Award No. 17200
Docket No. SG-17744

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION
(SUPPLEMENTAL)

Morris L. Myers, Referee

PARTIES TO DISPUTE:

BROTHERHOOD OF RAILROAD SIGNALMEN
UNION PACIFIC RAILROAD COMPANY

STATEMENT OF CLAIM: Claim of the General Committee of the Brotherhood of Railroad Signalmen on the Union Pacific Railroad Company that:

(a) Carrier violated the current Signalmen's Agreement, as amended, particularly Article II of the November 20, 1964 Mediation Agreement, insofar as it would not allow Signal Maintainer M. T. Best eight (8) hours' pay at the time and one-half rate for his birthday, November 15, 1966, on which day he was relieved for vacation and his position at Schuyler, Nebraska, was filled by Relief Maintainer H. D. Louis.

(b) Carrier should be required now to pay Mr. Best eight (8) hours at his time and one-half rate. (Carrier's File: A-10425.)

EMPLOYES' STATEMENT OF FACTS: This dispute involves the question of how an employe is to be paid if on a vacation day his birthday occurs and another employe is assigned to work his position on that day.

Signal Maintainer M. T. Best with headquarters at Schuyler, Nebraska, was on vacation November 15, 1966, his birthday. He was paid only eight (8) hours at the pro rata rate. Inasmuch as there was a vacation relief employe assigned to work his position and that employe worked on November 15, Signal Maintainer Best claims an additional eight (8) hours' pay at the time and one-half rate.

Correspondence exchanged on the property in connection with this claim and the handling thereof has been reproduced and attached hereto, identified as Brotherhood's Exhibit Nos. 1 to 7.

As indicated by the correspondence reproduced and cited above, this claim has been handled in the usual and proper manner by the Brotherhood, up to and including the highest officer of the Carrier designated to handle such disputes, without receiving a satisfactory settlement.

There is an agreement in effect between the parties to this dispute, bearing an effective date of April 1, 1962, as amended, including the Vacation Agreement; the August 21, 1954 National Agreement; the August 19, 1960 National Agreement; and the November 20, 1964 National Agreement, which are by reference made a part of the record in this dispute.

OPINION OF BOARD: The Claimant in this case, Mr. M. T. Best, was on vacation when his birthday occurred, which birthday fell on a regularly assigned work day of Mr. Best's position. Mr. H. D. Louis, Mr. Best's vacation relief, worked on Mr. Best's birthday.

Mr. Best was paid pro rata for the day on which his birthday occurred as a part of his vacation pay. He lays claim herein for an additional eight (8) hours' pay at the time and one half rate on the basis that his birthday was a holiday under the Agreement and that the fact of Mr. Louis' having worked on that day in and of itself entitles him to the additional pay.

Five Awards have been issued in this Division sustaining claims that involved identical facts to those that are present in this case. The first such prior Award in point of time was Award No. 15722, and that Award was followed under the doctrine of "STARE DECISIS" in Award Nos. 15910, 16131, 16377, and 16472.

We could dispose of this claim on the basis of "STARE DECISIS" also. However, we believe that the prior Awards in this Division on this issue are clearly in error. Although we are fully appreciative of the value of the "STARE DECISIS" doctrine, when we are thoroughly convinced that prior Awards have not been correctly decided, we believe that we have the obligation and responsibility not to follow them. This is particularly so when another Division has decided the issue involved in this case differently from the Awards in this Division.

In reaching our decision in this case, we start with the premise that the June 10, 1942 Interpretation to Article 7(a) of the Vacation Agreement of December, 1941 should be applied to this case, which Article and Interpretation read as follows:

> "Article 7(a)—An employee having a regular assignment will be paid while on vacation the daily compensation paid by the carrier for such assignment.
>
> "Interpretation—This contemplates that an employee having a regular assignment will not be better or worse off, while on vacation, as to the daily compensation paid by the carrier than if he had remained at work on such assignment. . . ."

