# Award No. 14816
# Docket No. CL-14917

## NATIONAL RAILROAD ADJUSTMENT BOARD

## THIRD DIVISION

## (Supplemental)

Paul C. Dugan, Referee

---

## PARTIES TO DISPUTE:

## BROTHERHOOD OF RAILWAY AND STEAMSHIP CLERKS, FREIGHT HANDLERS, EXPRESS AND STATION EMPLOYES

## SOUTHERN RAILWAY COMPANY

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood (GL-5502) that:

(a) Carrier violated the Clerks' Agreement, except as amended and supplemented, when it failed and refused to compensate clerical employe D. L. Jones for the New Year's Day Holiday, January 1, 1963.

(b) D. L. Jones shall now be allowed eight hours' pay at the applicable pro rata hourly rate for January 1, 1963.

EMPLOYES' STATEMENT OF FACTS: This dispute is between the Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employes as the representative of the class or craft of employes in which the Claimant in this case holds position and the Southern Railway Company.

The Claimant in this dispute was on furloughed status for a portion of the last part of the year 1962. On the last payroll period of December, 1962, she was placed thereon by the Carrier and compensated for a vacation period of eleven days or more which she had earned but until this time had not received. January 1, 1963, New Year's Day was on a Tuesday. The Claimant worked on Wednesday, January 2, 1963. She was not compensated for January 1, 1963.

On January 31, 1963, a claim was filed for and in behalf of D. L. Jones by Mr. W. B. Duke, Chairman of the Protective Committee (Employes' Exhibit A). It was denied by Mr. J. T. Bolling, Director of Revenue Accounting (Employes' Exhibit B). Appeal was then made to Mr. G. H. Keller, Assistant Comptroller (Employes' Exhibit C), and denied by Mr. Keller on February 28, 1963, (Employes' Exhibit D). Final appeal was then made to Mr. J. W. Staley, Assistant Director of Labor Relations, Southern Railway System, Washington, D. C., the highest officer of the Carrier designated to handle this claim, (Employes' Exhibit E). Appeal was denied by Mr. Staley (Employes' Exhibit F). An attempt was made to resolve this dispute in conference

diately following. If the holiday falls on the first work day of his work week, the last work day of the preceding work week shall be considered the work day immediately preceding the holiday.

All others for whom holiday pay is provided in Section 1 hereof shall qualify for such holiday pay if on the work day preceding and the work 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 employe is available for service.

NOTE: 'Available' as used in subsection (ii) above is interpreted by the parties to mean that an employe 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 purposes of Section 1, the work week for other than regularly assigned employes shall be Monday to Friday, both days inclusive, except that such employes who are relieving regularly assigned employes on the same assignment on both the work day preceding and the work day following the holiday will have the work week of the incumbent of the assigned position and will be subject to the same qualifying requirements respecting service and availability on the work days preceding and following the holiday as apply to the employe whom he is relieving.

For other than regularly assigned employes, whose hypothetical work week is Monday to Friday, both days inclusive, if the holiday falls on Friday, Monday of the succeeding week shall be considered the work day immediately following. If the holiday falls on Monday, Friday of the preceding week shall be considered the work day immediately preceding the holiday.

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

**OPINION OF BOARD:** The facts herein, which are not in dispute, are that Claimant, during the period of August 3, 1959 to September 15, 1962, worked on temporary vacancies as waybill assorter and messenger in Freight Accounting Department at Atlanta. Claimant did not perform any work for Carrier from September 16 to and including December 31, 1962. She was paid vacation pay on the second period December payroll for 15 days. On January 2, 1963 she was recalled and worked in the place of the regularly assigned messenger, who was off sick. Her claim for holiday pay for January 1, 1963 was denied by Carrier on the grounds that she had not qualified for said holiday pay under the requirements of Article III — Holidays, Section 1, of the National Agreement of August 19, 1960 governing the parties to this dispute.

The principal issue involved herein is whether or not the vacation pay was compensation for service paid her by Carrier so as to credit her with 11 or more of the 30 calendar days immediately preceding the holiday.

We agree with Carrier that the second paragraph of Article III, Section 1, of the August 19, 1960 Agreement, is the controlling provision in this dispute, and provides:

> "Subject to the qualifying requirements applicable to other than regularly assigned employes contained in Section 3 hereof, all others who have been employed on hourly or daily rated positions shall receive eight hours' pay at the pro rata hourly rate of the position on which compensation last accrued to him for each of the above-identified holidays if the holiday falls on a work day of the work week as defined in Section 3 hereof, provided (1) compensation for service paid him by the Carrier is credited to 11 or more of the 30 calendar days immediately preceding the holiday and (2) he has had a seniority date for at least 60 calendar days or has 60 calendar days of continuous active service preceding the holiday beginning with the first day of compensated service, provided employment was not terminated prior to the holiday by resignation, for cause, retirement, death, non-compliance with a union shop agreement, or disapproval of application for employment."

The Organization's contention is that Claimant qualified for the holiday pay under all of the holiday provisions of the August 21, 1954 Agreement as amended by the August 19, 1960 Agreement, that vacation pay is compensation for service already rendered and not a gratuity; that vacation pay was not excluded from being considered as compensation for purposes of this rule; that the agreements do not require an employe to actually work 11 days or more of the 30 calendar days immediately preceding the holiday.

The Carrier's position is that Claimant is not entitled to the holiday pay because she failed to work at least 11 or more days of the 30 calendar days immediately preceding the said holiday. Carrier is not contending that she failed to meet any of the other requirements of said Article III, Section 1, of the August 19, 1960 Agreement.

