Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 39663
Docket No. SG-39212
09-3-NRAB-00003-050678
(05-3-678)

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

PARTIES TO DISPUTE: (Brotherhood of Railroad Signalmen
(
(Union Pacific Railroad Company

STATEMENT OF CLAIM:

"Claim on behalf of the General Committee of the Brotherhood of Railroad Signalmen on the Union Pacific Railroad Company:

Claim on behalf of V. T. Palmer, for 4 hours' pay at the straight time rate, account Carrier violated the current Signalmen's Agreement, particularly Appendix D and Rule 80, when on July 26 and 27, 2004, the Claimant, who works 10 hours per day, 4 days per week, took two personal leave days and was compensated 8 hours per day instead of 10 hours: Carrier's File No. 1407160 (S4-UP172). General Chairman's File No. UPGCW-APPD-1009. BRS File Case No. 13352-UP."

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, at the time this dispute arose, was assigned to the position of Signalman on Signal Gang 2665. Signal Gang 2665 had elected to work a compressed week of eight ten-hour days followed by six rest days. On scheduled work days July 26 and 27, 2004, the Claimant took two personal leave days. He was compensated for eight hours for each day. According to Carrier payroll records, the Claimant had also been paid eight hours for personal leave days taken on January 30 and April 24, 2003.

The parties' Agreement includes the following pertinent provisions:

"Appendix D – Personal Leave, Article X

Section 1

* * *

Employees who have met the qualifying vacation requirement during seventeen calendar years under vacation rules in effect on January 1, 1982 shall be entitled to two days of personal leave in subsequent calendar years.

Section 2

* * *

(b) Personal leave days will be paid for at the regular rate of the employee's position or the protected rate, whichever is higher.

Rule 5 - 40-Hour Work Week

NOTE: The expressions 'positions' and 'work' used in Rule 5 refer to service, duties or operations necessary to be performed the

specified number of days per week and not to the work week of individual employees.

GENERAL:

There is established for all employees, subject to the exceptions contained in this agreement, a work week of 40 hours, consisting of five days of eight hours each, with two consecutive days off in each seven. . . . The foregoing work week rule is subject to the provisions which follow:

* * *

J. Accumulation of Rest Days

1. Members of Signal Gangs may, by majority, elect to have their hours of assignment and work days established to work . . . eight (8) ten (10) hour consecutive work days and accumulate six (6) consecutive rest days . . . subject to management approval.

Rule 25 – Vacations

The National Vacation Agreement of December 17, 1941 as it has been interpreted and amended will be considered a part of this Agreement. See Appendix B.

Employees may take their vacation in one week installments. However, they may elect to designate one (1) five-day installment of their vacation to be taken in one day parts, with the understanding that the Rules governing personal leave days in their entirety as shown in Appendix D will apply."

Appendix B of the National Vacation Agreement, § (a) provides in part: ". . . an employee having a regular assignment will be paid while on vacation the daily compensation paid by the Carrier for such assignment." Rule 80 (Loss of

Earnings) provides: "An employee covered by this agreement who suffers loss of earnings because of violation or misapplication of any portion of this agreement will be reimbursed for such loss."

The Organization's position is that the Carrier violated Appendix D (Personal Leave) and Rule 80 of the parties' Agreement by paying the Claimant eight hours at his straight time rate rather than ten hours for each personal leave day taken on July 26 and 27, 2004. According to the Organization, the Claimant's "regular rate" of pay at the time this dispute arose "was being paid for working 10 hours per day" and therefore, the Claimant was paid four hours less than he should have been under the provisions of Appendix D for his July 2004 personal leave days. The Organization argues that all employees are guaranteed a 40-hour workweek under the Agreement regardless of work schedule. In addition, the Organization asserts that the "language in Appendix D, Section 2(b) cannot be clearer, and mandates that personal leave days will be paid for at the regular rate of the employee's position."

In response to the Carrier's argument that employees in the Claimant's situation have the option of making up missed hours by working two additional hours during the workweek for each personal day used, the Organization points out that no contractual provision allows employees such as the Claimant to work without at least a Foreman present. Moreover, the Organization contends, the Carrier presented no proof of any Agreement provision or any policy in support of its argument in this regard. According to the Organization, the Carrier's argument asserts an affirmative defense, and therefore the burden shifted to the Carrier to prove such defense. In response to the Carrier's position that no Agreement provision adjusts the number of hours for which employees are compensated when their gang votes to work a shortened workweek, the Organization contends that the Carrier's established past practice has been to pay personal leave days at the daily rate. The Organization emphasizes that during on-property handling of the instant claim, the Carrier never refuted the Organization's arguments regarding past practice. Moreover, the Organization argues that vacation is paid at the employee's daily rate, and therefore personal leave days should also be paid at that rate.

It is well-established that the burden of proof cannot shift from the Organization to the Carrier until the Organization has met its initial burden of proof regarding its claim. In the instant case, the Board finds that the Organization has not met its initial burden of proof. The Organization offered no evidentiary support whatsoever for its claim that the Carrier's past practice has been to pay employees their daily rate for personal leave days, while the Carrier submitted payroll records showing that the Claimant himself has in the past been compensated only for eight hours at his straight-time rate for personal leave days, regardless of his work schedule.

