

The Third Division consisted of the regular members and in addition Referee Elliott H. Goldstein when award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employees
(National Railroad Passenger Corporation
(Amtrak) - Northeast Corridor

STATEMENT OF CLAIM: "Claim of the System Committee of the Brotherhood that:

(1) The Carrier violated the Agreement when it failed and refused to allow Mr. T. Burger holiday pay for Christmas Day (December 25, 1983 observed December 26, 1983) and New Year's Day (January 1, 1984 observed January 2, 1984) (System File NEC-BMWE-SD-971).

(2) The claimant shall be allowed sixteen (16) hours of pay at his straight time rate."

FINDINGS:

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

The carrier or carriers and the employe or employees involved in this dispute are respectively carrier and employees 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 waived right of appearance at hearing thereon.

Claimant was employed by Carrier at the time of the instant dispute as Track Foreman on Gang G-252 headquartered at Paoli, on Carrier's Philadelphia Division. The Gang's tour of duty was 8:00 P.M. to 6:00 A.M., with Friday, Saturday and Sunday as rest days.

In 1983, the Christmas Eve and Christmas Day holidays fell on Saturday, December 24 and Sunday, December 25. In accordance with Agreement rules, the Christmas Day holiday was observed on Monday, December 26. In 1984, the New Year's Day holiday fell on Sunday, January 1 and was observed on Monday, January 2.

Claimant worked his regular assignment from Monday, December 19 through Thursday, December 22, 1983. Claimant did not work Friday, December 23, a rest day, or Saturday, December 24, a rest day and the Christmas Eve holiday. On Sunday, December 25, Claimant was assigned to perform overtime and he was compensated at the overtime rate for the work he performed. From

Monday, December 26 through Thursday, December 29, Claimant was on his scheduled vacation. Effective Friday, December 30, a rest day for Claimant, his position on Gang G-252 was abolished. Saturday and Sunday, December 31, 1983, and January 1, 1984, were Claimant's rest days, and Monday, January 2, 1984, was observed as the New Year's Day holiday.

When Claimant reported for work at his regular starting time on Tuesday, January 3, 1984, the Organization contends he discovered that his position had been abolished and there were no junior employees he could displace at that time. Claimant ultimately displaced a junior employee on Gang Z-112, headquartered at Lancaster, Pennsylvania, on January 6, 1984.

The instant claim is for holiday pay for the Christmas Day holiday, observed December 26, 1983, and the New Year's Day holiday, observed on January 2, 1984. The Organization argues that Claimant qualified for holiday pay for the Christmas Day holiday as a regularly assigned employee because compensation paid to the Claimant was credited to the workdays immediately preceding and following the holiday in accordance with Rule 48(f). The workday immediately preceding the Christmas holiday was Thursday, December 22, 1983, and Carrier has not disputed that Claimant worked his regular assignment on that date, the Organization maintains. Moreover, the workday immediately following the Christmas holiday was Tuesday, December 27, 1983. The Organization asserts that Claimant was allowed vacation pay for that day and therefore had compensation credited to him in accordance with Rule 48.

With regard to the New Year's Day holiday, the Organization submits that Claimant was an "other than regularly assigned employee" as of December 30, 1983, the date he was displaced. Under Rule 48(g)(ii), the Claimant was available for service on the day preceding and the day following the New Year's Day holiday, and therefore he qualifies for New Year's Day holiday pay, according to the Organization.

The Carrier advances several arguments in support of its position that it properly denied holiday pay to the Claimant on the dates in question. First, Carrier argues that Claimant has no entitlement to the holiday pay sought because he failed to meet the qualifying requirements of Rule 48(f), in that no compensation paid him was credited to the workday preceding the Christmas Day holiday, Thursday, December 22, 1983, and the first day following his vacation period and the New Year's Day holiday, Tuesday, January 3, 1984, on which he could have exercised his seniority but withheld his services.

Second, Carrier asserts that Claimant was well aware even before his scheduled vacation that his position would be abolished, since the abolishment notice was posted on December 19, 1983. Therefore, Claimant had ample time and opportunity to make arrangements to timely displace a junior employee on Tuesday, January 3, 1984. Carrier in its submission lists the names of several junior employees holding positions which Claimant could have displaced on that date.

Third, Carrier argued after the Claim was submitted to this Board that Claimant did not work on Thursday, December 22, 1983, as alleged, and therefore was not entitled to holiday pay because he did not meet the requirements for the workday preceding the holiday.

