Award Number 17363
Docket Number TE-15453

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Louis Yagoda, Referee

PARTIES TO DISPUTE:

TRANSPORTATION-COMMUNICATION EMPLOYEES UNION
(Formerly The Order of Railroad Telegraphers)

SOUTHERN PACIFIC COMPANY (PACIFIC LINES)

STATEMENT OF CLAIM: Claim of the General Committee of The Order of Railroad Telegraphers on the Southern Pacific (Pacific Lines), that:

1. Carrier failed and refused to properly compensate Carl R. Francis for November 28, 1963 (Thanksgiving Day).

2. Carrier shall compensate Carl R. Francis in the amount of eight hours' pro rata pay for November 28, 1963, in addition to compensation already allowed.

EMPLOYES' STATEMENT OF FACTS: The Agreement between the parties, effective December 1, 1944, as amended and supplemented, is available to your Board and by this reference is made a part hereof.

At the time cause for this claim arose, Carl R. Francis was the regularly assigned occupant of the position of agent-telegrapher at Battle Mountain, Nevada, with assigned hours 8:00 A.M. to 4:00 P.M., work week beginning on Monday, assigned rest days Saturday and Sunday.

He was entitled to a vacation with pay during the calendar year 1963 in accordance with the National Vacation Agreement of December 17, 1941, as amended. In accordance with Article 4 of the Vacation Agreement, he was assigned a vacation period which included Thursday, November 28, 1963, a work day of his position and a holiday (Thanksgiving Day) listed in Rule 6 of the Agreement. He was required to work during his vacation, including November 28. Compensation for other days during the vacation is not a question at issue in this dispute. For November 28, 1963, claimant was compensated eight hours at the time and one-half rate for performing service, and eight hours at the pro rata rate for the holiday, which constitutes for that day the daily compensation paid by the Carrier for the assignment. He was compensated in the amount of eight hours at the time and one-half rate as vacation allowance. This vacation allowance is eight hours less than the daily compensation paid by the Carrier for the assignment.

Claim was filed and handled in the usual manner up to and including the highest designated officer of the Carrier and has been declined. Cor-

28, 1963 was denied and for that date he was allowed compensation as outlined in Item 5, hereinabove.

8. By letter dated December 10, 1963 (Carrier's Exhibit "C"), Petitioner's District Chairman presented claim to Carrier's Division Superintendent in behalf of Claimant for 8 hours pro rata rate, November 28, 1963, in addition to the compensation allowed Claimant that date. By letter dated December 12, 1963 (Carrier's Exhibit "D"), the Carrier's Division Superintendent denied the claim based on this Board's Award 9917 and by letter dated December 18, 1963 (Carrier's Exhibit "E"), Petitioner's District Chairman notified Carrier's Division Superintendent that the claim would be appealed further.

9. By letter dated January 22, 1964 (Carrier's Exhibit "F"), Petitioner's General Chairman appealed the claim to Carrier's Assistant Manager of Personnel, and under date of March 23, 1964 (Carrier's Exhibit "G"), the latter denied the cliam.

(Exhibits not reproduced)

OPINION OF BOARD: SURROUNDING FACTS There is no disagreement between the parties concerning the surrounding circumstances of this claim.

At the time referred to by the claim, the Claimant was the regularly assigned occupant of the position of agent-telegrapher at Battle Mountain, Nevada, with assigned hours 8:00 A.M. to 4:00 P.M., work week beginning on Monday, assigned rest days, Saturday and Sunday.

Pursuant to his entitlement under the Agreement, Claimant was assigned a vacation period which included Thursday, November 28, 1963, a work day of his position and a holiday (Thanksgiving Day) listed in Rule 6 of the Agreement. However, Claimant was required to work during his vacation, including Thursday, November 28th. Compensation for vacation days other than for November 28th is not in controversy in this dispute.

The controversy concerns compensation for Thanksgiving Day, November 28, 1963. Claimant was allowed a total of 32 hours pay for that day and claims payment of an additional 8 hours pay.

AGREEMENT TERMS CITED

CURRENT AGREEMENT, effective December 1, 1944 (reprinted October 15, 1963, including revisions)

RULE 4

BASIS OF PAY

Section (b), Employes shall receive the same compensation in relief service as the employes they relieve.

