year but had deferred taking their vacations because of the needs of Carrier's operation. On December 10, 1993, they were furloughed. The Organization contends that Claimants should be credited for the vacation days they had deferred and, accordingly, should qualify for holiday pay.

During handling on the property, Carrier pointed out that a number of Claimants did qualify and were paid for some or all of the holidays. The Organization agreed to withdraw those claims. Nevertheless, the Statement of Claim includes claims for S. Gray and T. Allen for Christmas and New Year's Eve; C. Wicks for Christmas; and S. Wolf for New Year's Eve and New Year's Day, even though those Claimants were paid. Accordingly, those claims must be denied.

During handling on the property, Carrier represented that a number of Claimants would not have had eleven days of compensated service within the thirty

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[1] Claimant Keyser was furloughed at the end of work on December 9.

calendar days preceding the holiday even if credited with vacation days remaining at the time they were furloughed. The Organization did not dispute the representations. Accordingly, the following claims must be denied:

C. Perry - New Year's Eve and New Year's Day
C. Owens - New Year's Eve and New Year's Day
C. Wicks - New Year's Eve and New Year's Day (and already paid for Christmas)
D. Schindler - all three holidays
W. Vickers - all three holidays
A. Smoot - New Year's Day
S. Millard - New Year's Day
R. Brown - all three holidays
C. Laden - all three holidays
R. Stewart - all three holidays
R. McCranie - all three holidays
E. Meyers - all three holidays
D. Bean - all three holidays
T. Harris - all three holidays
R. Van - all three holidays
M. Kayser - all three holidays
M. Mitchell - all three holidays
R. Pruitt - all three holidays.

The remaining parts of the claim turn on whether vacation that the Claimants had yet to take as of the time of their furloughs counts as compensated service to fulfill the requirement of eleven days of compensated service within the thirty days preceding the holiday. It was undisputed on the property that the Claimants had scheduled their vacations during the year but that Carrier had required them to work during their scheduled vacations and to take the time off later in the year. They had not taken all or some of their vacation as of the date they were furloughed and sought to take them upon being furloughed. Carrier paid them for their unused vacation time but maintained that they received pay in lieu of vacation and that the time did not count toward the compensated service requirement for holiday pay.

Appendix B, Vacation Agreement, on its face addresses the instant situation. Section 5 provides:

> "Each employe who is entitled to vacation shall take same at the time assigned, and, while it is intended that the vacation date designated will be adhered to so far as practicable, the management shall have the right to defer same provided the employe is given as much advance notice as possible; not less than ten (10) days' notice shall be given except when emergency conditions prevent. If it becomes necessary to advance the designated date, at least thirty (30) days' notice will be given affected employe.
>
> "If a carrier finds that it cannot release an employe for a vacation during the calendar year because of the requirements of the service, then such employe shall be paid in lieu of the vacation the allowance hereinafter provided. . . ."

There is no contention that the requirements of the service precluded the Claimants from taking their vacation, beginning December 11. On the contrary, their service was not required, as evidenced by their furloughs. Consequently, we are unable to agree with Carrier's contention that Claimants received pay in lieu of vacation; they received the vacation to which they were entitled under the Agreement.

Carrier maintains that the instant claim is controlled by Third Division Award 29936 and Public Law Board No. 4768, Award 9. In both of those cases, Claimants were furloughed considerably in advance of the holidays in question. They did not take their remaining vacation days immediately upon furlough. Rather, they sought to take vacation in sufficient proximity to the holidays to be able to use the vacation days to qualify for holiday pay. In each case, the board, quite correctly, refused to allow the claimants to manipulate their vacation days in such a manner and held that they did not qualify for holiday pay.

The instant case contains no similar strategic behavior. Rather, the Claimants had scheduled their vacations earlier in the year and had been required to defer them by management. Management had the right to do so under Section 5 of the Vacation Agreement. Section 5 further governed the circumstances under which the Claimants would receive pay in lieu of vacation, i.e. if the requirements of the service precluded them from taking their vacations anytime during the calendar year. In the instant case, the requirements of the service did not preclude Claimants from taking their vacations immediately upon being furloughed and, except as to the Claimants and holidays

discussed above, taking their vacations immediately upon being furloughed provided them with sufficient days of compensated service to qualify for holiday pay. Accordingly, as to those Claimants, the claim will be sustained.

AWARD

Claim sustained in accordance with the Findings.

ORDER

This Board, after consideration of the dispute identified above, hereby orders that an award favorable to the Claimant(s) be made. The Carrier is ordered to make the Award effective on or before 30 days following the postmark date the Award is transmitted to the parties.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Dated at Chicago, Illinois, this 22nd day of September 1999.

Carrier Members' Dissent
to Third Division Award 33476 (docket MW-32337)
(Referee Malin)

The disposition of this claim that most of the Claimants did not qualify for holiday pay is correct. However, all Claimants did not qualify.

Rule 29B stipulates the condition precedent for employees who are other than regularly assigned.

> ". . .(1) compensation for service paid him by the Carrier is credited to 11 or more of the 30 calendar days immediately preceding the holiday. . . ."

After December 9 or 10, 1993 none of the Claimants performed any service for which they were compensated. At that time they did not meet the rule requirement. After furlough, Claimant's performed no compensable service. Vacation time earned in 1992 is not compensation for service in 1993. Such does not meet the requirement of the rule. Third Division Awards 30588, 31135, 31384.

P. V. Varga

M. W. Fingerhut

M. C. Lesnik

LABOR MEMBER'S RESPONSE
TO
CARRIER MEMBERS' DISSENT
TO
AWARD 33476, DOCKET MW-32337
(Referee Malin)

According to the Carrier Members' Dissent, the Carrier should be allowed to make a mockery of the Vacation Agreement by requiring employes to forego their scheduled vacation period and avoid paying the Claimants for holiday pay to which they would have otherwise been entitled. It was undenied during the on-property handling of this dispute that a majority of the Claimants had scheduled vacation earlier in the year, but the Carrier requested that they work their scheduled vacation period and defer their vacations until later in the year. The Claimants agreed to do so and the Carrier repaid the Claimants by abolishing their jobs before they could take their vacations. The key point in this case is the day to which the compensation is credited. The Claimants were compensated vacation days credited from December 9, 1993 until their vacation had been exhausted, thereby qualifying them for holiday pay in accordance with Rule 29B.

Respectfully submitted,

Roy C. Robinson
Labor Member