

NATIONAL MEDIATION BOARD

PUBLIC LAW BOARD NO. 4768

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES

AND

BURLINGTON NORTHERN RAILROAD COMPANY

AWARD NO. 9

Carrier File No. CMWB 88-04-26
Organization File No. T-W-344

STATEMENT OF CLAIM

1. The Agreement was violated when the Carrier failed and refused to allow furloughed Group 5 Machine Operator R. Keppler holiday pay for Christmas Eve (December 24, 1987), Christmas Day (December 25, 1987), New Year's Eve (December 31, 1987) and New Year's Day (January 1, 1988) (System File T-W-344/CMWB 88-4-26).

2. The Claimant shall be paid eight (8) hours' pay for each day, December 24, 25 and 31, 1987 and January 1, 1988, at his Group 5 Machine Operator rate of pay because of the violation referred to in Part (1) above.

F I N D I N G S

The Claimant was furloughed on October 9, 1987 on account of force reduction. His seniority was insufficient to allow him to displace another employee. At the time of his furlough, the Claimant was entitled to 15 work days of vacation.

The Claimant did not request vacation pay at the time of his furlough. On December 4, 1987, however, the Claimant requested and received accumulated vacation pay.

According to the Organization, this put the Claimant "on vacation" until December 25. As a result, the Claimant seeks pay for four days of holiday (December 24-25, December 31, and January 1).

Article IV, Section 1 of the December 11, 1981 National Holiday Agreement provides in pertinent part as follows:

Section 1

. . .

C. Subject to the applicable qualifying requirements in Section 3 hereof, other than regularly assigned employees shall be eligible for the paid holidays or pay in lieu thereof provided for in paragraph B above, provided (1) compensation for service paid him by the carrier is credited to 11 or more of the 30 calendar days immediately preceding the holiday and (2) he has had a seniority date for at least 60 calendar days or has 60 calendar days of continuous active service preceding the holiday beginning with the first day of compensated service, provided employment was not terminated prior to the holiday by resignation, for cause, retirement, death, non-compliance with a union shop agreement, or disapproval of application for employment.

It is the Carrier's position that the furloughed employee was entitled to vacation pay in lieu of actual vacation. It may well be the case that vacation days of active employees

are counted towards holiday eligibility. The Carrier contends, however, that a furloughed employee may not, on his own initiative, designate specific days of "vacation" while on furlough.

The Board concurs in the Carrier's interpretation. 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 he would otherwise be at work if not on vacation.

As a result, the Claimant was not entitled to the requested holiday pay, because he was not at work since October 9, and he was not entitled to designate a specific period as "vacation" so as to qualify him for the holidays.

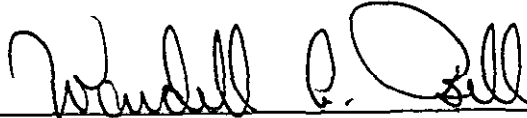
The Board finds that neither Award No. 14816 (Dugan), cited by the Organization, nor Public Law Board No. 2707, Award No. 60 (Cluster), cited by the Carrier, is directly applicable here.

A W A R D

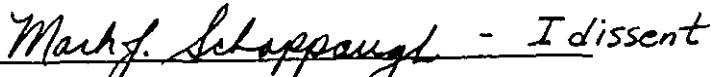
CLaim denied.



HERBERT L. MARX, JR., Chairman and Neutral Member



WENDELL A. BELL, Carrier Member



MARK J. SCHAPPAUGH, Employee Member

NEW YORK, NY

DATED: 8/17/90

DISSENT TO AWARD 9
OF
PUBLIC LAW BOARD NO. 4768

In this award, the Majority held that:

"It is the Carrier's position that the furloughed employee was entitled to vacation pay in lieu of actual vacation. It may well be the case that vacation days of active employees are counted towards holiday eligibility. The Carrier contends, however, that a furloughed employee may not, on his own initiative, designate specific days of 'vacation' while on furlough.

The Board concurs in the Carrier's interpretation. 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 he would otherwise be at work if not on vacation.

As a result, the Claimant was not entitled to the requested holiday pay, because he was not at work since October 9, and he was not entitled to designate a specific period as 'vacation' so as to qualify him for the holidays." (Underscoring in original)

There are two (2) problems with the Majority's decision. First, the determination that the Carrier may pay a furloughed employee a lump sum "in lieu" of vacation in place of crediting compensation to each vacation day observed is faulty because such action is not allowed for by the Vacation Agreement (Appendix A). The Vacation Agreement allows for only three (3) instances whereby

the Carrier may compensate an employee for vacation "in lieu" thereof. They are:

1. Appendix A, Section 1(L) provides that an employee who is laid off and has no seniority date and no rights to accumulate seniority, who renders compensated service on not less than one hundred twenty (120) days in a calendar year and who returns to service in the following year for the same Carrier will be granted the vacation in the year of his return. In the event such an employee does not return to service in the following year for the same Carrier, he will be compensated in lieu of the vacation he has qualified for.
2. Appendix A, Section 5, provides that each employee who is entitled to vacation shall take same at the time assigned, although the Carrier has the right to defer said vacation with proper notice. Moreover, if the Carrier finds that it cannot release an employee for a vacation during the calendar year because of the requirements of the service, then such employee shall be paid in lieu of the vacation at the time and one-half rate for work performed during his vacation period in addition to his regular vacation pay.
3. Appendix A, Section 8 provides that if an employee who has earned vacation is terminated for any reason, including, but not limited to, retirement, resignation, discharge, non-compliance with a union-shop agreement, or failure to return after furlough, he shall at the time of such termination be granted full vacation pay earned up to the time he leaves the service including pay for vacation earned in the preceding year or years and not yet granted, and the vacation for the succeeding year if the employee has qualified therefor under Article 1.

None of the circumstances described above applied to this case.

Second, we submit that a furloughed employee is entitled to observe each day of his/her vacation and receive vacation pay credited to each day observed in order to be relieved of certain

obligations under the Agreement. For example, furloughed employees are subject to recall and must report to service within ten (10) calendar days after having been recalled, in accordance with Rule 9. In this instance, the employee was entitled to fifteen (15) days of vacation. He desired to take his entire vacation beginning on December 4, 1987. Hence, if the employee desired to travel away from his residence, to Hawaii, Europe or to some other location for example, he would not be subject to mandatory recall because he was on vacation for fifteen (15) days. The reasoning in this award serves to destroy that entitlement.

For the above reasons, I respectfully dissent.

Mark J. Schappaugh

Mark J. Schappaugh
Employee Member