

The Third Division consisted of the regular members and in addition Referee Herbert L. Marx, Jr. when award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employes
(Burlington Northern Railroad Company

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

- (1) The Agreement was violated when the Carrier withheld thirty-two (32) hours' straight time pay from Jr. J. E. Doll on June 15, 1989 (System File T-D-426-H/3MWB 89-09-06B).
- (2) As a consequence of the aforesaid violation, Claimant J. E. Doll shall be allowed thirty-two (32) hours' 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 employes involved in this dispute are respectively carrier and employe 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.

As offered by the Carrier in its submission, this dispute involves the following:

"At the time of his furlough, Claimant was still entitled to ten days' vacation payable in the calendar year 1988. Claimant did not request his vacation immediately following his layoff or prior to his filing of his name and address and entering furlough status, but

rather, waited until December 19, 1988, seventeen days following his furlough on December 2, 1988, to begin to claim his vacation entitlement.

Since Claimant was not working by virtue of his being in furlough status, his vacation entitlement was, necessarily, paid to him in lieu of taking vacation from the job. The local timeroll maker erroneously posted Claimant's vacation compensation to the timeroll on a day-to-day basis, on December 19, 20, 21, 22, 23, 26, 27, 28, 29, and 30, 1988, rather than entering a lump sum payment equal to the hours of total vacation due him. Further compounding the accounting error, the timeroll maker also include payment for the December 25, 26, 1988 and January 1, 2, 1989 holidays."

Some time after these events, the Carrier discovered its "error". When the Claimant returned to duty in or around June 1989, the Carrier deducted the four days of holiday pay to which it contended the Claimant improperly received.

The Organization argues that the Claimant was entitled to designate the latter part of December 1988 as his vacation period and that, by doing so, the Claimant earned the appropriate days of compensation to entitle him to the four days' of holiday pay.

Secondarily involved here is whether vacation days and previous holidays (Thanksgiving Day and day following Thanksgiving) are appropriate to be counted for "other than regularly assigned" employees in the calculation for holiday pay. For such employees, the holiday rule requires "compensation for service" to be "credited to 11 or more of the 30 calendar days immediately preceding the holiday". Many Awards have been concerned with this issue, with somewhat mixed results. As will be seen, however, this aspect is not determinative here.

There is no question that an employee on furlough is due the vacation pay to which his previous active service entitles him. The issue directly in point here is whether such employee may elect to designate a specific period for such vacation during his furlough. The Board concludes that the Organization has demonstrated no rule support for such action. This issue has been previously resolved by Public Law Board 4768, Award 9, involving the same parties. That Award stated as follows:

"Paid vacations refer to those days on which an employee would otherwise be working if not on vacation. Here, the furloughed employee did not have the seniority to work but had not yet taken his vacation. He was entitled to pay for the amount of time he would otherwise be taking as vacation if employed. In this instance, the employee could not take "vacation" as such, but was obviously entitled to pay in lieu thereof. This did not permit the Claimant to say that he would otherwise be at work if not on vacation.

As a result, the Claimant was not entitled to the requested holiday pay..."

The Organization's dissent to this Award is worth noting. Therein, the Organization states that the Vacation Agreement provides for three circumstances in which "in lieu of" vacation pay is appropriate, and since these do not include that of a furloughed employee with seniority, such should not be recognized as providing for "in lieu of" vacation payment. The Board is not convinced by this reasoning. The three circumstances listed in Appendix A all concern special conditions on which questions of vacation pay entitlement might otherwise be raised -- layoff of non-seniority employees; employees who are terminated; and active employees who are not released for vacation.

In the case of a furloughed employee, the question is not (as in the three exceptions) whether an employee has vacation pay entitlement. Rather, the question here is somewhat different -- the assignment of vacation to specific days. Since the employee is not otherwise in active employment from which to obtain paid time off, the assignment of specific days to the vacation entitlement is without significance. Beyond this, it would clearly distort the meaning of holiday entitlement to suggest that a furloughed employee, simply by claiming a portion of his furlough as vacation time, could become eligible for holiday pay to which he is not otherwise entitled.

Separately, the Organization contends that the Carrier's correction of its "error" by payroll deduction is untimely. There is ample precedent for the right to correct such overpayments, and the Claim is not sustainable on this account.

A W A R D

Claim denied.

Form 1
Page 4

Award No. 29936
Docket No. MW-29553
93-3-90-3-495

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Attest: *Catherine Loughrin*
Catherine Loughrin - Interim Secretary to the Board

Dated at Chicago, Illinois, this 2nd day of December 1993.