Award No. 4323
Docket No. SG-4079

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Frank Elkouri, Referee

PARTIES TO DISPUTE:

BROTHERHOOD OF RAILROAD SIGNALMEN OF AMERICA

THE TEXAS & PACIFIC RAILWAY COMPANY

STATEMENT OF CLAIM: (a) That monthly salaried signal department employes who have rendered compensated service on not less than 160 days during the preceding calendar year are entitled to an annual vacation of six consecutive work days with pay and such employes who rendered compensated service on not less than 160 days during the preceding calendar year who had five or more years of continuous service are entitled to an annual vacation of twelve consecutive work days with pay, and that Sundays and holidays are not work days.

(b) That Leading Signal Maintainer J. E. Morris, Arlington, Texas, be allowed one day's pay account afforded but eleven work days vacation with pay during the calendar year 1946.

(c) That Signal Maintainer O. R. Pitts, Grand Prairie, Texas, be allowed two days' pay account allowed but ten work days vacation with pay during the calendar year 1946.

(d) That all monthly salaried signal department employes covered by the current agreement shall now be compensated for all work days not allowed within their vacation period in the calendar year 1946 and all subsequent years.

EMPLOYES' STATEMENT OF FACTS: The named signal department employes and various other signal department employes are paid a monthly salary by this Carrier on basis of three hundred and sixty-five eight-hour days per calendar year times the straight time hourly rate and dividing the total earnings by twelve. Overtime is not allowed except when work not covered by the agreement is performed outside of regular hours, nor is any time deducted unless these employes lay off of their own accord. Except for emergency service, they are not required to work on Sundays and holidays. They are regularly assigned to work six days per week except during weeks in which holidays occur, at which time they work but five days. These monthly salaried employes are not now nor were they ever regularly assigned to perform service on Sundays and holidays.

Leading Signal Maintainer J. E. Morris began his twelve working days vacation with pay at 8:00 A. M. Monday, October 7, 1946, and continued through Saturday, October 19, 1946. He was not allowed pay for October 19, 1946, the twelfth work day of his vacation.

Signal Maintainer O. R. Pitts began his twelve work day vacation with pay at 8:00 A. M. Monday, August 26, 1947, and continued through Friday, September 6, 1947, a total of but ten work days vacation with pay.

nevertheless they are required to stand by in readiness to perform such service if required and receive pay for such Sundays and holidays the same as any other work day.

Fourth: Such stand-by service has been recognized by your Board in your Award No. 826 and others, as well as by Referee Morse in ruling on the Vacation Agreement, as constituting a "work day".

Fifth: To concur in the position of the employes in this case would constitute a violation of Section 2 B of the National Vacation Agreement Supplement of February 23, 1945, and of Article 12 (a) of the National Vacation Agreement of December 17, 1941, since it would require thirteen and in some cases fourteen or fifteen days' pay for a vacation instead of the twelve days to which the employes thereunder are entitled. The payment of a similar amount to the relief employe would result in the Carrier assuming an additional expense of from two to six days' pay per vacationing employe above that which is clearly contemplated in the Vacation Agreement.

Sixth: Inasmuch as this Carrier was not a party to Decision No. 707 of the United States Railroad Labor Board, the provisions and interpretations of such decisions are in no way applicable to it.

Seventh: The intent of the parties to the Vacation Agreement of December 17, 1941, and its supplement of February 23, 1945, was that days for which a full day's compensation is allowed, whether for working or merely standing by, shall be counted as "work days", both for the purpose of determining eligibility and for determining the length of a vacation period.

Eighth: Claims (a), (b), (c), and (d) as submitted by the Organization herein are unfounded and without merit and should be denied.

Wherefore, the Carrier earnestly requests that the claims of the Organization and employes herein be denied.

OPINION OF BOARD: The question currently before this Board is whether or not Sundays and holidays are "work days" within the meaning of Section 2, (a) and (b), of the Supplemental Agreement of February 23, 1945. This question, arising under contracts with Carriers other than the one involved here, has been considered by this Board on three separate occasions within the past few months. In each of the Awards in those cases this Board held that Sundays and holidays were not work days (see Awards 3996, 4003 and 4238).

In Award 4003 this Board, making reference to Award 3996, said:

> "We adopt the reasoning of that award and hold that the words 'twelve consecutive work days' mean twelve consecutive days on which the regularly assigned work of the position is to be performed. Sundays and holidays not being assigned work days of the position, the Carrier improperly withheld three days' pay from claimant."

In our instant case the Carrier has said: "It is this stand-by service and performance of signal work if necessary for which the employe receives a day's pro rata pay each Sunday and holiday." This indicates that Sunday and holiday service is recognized by the Carrier to be stand-by service, as distinguished from regularly assigned service. Rule 48 (a) provides:

> "Employes who are regularly assigned to seven eight-hour days per week under provisions of Rule 28 will be paid on an hourly basis."

Thus, it is seen that employes regularly assigned to work seven days per week are paid on an hourly basis; claimants are paid on a monthly basis.

Carrier places stress upon the part of Rule 48 (b) which states that ". . . the monthly rate compensates for all service performed, . . ." While it is true that the Sunday and holiday stand-by service involved in Award 3996 and Award 4003 was restricted, by the agreements therein involved, to emergency service, the record in the instant case clearly shows that in the past the Carrier has not required Claimants to do other than emergency work on

Sundays and holidays. Past practice indicates that in each of these cases the parties had the same intent, to restrict stand-by service to emergency service. It is a recognized and sound principle of contract interpretation that the past practice of the parties shall be accepted as an aid in establishing the intent of an ambiguous contract. It is to be noted, also, that Rule 20 of the Agreement provides that "Employes assigned to regular maintenance duties will notify the person designated by the Management where they may be called in case of an emergency." (Underscoring added.) In view of these considerations it can be said that the distinction between the provisions here in question and those in Awards 3996 and 4003 is a distinction without a material difference. The Board finds no distinction between the cases sufficient to merit a departure by the Board from its rulings in Awards 3996, 4003 and 4238.

The parties involved in Award 3996 and Award 4003 submitted those disputes to the Joint Committee provided for by Section 14 of the Vacation Agreement of December 17, 1941. In each case that Committee returned the issue to the parties with the statement "Committee unable to agree" (see cases 7-W and 33-W before the Vacation Committee). Section 14 provides that it is not intended by the parties as a waiver of any of their rights provided in the Railway Labor Act as amended, in the event that the Committee fails to dispose of any dispute or controversy. The Board finds that this case is properly before the Board.

FINDINGS: The Third Division of the Adjustment Board, after giving the parties to this dispute due notice of hearing thereon, and upon the whole record and all the evidence, finds and holds:

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.

AWARD

Claims sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: A. I. Tummon
Acting Secretary

Dated at Chicago, Illinois, this 17th day of February, 1949.

DISSENT TO AWARD 4323, DOCKET SG-4079

The Vacation Agreement of December 17, 1941, out of which this dispute arose, provides in its Article 14 that such a dispute shall be referred for decision to a committee consisting of Carrier and Employe members appointed as specified in that Article. The instant dispute was not submitted to that Article 14 Committee for decision prior to submission to this Board. Until the provisions of Article 14 are complied with, this Board should not render an award.

/s/ **C. C. Cook**
/s/ **A. H. Jones**
/s/ **R. H. Allison**
/s/ **R. F. Ray**
/s/ **C. P. Dugan**