

Form 1

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 37989
Docket No. MW-36915
06-3-01-3-531**

The Third Division consisted of the regular members and in addition Referee Joan Parker when award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employees
(Soo Line Railroad Company)

STATEMENT OF CLAIM:

“Claim of the System Committee of the Brotherhood that:

- (1) The Carrier violated the Agreement when it refused to allow Christmas Eve, Christmas Day, New Year's Eve and New Year's Day holiday pay to Welder Foreman L. H. Hultberg for December 24, 25 and 31, 1999 and January 1, 2000 (System File R1.583/8-00400).
- (2) As a consequence of the violation referred to in Part (1) above, Claimant L. H. Hultberg shall now be compensated for eight (8) hours' pay for each date of December 24, 25 and 31, 1999 and January 1, 2000 at his respective straight time rate of pay.”

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 holds seniority dating from April 17, 1991. At the time pertinent to the instant claim, he was assigned as a Welder Foreman headquartered in Minot, North Dakota. On November 18, 1999, the Claimant was removed from service pending an Investigation into alleged irregularities regarding his expense account.

On December 21, 1999, the Claimant and the Carrier entered into an Agreement under which the Claimant was returned to active service effective December 22, 1999. The Claimant was subsequently paid for three weeks' vacation, beginning retroactively on December 13, 1999. According to payroll records, the Claimant received vacation pay for each of his regularly scheduled workdays through the end of the year, including December 13, 14, 15, 16, 20, 21, 22, 23, 27, 28, 29 and 30, 1999. Following the New Year's holiday, the Claimant reported for work on his first scheduled workday in 2000.

The Carrier denied the Claimant holiday pay for December 24, 25, and 31, 1999, and January 1, 2000. On March 11, 2000, the Organization filed a claim on behalf of the Claimant, which the Carrier denied. The parties exchanged additional correspondence, and discussed the matter in conference on February 7, 2001. Having failed to resolve the matter on the property, the parties submitted it to the Board for final and binding resolution.

Appendix B of the parties' Agreement, entitled "Nonoperating (M of W) National Holiday Provisions," includes in pertinent part:

"Section 3. A regularly assigned employee shall qualify for the holiday pay provided in Section 1 hereof if compensation paid him by the carrier is credited to the workdays immediately preceding and following such holiday or if the employee is not assigned to work but is available for service on such days. . . ."

The Organization asserts that the Claimant was a regularly assigned employee who was returned to service on December 22, 1999 and, following his assigned vacation during the last three weeks of December, reported to his regularly assigned Welder Foreman position at Minot, North Dakota. According to the Organization, the Claimant's payroll records demonstrate that he was credited with

vacation compensation for December 23 and 27, 1999, the workdays immediately preceding and following the December 24 and 25 holidays; as well as December 30, the day preceding the New Year's holidays (December 31 and January 1). The Claimant also received compensation for his first workday following the January 1, 2000 holiday. Therefore, the Organization argues, as a regularly assigned employee with compensation credited to the workdays immediately preceding and following the holidays in question, the Claimant was qualified for holiday pay under Section 3 of Appendix B.

The Carrier challenges the Organization's position on two bases. First, with regard to the payroll records, the Carrier contends that any attribution of the Claimant's vacation pay to particular work days was done in error. According to the Carrier, it was intended that the Claimant receive a lump sum amount for vacation time earned in 1999. The Carrier argues that the Claimant was removed from service on the days in question, and was not on vacation. Therefore, the Carrier asserts, the Claimant was not credited with compensation on the workdays that would have qualified him for holiday pay.

The Carrier's position in this regard, however, is entirely without evidentiary support. It is undisputed that the Claimant was returned to active service on December 22, 1999. While he may not have been on vacation from December 13 to December 21, once the Claimant had returned to service under the December 21 Agreement, he must either have been working or on some sort of leave. The Claimant purports to have been on vacation. The Carrier presented no evidence to refute the Claimant's assertion.

The Board emphasizes that the Agreement under which the Claimant was returned to service on December 22, 1999, was not made part of the record submitted to the Board by either party, although it was referenced in the Carrier's Submission. If terms included in the Agreement support the Carrier's position, the Agreement should have been provided. On the basis of the evidence before it, the Board must find that - as reflected by the payroll records - the Claimant was credited with vacation pay for each workday from December 13, 1999 until his return to work in January 2000. The Board is aware of, but on the basis of the evidence before it cannot resolve the contradiction of the Claimant's having received vacation pay from December 13, although he was not returned to active service until December 22; nor is that contradiction material to the outcome herein.

The Carrier also challenges the Organization's position by arguing that vacation days are not "workdays" for the purposes of Section 3 of Appendix B. According to the Carrier, the parties therefore, by Agreement, look to the days immediately prior to and after an employee's vacation to determine qualification for holiday pay under Section 3, citing Third Division Award 28027 and 26305. The Claimant's status prior to his vacation (whether considered to have begun on December 13 or December 22) was that he had been removed from service. Therefore, the Carrier contends, the Claimant did not have compensation credited to him for the workday prior to vacation (whether December 9 or December 21) and is not qualified for holiday pay under Section 3.

The Board does not find the Carrier's argument in this regard to be persuasive. While it is unclear whether all of the language of Appendix B has been included in the record presented to the Board, the language that has been provided says nothing about excluding vacation pay as compensation credited to a workday for the purposes of Section 3. Moreover, the Awards cited by the Carrier do not support its position. Award 28027 concerned an employee placed on a medical leave of absence and referred to rehabilitation upon his return from a 15-day vacation, and is simply not sufficiently factually analogous to the instant case to be persuasive. Award 26305 concerned an employee regularly assigned Monday through Friday, who took a personal leave day on Wednesday, November 23, the day immediately prior to the Thanksgiving holiday. The carrier in that case argued that the parties had agreed that bereavement and vacation days would not count as workdays for purposes of Section 3 of the National Holiday Agreement, and that personal leave days should be similarly treated. The Board, however, rejected the Carrier's argument, based on its own reading of a "Note" to Section 3 that excluded only sick leave pay from qualifying compensation, as well as on consideration of Second Division Awards that concluded that the parties would have explicitly excluded personal leave pay from qualifying compensation for purposes of Section 3 if they had intended to do so. The Board in the instant case can find no evidence that the parties intended to exclude vacation pay from the compensation qualifying an employee for holiday pay under Section 3. Nor has the Carrier submitted any evidence of an agreement by the parties to count as "workdays" for Section 3's purposes the days before and after an employee's vacation.

Having carefully reviewed all available evidence, the Board finds that the Carrier simply has not provided any evidentiary rebuttal to the case presented by

the Organization. In such circumstances, the Board must find that the Organization met its burden of proof, and the claim must be sustained.

AWARD

Claim sustained.

ORDER

This Board, after consideration of the dispute identified above, hereby orders that an award favorable to the Claimant(s) be made. The Carrier is ordered to make the Award effective on or before 30 days following the postmark date the Award is transmitted to the parties.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Dated at Chicago, Illinois, this 25th day of October 2006.