

Form 1

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 39698
Docket No. MW-38361
09-3-NRAB-00003-040311
(04-3-311)**

The Third Division consisted of the regular members and in addition Referee Peter R. Meyers when award was rendered.

**(Brotherhood of Maintenance of Way Employes
PARTIES TO DISPUTE: (
(Soo Line Railroad Company**

STATEMENT OF CLAIM:

“Claim of the System Committee of the Brotherhood that:

- (1) The Carrier violated the Agreement when it failed and refused to compensate Mr. R. L. DeSmith for holiday pay for December 31, 2002 and January 1, 2003 (System File C-03-150-022/8-00415-087).**
- (2) As a consequence of the violation referred to in Part (1) above, Claimant R. L. DeSmith shall now be compensated for the holiday pay in the amount of three hundred twelve dollars and forty-eight cents (\$312.48) and have all other rights and benefits restored that were lost as a result of this violation.”**

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 Organization filed the instant claim alleging that the Carrier violated the parties' Agreement when it improperly failed and refused to compensate the Claimant with holiday pay for December 31, 2002, and January 1, 2003.

The Organization initially contends that there is no dispute that the Claimant was entitled to observe 25 days of vacation during 2002 in accordance with the provisions of the National Vacation Agreement. The National Holiday Agreement sets forth how an other than regularly assigned employee shall qualify for holiday pay. The Organization asserts that the Claimant fully satisfied the requirements set forth in the National Holiday Agreement for qualifying for holiday pay for the December 31, 2002, and January 1, 2003, holidays.

Addressing the Carrier's position that vacation days do not count towards qualifying days when an employee is on furlough, the Organization argues that the Carrier is in serious error. The Organization points to a February 1988 Carrier memo that states the Carrier's Agreement with the very position that the Organization takes in this matter. The Organization emphasizes that this memo deals with precisely the same situation as presented in this dispute, and the instant claim should be sustained based upon the Carrier's stated position therein.

As for the Carrier's argument that the Claimant was on furlough, and not on vacation, during the time period in question, the Organization maintains that the Carrier failed to prevent any documentation to refute the Organization's statement of facts here. Moreover, it was the Carrier, not the Organization, who asserted that the Claimant began his vacation on December 3, 2002.

The Organization ultimately contends that the instant claim should be sustained in its entirety.

The Carrier initially contends that the Organization failed to meet its burden of proof in this matter. The Organization failed to show that the Claimant had a scheduled vacation and that compensation was credited on 11 of the 30 days preceding the holiday. The Carrier asserts that the Organization failed to show a violation of any of the cited Rules.

The Carrier argues that the Claimant did not have any scheduled vacation. It points out that the Claimant's last day worked was November 27 and he was furloughed on Monday, December 2, 2002. The Carrier emphasizes that once furloughed, the Claimant was without assignment. The Carrier contends that under the circumstances, the Claimant does not meet the requirements for being classified as an "other than regularly assigned" employee. Accordingly, the Carrier asserts that the Claimant is not subject to the qualifying requirements set forth in the National Holiday Agreement.

The Carrier asserts that because the Claimant was furloughed on December 2, he had no compensation credited to 11 of the 30 calendar days preceding the holidays in question. The Carrier insists that the Claimant was not regularly assigned, was not "other than regularly assigned," and was not filling in for anyone. The Carrier points out that the Claimant was paid in lieu of vacation on January 15 of the following year, but no compensation was credited to any days in December.

The Carrier argues that what its February 1988 memo confirms is that if an employee had vacation scheduled and commenced prior to furlough, then compensation would be credited to each day on vacation and the employee would qualify for vacation pay. The Carrier insists that there is no evidence that the Claimant had a scheduled vacation during the period in question, and the Claimant did not commence any vacation prior to furlough. The Carrier further asserts that there is no evidence that the Claimant was credited with pay for 11 of the 30 days preceding the holidays in question, and the fact that he was paid a lump sum in lieu of vacation is not the same as having vacation pay credited to each day scheduled. The Carrier asserts that there is no dispute that the Claimant was furloughed, and there is no evidence to support the Organization's position that the Claimant commenced vacation on November 14 or 18.

The Carrier emphasizes that the Board should not be confused by the inclusion of the February 1988 dispute in the record herein. The Carrier insists that this memo refers to an employee who is other than regularly assigned and commences a scheduled vacation for which a vacation day is credited to each day of that vacation. The Carrier contends that this is different from the situation at issue in that the Claimant here had no scheduled vacation, was in a furloughed status, and was paid a lump sum in lieu of vacation at the end of the year. The Carrier points out that no vacation pay was credited to any 11 days in the 30 days preceding

the holidays in question. The Carrier argues that the Organization failed to meet its burden of proving that compensation was credited to 11 or more of the 30 days preceding the holidays at issue, as well as that the Claimant had compensation credited to the days immediately preceding and following the holiday or was available for service on such days.

The Carrier ultimately contends that the instant claim should be denied in its entirety.

The Board reviewed the record and finds that the Organization met its burden of proof that the Carrier violated the Agreement when it refused to compensate the Claimant for holiday pay for December 31, 2002, and January 1, 2003. Therefore, the claim must be sustained.

The record reveals that the Claimant possesses a seniority date of July 17, 1977. Based on that number of years, the Claimant was qualified for 25 days of vacation in the year 2001. The record reveals that the Claimant served his vacation starting on November 18, 2001. Consequently, by the time of the Christmas holidays, the Claimant had received pay for in excess of 11 days of the previous 30 calendar days preceding the applicable holidays.

The Carrier issued a memorandum in February 1998 which interpreted the National Vacation Agreement. In that memorandum, the Carrier interpreted the Vacation Agreement based on arbitration Awards and stated that “. . . nothing in the Holiday Agreement requires the employee to actually ‘render service’ or ‘work’ during the thirty calendar days immediately preceding the holiday. The only requirement placed on the employee by the Agreement is that he/she had compensation for service paid by the Carrier credited to eleven (11) or more days of the thirty (30) calendar days immediately preceding the Holiday in question. . . .”

Because the Claimant was off on vacation and was compensated for more than 11 of 30 days preceding the holiday, the Board orders that the claim seeking holiday pay for the Claimant for December 31, 2002, and January 1, 2003, be sustained.

AWARD

Claim sustained.

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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 26th day of May 2009.