

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

Award No. 40430
Docket No. MW-39862
10-3-NRAB-00003-070005
(07-3-5)

The Third Division consisted of the regular members and in addition Referee Michael D. Gordon when award was rendered.

PARTIES TO DISPUTE: ((Brotherhood of Maintenance of Way Employees Division -
(IBT Rail Conference
(BNSF Railway Company (former Burlington
(Northern Railroad Company)

STATEMENT OF CLAIM:

“Claim of the System Committee of the Brotherhood that:

- (1) The Carrier violated the Agreement when it recovered and refused to allow Mr. M. Douglas the holiday pay (Thanksgiving Day and Day after Thanksgiving) he had received for November 25 and 26, 2004 [System File C-05-H050-6/10-05-0126(MW)BNR].
- (2) As a consequence of the violation referred to in Part (1) above, the Claimant M. Douglas shall now be compensated for sixteen (16) hours' pay at his respective straight time rate of pay.”

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.

This disagreement is over holiday pay for Thanksgiving and the Day after Thanksgiving Day, November 25 and 26, 2004, respectively. Collateral confusion arises because some of the Carrier's dates are based on the erroneous belief that New Year's Day, January 1, 2005, fell on a Sunday whereas it occurred on a Saturday. However, the error is not relevant to this particular dispute which asks if the workday following a holiday in the Nonoperating (M&W) National Holiday Provisions ("National Holiday Agreement") Section 3 only is the day an employee is scheduled to actively return to work from a holiday, or if it also can be an approved, compensated vacation day taken immediately after the holiday ends. Although all material facts about the Claimant's return to active employment are undisputed, a 2005 calendar is used for narrative purposes.

The Claimant is a regularly assigned employee holding seniority in various Track Sub-department classifications. His regular work schedule was 8 hours/day Monday through Friday with Saturday and Sunday rest days.

The Claimant worked on Monday, November 22, 2004. On Tuesday November 23 and Wednesday, November 24, he took approved, paid personal leave. Thursday and Friday, November 25 and 26, were recognized holidays. Saturday and Sunday, November 27 and 28 were his rest days.

The Claimant started vacation on Monday, November 29. With intervening holidays and rest days, he was scheduled to return to work on Monday, January 3, 2005. He did not return until January 4.

The Claimant originally was paid for the November 25 - 26 holidays. But, after he failed to return to active duty on January 3, the Carrier recouped 16 hours pay, because he had not worked the "work day" following the November 25 - 26 holidays. On July 7, 2005, the Carrier presented an internal memo from the then Assistant Manager in the Topeka, Kansas, MOW Timekeeping Department stating that during her various capacities since April 1998, it was the consistent practice that "vacation pay did not cover an employee's holiday payment."

The Organization claims that the workday referenced in the National Holiday Agreement is satisfied by the compensated vacation day that the Claimant received for November 29. It argues that prior arbitral Awards affirm its position.

The Carrier contends that (1) the Claimant had to work (actually render compensated service) on his next available workday (January 3) in order to qualify for holiday pay (2) reading the National Holiday Agreement as a whole, including Sections 3 and 7, shows a compensated vacation day is not a “work day” (3) its plain language controls and unambiguously confirms the Carrier's reading (4) the Carrier's position is supported by established practice in effect since 1981, affirmed in the 2005 Timekeeper's statement and recognized in various arbitral Awards and (5) the Organization's citations are factually distinguishable, arose off the property or have been rejected by on-property arbitration decisions.

It is undisputed that the Claimant satisfied holiday pay requirements on the Wednesday before Thanksgiving. The issue here is whether the Claimant satisfied the eligibility requirement following the holidays.

Relevant portions of the National Holiday Agreement provide:

“APPENDIX B - NONOPERATING (M of W) NATIONAL
HOLIDAY PROVISION - Section 1.

Subject to the qualifying requirements contained in Section 3 hereof, and to the conditions hereinafter provided, each hourly and daily rated employee shall receive eight hours' pay at the pro rata hourly rate for each of the following enumerated holidays:

* * *

Day After Thanksgiving Day
Thanksgiving Day

* * *

Section 3.

A regularly assigned employee shall qualify for the holiday pay provided in Section 1 hereof if compensation paid him 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 workweek, 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 the 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.

* * *

Compensation paid under sick-leave rules or practices will not be considered as compensation for purposes of this rule.

* * *

Section 7.

When any of the ten recognized holidays enumerated in Section 1 of this Article II, or any day which by agreement, or by law or proclamation of the State or the Nation, has been substituted or is observed in place of any of such holidays, falls during an hourly or daily rated employee's vacation period, he shall, in addition to his vacation compensation, receive the holiday pay provided for therein provided he meets the qualification requirements specified. The

'workdays' and 'days' immediately preceding and following the vacation period shall be considered the 'workdays' and 'days' preceding and following the holiday for such qualification purposes.”

On October 17, 1986, the parties executed a Letter of Agreement (“1986 LOA”). It reinforced an understanding that a personal day taken on the work day immediately before or after a holiday is considered a qualifying day for holiday purposes.

Despite the Carrier's urging, no plain and unmistakable language in the National Holiday Agreement compels the Carrier's reading. To the contrary, the document's words support the Organization's interpretation. If the parties had meant to require an active work day after a holiday in order to qualify for holiday pay, there are far simpler, more direct, common and expected ways of expressing the concept than “compensation paid him by the carrier . . . credited to the workdays immediately following such holiday. . . .” It does not take a master wordsmith to write something like “to qualify for holiday pay, an employee must work the day before and the day after the holiday.” The Agreement's words indicate something other than actual work is the criterion.

Moreover, a compensated day is not always the same as an active work day. The parties recognize the breadth of the entitlement by exempting “compensation paid under sick leave rules or practices” but nothing else. The distinction reinforces the conclusion that unmentioned compensated days satisfy the holiday pay requirement.

Numerous arbitration decisions support the Organization's interpretation. See, Third Division Awards 20309, 37748, 37989 and Award 39698. The meaning of “compensation paid” and “credited” is the same whether the employee had to work on the day before the holiday, or only 11 of 30 days before the holiday.

The Carrier's case citations arose on the Second Division between the Carrier and other labor organizations and involve comparable, if not identical, facts. See, Second Division Awards 9977, 10112 and 10534, as well as Public Law Board No. 3305, Award 3. They deserve close reading and strong deference as on-property decisions arising under the National Holiday Agreement. Nonetheless, the opinions are incompatible with the more recent, better reasoned Third Division opinions on the same issue. Each Carrier citation essentially uses only “workday” as the criterion,

ignoring both the meaning of the concept of credited compensation and the consequences of the express sick leave exception. Disagreements with precedent from other Divisions should be reached reluctantly. This qualifies as a rare exception.

Nothing evidences a mutual intent to exclude vacation pay from the compensation qualifying an employee from holiday pay. Indeed, the Carrier's entry into the 1986 LOA and its acceptance of the Claimant's November 24 personal leave as a qualifying day on the day immediately before Thanksgiving is difficult to reconcile with its position on vacation entitlement on the day immediately after Thanksgiving. The Timekeeper's statement does not indicate how many times this particular situation arose during her tenure, whether the Organization knew it occurred and remained silent or how often during her seven year career she would have been in a position to know the Carrier's treatment of vacation days regarding holiday pay. In any case, on this record, her statement does not counterbalance the relevant language, establish a binding practice, or override substantial Third Division authority to the contrary.

Accordingly, the claim is sustained.

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 14th day of May 2010.