Carrier further argues that the money received by Claimant in December, 1962 was not for vacation pay but was money received in lieu of vacation due to the fact that Claimant was not paid for vacation from work as distinguished from vacation allowance for a furloughed employe, and cites Article 5 of the Vacation Agreement of December 17, 1941 in support thereof.

With this contention, we do not agree. The crucial test is not whether the vacation pay was vacation pay from work or vacation allowance in lieu of vacation for a furloughed employe, but whether or not Claimant had compensation for service paid her by Carrier credited to 11 or more of the 30 calendar days immediately prior to January 1, 1963. If she did, inasmuch as there is no dispute as to her meeting the other requirements of the agreement, then she is entitled to the holiday pay.

In Award No. 14674, this Board concluded that vacation with pay is not a gratuity, but by contract is earned compensation for service rendered, citing Award No. 6133 in support thereof.

Nothing in the Agreement of August 19, 1960 requires that the Claimant actually renders service or works during the 30 calendar days period immediately prior to the holiday. All Claimant has to prove in this instance is that she had compensation for service paid her by Carrier credited to 11 or more days of the 30 calendar days immediately prior to the holiday in question.

Also, when Claimant was paid by Carrier her vacation pay during the second half of December, 1962, her vacation period during 1962 was established by said payment during that time, and it was immaterial that she was furloughed at the time of said vacation pay.

Further, the August 19, 1960 Agreement provides that compensation paid under sick leave rules or practices will not be considered as compensation for purposes of this rule. There is no such exception made in said Agreement as to vacation compensation.

Therefore, it is the conclusion of this Board that Claimant met the requirements of Article III, Section 1, of the 1960 Agreement, and that her claim must be sustained.

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

Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 5th day of October 1966.

## CARRIER MEMBERS' DISSENT TO AWARD 14816, DOCKET CL-14917 (Referee Dugan)

We must respectfully dissent to the conclusions reached by the majority in Award 14816.

In determining whether "compensation for service paid by the Carrier is credited to 11 or more of the 30 calendar days immediately preceding the holiday," as provided in Article III, Section 1, of the August 19, 1960 Agreement, there is a very significant difference between the case of an employe being absent from his position on vacation and that of a furloughed employe who, at the close of the year, receives "pay in lieu of vacation" for no assigned or specified work period. The latter situation applies to claimant who admittedly was a furloughed employe during the vacation year 1962. Claimant performed

no service whatever for Carrier from September 16, 1962 to and including January 1, 1963.

The pay in lieu of vacation was made to claimant in accordance with the following provisions of Article 7 of the 1941 Vacation Agreement.

> "(e) An employe not covered by paragraphs (a), (b), (c), or (d) of this section will be paid on the basis of the average daily straight time compensation earned **in the last pay period preceding the vacation during which he performed service.**" (Emphasis ours.)

and Article 5 of the agreed-to Interpretations dated June 10, 1942:

> "As the vacation year runs from January 1 to December 31, payment in lieu of vacation may be made prior to or on the last payroll period of the vacation year; if not so paid, shall be paid on the first payroll period in the January following, or if paid by special roll, such payment shall be made not later than during the month of January following the vacation year."

The first period September 1962 was the last pay period during which claimant performed service in the vacation year 1962. Thus it is plainly evident that the pay in lieu of vacation made to calimant as provided in the above-quoted interpretation did not constitute or represent **compensation for service credited** to any of the 30 calendar days immediately preceding the January 1, 1963 holiday.

The factual situation in the case covered by Award 14674 is entirely different from the facts in this claim. In that case it was found that claimant received pay from Carrier for 16 days in the 30-day period — "10 days' pay was for work performed on those 10 days, **5 days' pay was for vacation days with pay taken off during the period,** and one day's pay was for the Christmas holiday." Thus, but for the five days' vacation taken off, claimant would have worked 15 days in the 30-day period preceding the holiday. In sustaining that claim for January 1 holiday pay, the Board said "Carrier has failed to present strong enough evidence or argument to convince us that pay for vacation days taken off is not to be counted as compensation for service credited to the days taken off."

The assertion that vacation compensation is not a "gratuity" has no bearing on the basic question of whether claimant worked (or if on vacation would have worked) eleven or more days in the 30-day period immediately preceding January 1, 1963. Where, as here, claimant neither worked nor would have worked 11 or more days in the 30-day period, as required by Article III of the August 19, 1960 Agreement, the allowance to claimant of 8 hours' holiday pay for January 1, 1963 is without contract support and is nothing more than a "gratuity."

**R. A. DeRossett**
**W. B. Jones**
**C. H. Manoogian**
**J. R. Mathieu**
**W. M. Roberts**

## LABOR MEMBER'S ANSWER TO CARRIER MEMBERS' DISSENT TO AWARD 14816, DOCKET CL-14917

In the case decided by Award 14816 there was but one question properly before the Referee for consideration. That question was whether or not payment in lieu of vacation was "compensation" in accord with the August 19, 1960 Agreement. Carrier argued that it was not and that Claimant must have performed service on 11 or more days in the 30-day period immediately preceding the holiday.

The question was correctly answered in this Award as well as others relied on. It seems quite obvious that the proper "test" is "was **compensation** credited" and **not** "how" or "why" or "what would have happened if."

Only compensation for "sick pay" was excluded under the terms of the Agreement and Award 14816 is quite correct in deciding the issue based on the rules of the Agreement.

**D. E. Watkins**
Labor Member
11-18-66

Keenan Printing Co., Chicago, Ill. Printed in U.S.A.