The Board in resolving the instant dispute notes that there are several issues which must be addressed in making a determination as to whether or not Claimant qualified for holiday pay. First, with regard to the Christmas Day holiday, observed December 26, 1983, we find that there is a dispute as to whether Claimant worked on Thursday, December 22, 1983, the workday preceding the holiday. However, Carrier made no mention of Claimant's alleged absence on that date until after the Claim was submitted to this Board. In fact, Carrier's position throughout the handling of the claim on the property establishes that the only issue raised by the Carrier was the Claimant's availability on January 3, 1983. Accordingly, we must conclude that is the only issue which the Carrier may now bring before the Board. Awards supporting that well-established principle are so numerous as to preclude the necessity of citation.

Second, while we cannot accept Carrier's new argument that the date of December 22, 1983, is in any way determinative of Claimant's eligibility for holiday pay, we must also reject the Organization's contention that Tuesday, December 27, 1983, was the first workday following the Christmas holidays. We have reviewed and considered the Organization's citation of Third Division Award 20309, and have concluded that it is inapposite to the present matter, inasmuch as that Award concerns a holiday which followed a single vacation day, which placed the holiday outside the vacation period. We think the record is clear that in this case, the Christmas Day holiday observance for which pay is being claimed occurred on the first day of Claimant's one week vacation period, Monday, December 26, 1983, and thus within the vacation period. It is the Board's view that Rule 48(j), concerning holiday pay qualifications for holidays occurring during an employee's vacation period, clearly applies to and governs Claimant's entitlement to Christmas Day holiday pay in this case. The language of that provision requires that an employee must have compensation paid him by the Carrier credited to the workdays preceding and following his vacation period in order to qualify for holiday pay for a holiday falling during the vacation period. Moreover, we note that even absent this clear and unambiguous language, several Awards have ruled that vacation days are not workdays, even though an employee is compensated for the vacation days. See, e.g., Second Division Awards 9977 and 10534.

Accordingly, we find that Tuesday, December 27, 1983, was not the "workday" following the Christmas holidays. It was a vacation day. The operative date for purposes of determining holiday pay eligibility was January 3, 1984, the first workday following Claimant's vacation period. That becomes the crucial date for both Christmas Day and New Year's Day holiday pay. As both parties agree, Claimant became "other than regularly assigned" as contemplated by Rule 48(g) upon the abolishment of his position effective December 30, 1983. Carrier urges that Claimant knew full well when the abolishment notice was posted on December 19, 1983, that he would become an "other than

regularly assigned employee" after December 30, 1983, and in deciding against exercising his seniority on January 3, 1984, he failed to qualify for holiday pay under Rule 48(g) because he was not available for service on January 3, 1984, as contemplated in Rule 48(g)(ii).

There appears to be some dispute in the record as to when the abolishment notice was posted, the Organization having asserted on the property that the notice was posted while Claimant was on vacation. Carrier has argued that the Board should consider dismissing this case based upon what it considers to be an irreconcilable factual difference concerning the date of posting of the notice.

We do not agree. It is this Board's view that the posting of the abolishment notice, and the secondary issue regarding Claimant's subjective knowledge of the notice, is not relevant in determining whether Claimant was available for service on January 3, 1984, so as to qualify for holiday pay under Rule 48(g)(ii). The crucial factor in determining availability is whether there were in fact junior employees who Claimant could have displaced on January 3, 1984. As we discussed in Third Division Award 28232, absent evidence that Claimant could have displaced a junior employee so as to be available on January 3, 1984, we will not find that Claimant laid off or was unavailable for service. The Carrier in the instant case never offered any factual evidence on this point until its Submission before the Board. While this proffer of evidence would be quite persuasive if we were permitted to consider it, it is well-settled by our Awards that evidence not brought to the other party's attention while the case is in progress on the property cannot be considered by this Board. See, e.g., Third Division Awards 8324, 7848, 7036, 6657, 5469, 5095, 3950, 1485.

Under these circumstances, we must find that Claimant was available for service on January 3, 1984, and that Carrier improperly denied his holiday pay entitlement for Christmas and New Year's Days.

A W A R D

Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division.

Attest:


Nancy J. Dever, Executive Secretary

Dated at Chicago, Illinois, this 11th day of January 1990.