Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 34024
Docket No. CL-34125
00-3-97-3-644

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

PARTIES TO DISPUTE: (Transportation Communications International Union
(Burlington Northern Santa Fe Railway Company

STATEMENT OF CLAIM:

"Claim of the System Committee of the Organization (GL-11832) that:

1. Carrier denied Merger Protection Pay (Clerks) Form 12613 for the difference between Mr. L. A. Vogele's protected rate and his earnings for pay period ending May 31, 1993.

2. Carrier must now pay the difference between claimant Vogele's protected rate and his earnings for a total amount of $11.28.

FINDINGS:

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

The carrier or carriers and the employee or employees involved in this dispute are respectively carrier and employee 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 were given due notice of hearing thereon.

The Claimant held a Crew Hauler position at Laurel, Montana, with an Orange Book protected rate of $106.28. The Claimant sought payment for the difference

between his protected rate and his earnings for the pay period ending May 31, 1993 in the amount of $78.96. The Carrier compensated Claimant $67.68 — a difference of $11.28. The Organization contends that the Claimant is entitled to another $11.28.

The dispute focuses on May 31, 1993, a holiday worked by the Claimant. The Organization seeks the differential of $11.28 twice for that day. The Carrier asserts that it is only obligated to pay it once.

The Organization relies upon Article III, Section 1(a) of the Orange Book Protective Agreement:

> ". . . The guaranteed daily rate of pay shall be multiplied by the number of workdays and holidays falling on workdays in the semi-monthly pay period and each employe shall receive no less than this amount each pay date. . . ."

Arguing that because the Claimant worked on the May 31, 1993 holiday, that day was a "workday . . . and holiday . . . falling on a workday . . . in the semi-monthly pay period," the Organization justifies counting May 31, 1993 twice. The Carrier asserts that the language does not justify a double difference in earnings for May 31, 1993.

The traditional Rules of contract construction must be used to resolve this dispute. Further, because this is a contract dispute, the burden is on the Organization to demonstrate that those Rules of construction support its position. That burden has not been carried.

The first question is whether clear language supports the Organization's position? It does not.

The phrase "number of workdays and holidays falling on workdays" can be interpreted consistent with both parties' positions. The key is how the word "and" is used.

The word "and" can be used to mean "added to, plus." Because the Claimant worked on the May 31, 1993 holiday, that day was a "workday" as well as a "holiday falling on a workday." Thus, in accord with the Organization's position, the phrase "workdays and holidays falling on workdays" can be read to mean that the parties

intended that such days be counted twice, i.e., the numeric "workdays [added to, plus] holidays falling on workdays" which are then "multiplied" by the guaranteed daily rate.

However, the word "and" can also be used in the context of meaning "also, at the same time." Under that use of the word "and" the phrase "number of workdays and holidays falling on workdays" would mean that May 31, 1993 would be counted only once because the phrase shows that the parties intended to include days which are "workdays [also, at the same time] holidays falling on workdays."

Both interpretations are plausible. The language is therefore ambiguous.

One important tool for ascertaining the parties' intent for ambiguous language is bargaining history. The parties provided a transcript of the discussions at Miami, Florida, in November 1967, where the parties set forth their understandings and interpretations of the various provisions of the Orange Book. The following passage is found at Transcript Page 47 concerning the language at issue in this case where one of the Organization negotiators stated the employee:

> ". . . is then guaranteed this daily rate of pay by the number of workdays and holidays falling on workdays in the semi-monthly pay period, and he shall receive no less than this amount each pay date. All of the Carriers involved pay on a semi-monthly pay period; and, in application, if there were ten workdays in a half month, the employee would be guaranteed ten workdays' pay. If there were eleven workdays in a half month, he would be guaranteed eleven workdays' pay. If there were twelve workdays, he would be guaranteed twelve. I know of no case where he would get more than twelve for a regularly assigned employee." [Emphasis added]

Under the Organization's interpretation, an employee who works on holidays could "get more than twelve" days of guaranteed compensation in a semi-monthly pay period. For example, if an employee had Wednesday and Thursday as rest days, during the period May 16 through May 31, 1993, there were 12 workdays (May 16, 17, 18, 21, 22, 23, 24, 25, 28, 29, 30 and 31). If the holiday of May 31 was meant to be counted twice, there would then be 13 days of compensation. But the Organization representative clearly stated "I know of no case where he would get more than twelve for a regularly assigned employee." The Organization's interpretation is therefore contrary to the stated intent of the language.

Where language is ambiguous, another tool for ascertaining the parties' intent is past practice. Here, the Carrier asserts without rebuttal that there have been no similar payments since the effective date of the Orange Book (November 17, 1967). Thus, according to the Carrier, over the years there have been many situations where employees have worked on holidays and have not received this kind of double payment. Therefore, according to the Carrier, a past practice exists supporting its interpretation.

We agree. Given the length of time since the provisions of the Orange Book were negotiated, the number of employees covered by the Orange Book and the number of holidays that have gone by, the fact that payment like this has not been made indicates that an application exists consistent with the Carrier's interpretation.

In sum, clear language and bargaining history does not resolve the dispute in the Organization's favor. Further, past practice supports the Carrier's position. The Organization has therefore not carried its burden. The claim must be denied.

AWARD

Claim denied.

ORDER

This Board, after consideration of the dispute identified above, hereby orders that an Award favorable to the Claimant(s) not be made.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Dated at Chicago, Illinois, this 25th day of May, 2000.