RULE 6

HOLIDAY WORK

Section (a). Time worked on the following days:

New Year's Day
Washington's Birthday
Decoration Day
Fourth of July
Labor Day
Thanksgiving Day
Christmas Day

shall be paid for at the overtime rate when the entire number of hours constituting the regular week day assignment are assigned and worked.

RULE 24 (in pertinent part)

VACATIONS

Employes shall be granted vacations with pay or payment in lieu thereof in accordance with the Vacation Agreement of December 17, 1941 and the Supplemental Agreement of February 23, 1945, agreed supplements thereto and agreed interpretations thereof provided that the foregoing shall be subject to the provisions of Section 6 of the Supplemental Agreement.

VACATION AGREEMENT
(signed at Chicago, December 17, 1941)

5. (in pertinent part)

If a carrier finds that it cannot release an employee for a vacation during the calendar year because of the requirements of the service, then such employee shall be paid in lieu of the vacation allowance hereinafter provided.

7. Allowances for each day for which an employee is entitled to a vacation with pay will be calculated on the following basis:

(a) An employee having a regular assignment will be paid while on vacation the daily compensation paid by the carrier for such assignment.

10. (a) An employee designated to fill an assignment of another employee on vacation will be paid the rate of such assignment or the rate of his own assignment, whichever is the greater; provided that if the assignment is filled by a regularly assigned vacation relief employee, such employee shall receive the rate of the relief position. If an employee receiving graded rates, based upon length of service and experience, is designated to fill an assignment of another employee in the same occupational classification receiving such graded rates who is on vacation, the rate of the relieving employee will be paid.

(c) No employee shall be paid less than his own normal compensation for the hours of his own assignment because of vacations to other employees.

AGREEMENT BETWEEN PARTICIPATING EASTERN WESTERN AND SOUTHEASTERN CARRIERS and EMPLOYEES REPRESENTED BY THE FIFTEEN COOPERATING RAILWAY LABOR ORGANIZATIONS SIGNATORY THERETO (signed at Chicago, Illinois, August 21, 1954)

ARTICLE I.

HOLIDAYS

Section 3. When, during an employee's vacation period, any of the seven recognized holidays (New Year's Day, Washington's Birthday, Decoration Day, Fourth of July, Labor Day, Thanksgiving Day and Christmas) or any day which by agreement has been substituted or is observed in place of any of the seven holidays enumerated above, falls on what would be a work day of an employee's regularly assigned work week, such day shall be considered as a work day of the period for which the employee is entitled to vacation.

Section 4. Effective January 1, 1955, Article 5 of the Vacation Agreement of December 17, 1941 is hereby amended by adding the following:

> Such employee shall be paid the time and one-half rate for work performed during his vacation period in addition to his regular vacation pay.
>
> Note: This provision does not supersede provisions of the individual collective agreements that require payment of double time under specified conditions.

ARTICLE II

HOLIDAYS

Section 1. Effective May 1, 1954, each regularly assigned hourly and daily rated employee shall receive eight hours' pay at the pro rata hourly rate of the position to which assigned for each of the following enumerated holidays when such holiday falls on a workday of the workweek of the individual employee:

New Year's Day	Labor Day
Washington's Birthday	Thanksgiving Day
Decoration Day	Christmas
Fourth of July	

> Note: This rule does not disturb agreements or practices now in effect underwhich any other day is substituted or observed in place of any of the above-enumerated holidays.

Section 3. An employee shall qualify for the holiday pay provided in Section 1 hereof if compensation paid by the Carrier is credited to the workdays immediately preceding and following such holiday. If the holiday falls on the last day of an 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.

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

POSITION OF EMPLOYEES

The essential contention of the Employes on behalf of the Claimant is that all of the pay provisions relating to holidays and vacations must be

applied separately to each of the two employment situations existing under this set of facts: (a) the work requirement, (b) the allowance in lieu of vacation not granted.

In respect to the work requirement situation, Employes concede that Claimant has been properly paid 8 hours at the time and one-half rate for each of the five days in question, including the holiday day, pursuant to Article 5 of the Vacation Agreement as well as Section 4 of the Agreement of August 21, 1954 and both the 8 hours pro rata holiday pay and 8 hours time and one-half pay for working on a holiday, pursuant to Rule 6 (a) of the Current Agreement and Section 3 of the Agreement of August 21, 1954.

