

Form 1

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 35503
Docket No. TD-34594
01-3-98-3-196**

The Third Division consisted of the regular members and in addition Referee Donald W. Cohen when award was rendered.

**(American Train Dispatchers Department/
(International Brotherhood of Locomotive Engineers
PARTIES TO DISPUTE: (
(National Railroad Passenger Corporation (Amtrak)**

STATEMENT OF CLAIM:

“Please arrange to compensate Mr. Nash by allowing 2 days pay at the proper rate for 2 road days owed him as provided by RULE 15 of our agreement which reads in part ‘Train Dispatchers will be allowed a minimum of four (4) road days each year commencing January 1, 1977, without loss in compensation.. .’

Train Dispatcher Nash made several requests to be assigned this duty, but was apparently denied because of insufficient Extra Board Employees to back fill his bulletined position. Because Amtrak apparently could not relieve Mr. Nash on his assigned work days, we contend that it had the option of offering him the opportunity to perform this necessary function on his rest day(s), and compensated at the appropriate rate. We therefore claim compensation at the time and one-half rate for his remaining two Road Days for 1996.”

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 Claimant contends that under the provisions of Rule 15 he must be allowed four road days each year. The Organization contends that he took two days and requested two other days which were denied. It is the position of the Organization that the Rule requires a minimum of four days each year. It relies upon Third Division Award 19695 which states in part at page 4 "The word 'will' is imperative. It places an obligation. It is not 'optional' with the Carrier. . . ."

The Carrier raises an issue of timeliness, contending the Claimant should have raised the issue when he was last denied permission for a road day on November 30, 1996. The Carrier points out that a grievance was not tiled until February 23, 1997. The Carrier also contends that the Rule is not mandatory and that it does not require payment for days not used. Finally the Carrier claims that the use of the word "will" is not mandatory within the context of Rule 15, citing Third Division Award 16172.

The first question to be resolved is whether the grievance is timely. Clearly the Claimant had the right to take road days up to December 31, 1996. Under such circumstances he would have no way of knowing he had a claim until that date had passed. As a result, the grievance is timely.

The issue then becomes whether there is a mandatory requirement that employees receive four road days each year and pay for each day less than that amount. In this case the Claimant took two road days and contended that on two other occasions he was denied the opportunity to take such a day. The Rule provides:

"Train Dispatchers will be allowed a minimum of four road days each year commencing January 1, 1977, without loss in compensation, for the purpose of reacquainting themselves with the physical characteristics of their dispatching territory.. . ."

The Carrier cites Award 24084, which in turn relies upon Award 16172 for the proposition that "The absence of negative words tends to show that the language used is directory and not mandatory." The reasoning in these cases is compelling so far as

it goes, but there are many situations where the entire context of the Agreement must be taken into consideration. If the language is mandatory, the absence of a remedy is not fatal. The burden of proof in this case is that of the Organization and its contention that the Rule is mandatory is correct, and the remedy flows from the failure to follow the Rule. Not only does the Rule set forth that the carrier “will” provide the four days, but it sets forth that this shall be a minimum. The Rule is intended to benefit both the Carrier and the employee. Finding is for the Claimant.

AWARD

Claim sustained.

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 21st day of June, 2001.