The Carrier asserted on the property and it was not denied by the Organization that if the Claimant had not been on vacation during the work week in which the Claimant's birthday fell, "he would have received a total of 40 hours' compensation for this week, 32 hours' pay for time worked and 8 hours' Holiday pay." In other words, it was undisputed on the property that Claimant's position would have been "blanked" on the Claimant's birthday had the Claimant been actively at work rather than having been on vacation. Therefore, if the above-quoted Interpretation to Article 7(a) is to be applied (and it has been applied consistently in the past), the Claimant should not be entitled to more than he has already received.

The Organization's main thrust in this case is that the Claimant's vacation relief worked on the Claimant's birthday and that it must be assumed perforce that the Claimant would have worked on his birthday had

he not been on vacation. However, the fact of the vacation relief's having worked on the Claimant's birthday does not flow logically into the conclusion that the Claimant's position would not have been "blanked" had he been working instead of having been on vacation. As stated earlier, the undisputed evidence in the Record on the property is to the contrary —the Claimant would not have worked on his birthday had he not been on vacation.

If by some coincidence, the Claimant's vacation relief had the same birthday as the Claimant and he had worked on that day, the fact of his working would have created a presumption, rebuttable perhaps, but at least a rebuttable presumption that the Claimant would have worked on that day instead of the position having been blanked. If those were the facts, we would have a situation comparable to other Holidays under the Agreement. But those are **not** the facts in this case. The Claimant's birthday was **his** holiday, but it was not a holiday for his vacation relief. This is of course, not true as to the other Holidays under the Agreement, for Christmas is Christmas, the Fourth of July is the Fourth of July, etc., for all employees. Thus, as to an employee's birthday that is **his** holiday, it must be shown by the Organization that the position in which the employee works would not have been blanked if he had been actively at work. The fact that his vacation relief worked on the vacationing employee's birthday does not **per se** establish that this would have occurred.

In reaching this conclusion, we wish to point out that the Award in this case is consistent with Award No. 5585 in the Second Division. It is also consistent with the principle established in Award Nos. 11827 and 16684 in this Division that an employee is entitled to Holiday pay over and above his vacation pay when a holiday falls during his vacation on a day which is during his regular work week only "if (1) the position regularly works on the day on which the holiday falls; (2) the position has always been filled on the holiday; and (3) the position was filled on the particular holiday for which claim is made." In this case, only requirement (3) was met; requirements (1) and (2) were not.

The claim will be denied.

FINDINGS: The Third Division of the Adjustment Board, upon the whole record and all the evidence, finds and holds:

That the parties waived oral hearing;

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 had jurisdiction over the dispute involved herein; and

That the Agreement was not violated.

AWARD

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 6th day of June 1969.

Dissent to Award No. 17200

Docket No. SG-17744

The members of this Board discussed Docket No. SG-17744 before the Referee on February 18, 1969. During that discussion the Awards of this Board (and other material) acknowledged by the Referee in the third paragraph of the award were placed before the Referee for his information in giving consideration to this dispute. A proposed award denying the claim of the employes was circulated to the members of the Board on May 12, 1969.

In the intervening time, i.e., on March 25, 1969, the Board adopted two Awards (Nos. 17009 and 17011), John B. Criswell, Referee, disposing by sustaining award of disputes involving facts identical to those in Docket No. SG-17744. The weight of decisions now being even more favorable to the position of the employes than it was on the date of discussion of this docket, Award No. 17200 is in error.

We would, in the interest of correctness, point out that not all of the Awards numbered in the third paragraph of the award contain "identical facts." In Award No. 16131 the claimant's position was filled only on his birthday. We have searched the record in Award No. 15910 and find only the statement that the claimant's position was "filled on his birthday"; there is no showing that it was filled on other days of his vacation.

We would observe that the Congress established this Board "to provide for the prompt and orderly settlement of all disputes growing out of grievances or out of the interpretation or application of agreements * * *". The essential consistency of awards adopted in this subject to date has reached a point at which it can be said that this subject is settled. Award No. 17200 defeats the purpose set out in the Railway Labor Act and adds confusion and additional disputes.

Award No. 17200 being in error, I dissent.

/s/ W. W. Altus, Jr.
W. W. Altus, Jr.
For Labor Members
June 11, 1969

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