Employes contend, however, that Carrier has not met the requirement of Article 7 (a) that "an employee having a regular assignment will be paid while on vacation the daily compensation paid by the carrier for such assignment" inasmuch as an employee filling in for Claimant's assignment would be paid a total of 8 hours pro rata plus eight hours time and one-half rate for working said day. Therefore, **as a vacationer**, Claimant should have received said "equivalent" (20 hours) in addition to the time and a half rate for working on the vacation (12 hours) and 8 hours pro rata for his regular vacation pay, a total of 40 hours or 5 days, instead of the 4 days' pay allowed.

POSITION OF CARRIER

Carrier contends that compensation given this employe satisfies all Agreement requirements, viz:

> (a) Eight hours at time and one-half rate of pay for work performed during a vacation period, in compliancce with Article I, Section 4, Agreement of August 21, 1954.
>
> (b) Additional payment of eight hours at time and one-half rate of pay for work performed on a holiday, in compliance with Rule 6(a) of the Current Agreement.
>
> (c) Additional eight hours holiday pay at the pro rata of his assigned position, in compliancce with Article II, Section I, of the National Agreement of August 21, 1954.

Carrier contends that the clear intent of Article I, Section 3 of the National Agreement of August 21, 1954 was to reduce by one day the combined holiday and vacation days paid by Carrier.

Carrier contends also that the same fact situation involved in the instant claim was dealt with by this Board under the same Rules and for the same parties in Award 9917 (Referee Begley) and by that Award, claim denied; therefore, said Award is controlling on the claim now before us.

In Award 9917, petitioners were required to work the dates of their assigned vacation, including Christmas Day, a workday of the regular assignment of Claimants. There, as here, Claimants were paid a total of four days pay each for said day. There, as here, claim was made for an additional eight hours pay for each. Claim was denied.

Carrier invokes the Board's repeatedly stated policy of its obligation to maintain consistency in its decisions, particularly where the same parties, issues and agreement are involved (Awards 10986, 10086, 12494) unless it can be shown that the Award was palpably erroneous.

OPINION OF BOARD

In a number of awards involving substantially the same fact situation and controlling Agreement terms as are involved here, but involving other Carriers, we have sustained Claimant on the issue present here. (Awards No. 9754, 10892, 12759, 16638).

However, in another claim which, unlike the foregoing ones, involved the same Organization and the same Carrier as in the dispute before us, we denied the claim on the same general set of facts. This was in Award 9917, Third Division, involving Christmas Day, 1955 and issue on April 13, 1961 (Referee Begley).

It is contended by Carrier that it has the right to rely on Award 9917 inasmuch as said award ruled on the same parties, issues and agreements. It cites in this respect our comment in Award 10911 (Boyd):

"When the Division has previously considered and disposed of a dispute involving the same parties, the same rule and similar facts presenting the same issue as is now before the Division, the prior decisions should control. Any other standard would lead to chaos". (See also Awards 10086 and 10986).

Employes, on the other hand, characterize Award 9917 as "palpably erroneous" and as an exceptional deviant from the significant line of awards cited above. They contend therefore, that Carrier should not be permitted to rely on said "erroneous" Award and such reliance is, in fact, not in good faith, in the face of surrounding practice of other Carriers for the same set of circumstances and the same rules.

It is the opinion of this Board that, in general, a settled interpretation of rules, relied on by the parties, should be left undisturbed, subject only to mutual amendment by the parties through collective negotiation.

In the situation before us, we have already ruled in Award 9917, for the identical parties under the same rules and Agreement terms which are present here in a fact situation which except for the identity of the Claimant and the particular date and holiday involved is indistinguishable from the facts now put before us. We believe that our duty to the parties and to the Act is best accomplished by leaving that Award undisturbed.

Notwithstanding other Awards involving other Carriers going the other way, the intent of the Act and of the Agreement between the parties dictates a presumption that parties who bring a controversy to this Board may rely on an award of this Board as a compelled way of carrying on their business in respect to the matters involved, absent a positive showing that they were misled in such reliance by the patently visible presence of error. Awards 10986 and 10086. To permit another course could lead only to undermining the authority of this Board as well as the disputes resolution process under the Act and the Agreement, and to invite an endless search for new Board majorities to seek reversals and leave the parties without dependable direction.