Moreover, the Organization failed to point to any clear language in the parties' Agreement that supports its position that the Claimant should have been paid ten hours for his July 2004 personal leave days. The Board notes that while the National Vacation Agreement, incorporated by reference in Appendix B of the parties' Agreement, specifies that employees with regular assignments will be paid for vacation days "the daily compensation paid by the Carrier for such assignment," (emphasis added) Appendix D states only that employees will be paid for personal leave days "at the regular rate of the employee's position or the protected rate, whichever is higher." Having found that the Organization failed to offer evidentiary proof sufficient to support its initial burden, the Board must deny the claim.

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 22nd day of April 2009.

Organization's Dissenting Opinion

Third Division Award No. 39663
Docket No. SG-39212
Referee Joan Parker

Brotherhood of Railroad Signalmen
V.
Union Pacific Railroad Company

The Organization firmly believes that Findings of aforementioned Award are beyond the point of absurdity and should be reviewed only as an example of an assailable injustice.

The facts of record indicate that the Claimant was working a compressed work week of eight ten-hour days followed by six rest days. Claimant requested and was allowed to observe two personal leave days; however, he was not compensated, as in the past, at the proper rate of 10 hours pay per day. The clear and unequivocal language of the Agreement demands compensation of 10 hours pay and not eight hours pay as alleged by Carrier in this dispute.

The Referee stated in her Findings that, "*...the Organization failed to point to any clear language in the parties' Agreement that supports its position that the Claimant should have been paid ten hours for his July 2004 Personal Leave days. The Board Notes that while the National Vacation Agreement, incorporated by Reference in Appendix B of the parties' Agreement, specifies that employees with regular assignments will be paid for vacation days 'the daily compensation paid by the Carrier for such assignment,'(emphasis added) Appendix D states only that employees will be paid for personal leave days 'at the regular rate of the employee's position or the protected rate, whichever is higher.*

Here, the referee erred when she chose to ignore the fact that the Organization clearly established the past practice of compensating employees 10 hours for personal leave days when working a compressed work week.

The Referee clearly overlooked or failed to read the Organization's submission where it clearly pointed out Carrier's position on compensated hours paid to employees working a compressed work week back in 1995, in a claim denied by the Carrier, wherein it stated:

> "...it has been a past practice by the Carrier that if the Claimant is an eight (8) hour a day employee who works 5 days a week, then they would be entitled to eight hours. Similarly, if an employee is a ten- (10) hour employee, such as Claimant, then his vacation is taken at ten (10) hours per day. I direct the Organization's attention to Appendix B section (a) of the agreement which states, *'an employee having a regular assignment will be paid while on vacation the daily compensation paid by the Carrier for such assignment.'* As stated in your claim, Claimant's assignment is eight (8) days on a ten (10) hour per day schedule, and as such Claimant is therefore entitled to ten (10) hours for each day of vacation." **(See Organization's Exhibit No. 6 – emphasis added)**

Even though the above concerned vacation day compensation, and this issue concerns personal leave day compensation, they are one of the same in how Carrier, in the past 20 years, compensated employees working a compressed work week.

It is obvious that Carrier, in 1995, made the clear and unequivocal determination that when an employee works a compressed work week they would be compensated the daily rate of 10 hours per day to guarantee that employees received 40 hours of compensation for that work week, per Rule 5 of the Agreement. As stated by Carrier in its denial of this instant claim on March 7, 2005, *"Personal leave days are paid in the same manner as vacation days are paid to employees."* The only record provided by Carrier was that it stopped compensating employees 10 hours for a personal leave day when working a compressed work week. During the on-property handling of this claim, Carrier never refuted the Organization's arguments regarding the past practice of compensating employees 10 hours per day for personal leave days, the same as it has done historically for vacation days.

Carrier attempts to tell a tale that the Claimant has the option of making up missed hours by working two additional hours during the workweek. However, without refute from Carrier the Organization established that there was no contractual provision or policy that

allows employees, such as the Claimant, to work additional hours without a Foreman. Therefore, the Claimant was never provided an opportunity or instructed on how to recover two hours of lost wages per each personal leave day he observed, when Carrier arbitrarily changed its past practice on the amount of hours paid for personal leave days when working a compressed workweek.

Obviously, the Referee took the bait, hook-line-and sinker, and swallowed Carrier's misguided argument that, since the inception of personal leave days, Carrier has always paid an employee eight hours pay on such days, no matter if that employee was working a five day work week or a compressed work week. One would wonder if Carrier was correct in its assumption, why have there never been any claims filed prior to this instant case by the Organization? One can only presume that the Referee's ability in making reasonable interpretations is highly suspect and beyond the bounds of reasonableness.

In conclusion, based on the foregoing, the Organization dissents to the findings in this Award.

Respectfully submitted,

C.A. McGraw, BofRS Labor Member
National Railroad Adjustment board

Roy Robinson - BMWED

David Volz - AFDA

Steve Watson - TCU