There is no indication in Award 9917, that the Board majority which adopted it did not have the fully stated position of both sides or that they failed to give full consideration to or have full understanding of these posi-

tions. In short, although that Award differs from others on the same subject, that difference does not appear to arise out of incomprehension, misconception, misperception or erroneous fact. It must therefore continue to stand for these parties.

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 has jurisdiction over the dispute involved herein; and

That the Agreement was not violated.

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 1st day of August 1969.

DISSENT TO AWARD 17363, DOCKET TE-15453

The majority, in this Award, has compounded error by perpetuating the plain error of prior Award 9917.

The dissent to Award 9917 sets out the main reasons that award was palpably erroneous, and is by reference incorporated herein as dissent to the present award.

The majority recognizes the fact that other awards, involving the same rules and issue, but other carriers, have not followed Award 9917. But, then, instead of putting an end to the anomalous situation created by Award 9917, its error was solidified by application of a respectable principle—but entirely out of context. Referee Boyd, in Award 10911, was not speaking of a prior award that had been proved erroneous by an unbroken line of later decisions.

Long ago, Referee Lloyd K. Garrison, faced with a problem concerning prior awards, wrote a memorandum to Award 1680 which has been generally accepted as an authoritative guide by both carriers and organizations down through the years. Its logic is unassailable. One of the points most nearly applicable to the case at hand is quoted:

> "It may sometimes happen that through an incomplete job of presentation, an Award may be handed down which later may be regarded as clearly erroneous in the light of material facts or supporting arguments of a decisive nature which should have been, but were not, presented for consideration in the prior Award. It would seem proper in such circumstances to overrule the prior Award."

Assuming that the Referee in Award 9917 considered the presentation to be deficient, and in light of later awards on the same issue, Award 9917 falls squarely within the principle quoted, and should have been overruled.

In Award 7134, Referee Carter, in a dispute concerning rules of a national agreement, said:

> ". . . It would border on the ludicrous to say that a provision of the Forty-Hour Week Agreement meant one thing to one signatory to it and something altogether different to another. . . .".

Essentially that same expression was made to the present referee, but with little apparent effect.

In Awards 13660 and 13661, this Board, with Referee Kornblum, had a situation precisely on all fours with the one here involved. The Board had previously rendered Awards 6281 and 6282 denying identical claims, but later awards, interpreting the same national rules on other carriers had established a "case law" sustaining such claims. Referee Kornblum correctly applied the principles concerning precedent, and sustained the claims, thus terminating a situation where rules of a national agreement were given one meaning on one railroad and an opposite meaning on most others. And there was no dissent from the Carrier Members.

These two awards were cited—and emphasized—to the Referee.

Notwithstanding the present erroneous digression, the idea of keeping interpretation of joint multi-party agreements uniform is almost universal—and proper. A recent example is Award No. 6 of Public Law Board No. 153, where the same vacation and holiday rules were involved. After a careful discussion of conflicting prior awards, Referee House said:

". . . We will follow the national pattern of awards.

The apparent concern of the majority for the carrier's alleged reliance on the prior award is misplaced. Carrier knew quite well that its award was the single exception to the "national pattern". I think it appropriate to note what Referee Dorsey said in Award 12460:

> ". . . The collective bargaining relationship is not terminated with the execution of a Collective Bargaining Agreement. The legal obligation of the parties to bargain concerning wages, hours and other conditions of employment is a continuing one, not only as to interpretation and application of the Agreement; but, also, as to later developments and situations affecting the employer-employe relationship."

Carrier's blind insistence upon continuance of the error of Award 9917 in the face of "later developments" was avoidance of its plain obligations in the collective bargaining process. Blind acceptance of the Carrier's argument by the majority here has put this Board in the position of rejecting the very purpose for which it was created: Stability of labor relations in the railroad industry.

C. E. Kief
Labor Member

CARRIER MEMBERS' ANSWER TO LABOR MEMBER'S DISSENT TO AWARD 17363

(REFEREE YAGODA)

The obvious fallacy in the Dissent is the manifestly false assumption that Award 9917 is "clearly erroneous". As the Carrier Members clearly demonstrated in the memorandum submitted at the panel discussion of this case, Award 9917 is far more logical in its application of the controlling rule than are the few awards that reached a different result. In these circumstances the authorities cited by the dissenter actually support the action taken by the majority.

G. L. Naylor
R. E. Black
W. B. Jones
P. C. Carter
G. C. White

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