

Award No. 2136

Docket No. 1986

2-CRI&P-BM-'56

NATIONAL RAILROAD ADJUSTMENT BOARD

SECOND DIVISION

The Second Division consisted of the regular members and in addition Referee Adolph E. Wenke when the award was rendered.

PARTIES TO DISPUTE:

**SYSTEM FEDERATION NO. 6, RAILWAY EMPLOYES'
DEPARTMENT, A. F. of L. (Boilermakers)**

**CHICAGO, ROCK ISLAND AND PACIFIC RAILROAD
COMPANY**

DISPUTE: CLAIM OF EMPLOYES:

1. That under the current Vacation Agreement retired Boilermaker B. V. Lee has been improperly denied payment in lieu of an additional five days of vacation due him in the year 1954.

2. That accordingly the Carrier be ordered to additionally compensate the aforesaid retired Boilermaker in the amount of forty (40) hours' pay in lieu of his additional five days of vacation in the year 1954.

EMPLOYES' STATEMENT OF FACTS: Retired Boilermaker B. V. Lee, hereinafter referred to as the claimant, was employed by the carrier at their Armourdale Shops, Kansas City, Kansas, having more than fifteen (15) years of continuous service with the carrier. The claimant retired from the carrier's service in October 1953, after having performed not less than 133 days of compensated service in 1953. In the second pay period of the month of July, 1954, the claimant was issued a check (received by him after the first day of August, 1954) showing a gross earnings of \$167.44 and representing 10 days in vacation pay in lieu of a vacation in the year 1954, which was earned in 1953. Claimant requests an additional forty hours pay in lieu of the additional five days vacation provided for in the August 21, 1954 agreement.

This dispute has been handled with the carrier up to and including the highest designated officer to whom such appeals are subject to be made and who has declined to adjust it.

The agreement effective October 16, 1948, as amended, and the vacation agreement of December 17, 1941, as subsequently amended, are controlling.

POSITION OF EMPLOYES: The employees contend that Article 8 of the vacation agreement of December 17, 1941 is controlling in the instant case and reads as follows:

Name: Bernard V. Lee Last
Occupation: Boilermaker-Mech.
Address: 2602 Kensington Location or
Kansas City, Mo. Division: Kansas City, Kans.
Date of Last
Service: October 16, 1953.

The Railroad Retirement Board should be immediately notified if at any time this annuitant returns to compensated service for your company.

Very truly yours,

(S) Robert H. LaMotte,
Director of Retirement Claims."

Mr. Lee, having been awarded a full annuity, effective October 17, 1953, had no employe status with the carrier in 1954 so as to entitle him to three weeks' vacation in 1954 as provided by the Aug. 21, 1954 vacation agreement, effective January 1, 1954. Mr. Lee is no more entitled to three weeks' vacation than is any employe who retired in 1953 and received his vacation pay in lieu of 1954 vacation upon retirement.

The organization has argued that Mr. Lee had employe status in 1954 because of certain premiums which he paid on a group insurance policy and hospital association dues. It is our position that neither of these actions constitutes or creates an employment relationship so as to increase the vacation benefits of a retired employe.

The organization has also argued that a leave of absence granted Mr. Lee in 1953 extended over into 1954, thus giving Lee employment rights and entitling him to three week's vacation in that year. Again we refer to action by the Railroad Retirement Board in which sick benefits paid in 1953 were halted in October of that year and pension payments made after that date. Any payments by the Retirement Board in 1954 were pension payments which any person having employment status is not eligible to receive.

Thus, the carrier's position that Lee performed no service and had no employment relationship during 1954 so as to make him eligible for 3 weeks' vacation is supported by action by the Railroad Retirement Board.

Having full annuity pensioner status, effective October 17, 1953, Mr. Lee consequently had no employe status subsequent to that date. The vacation pay allowed Mr. Lee on that date was according to the terms of the 1941 vacation agreement and practice in effect on this property at that time. The 1954 agreement, effective January 1, 1954 cannot be interpreted in any manner so as to cover employes who had no employment status on January 1, 1954.

We respectfully request your Board to deny this claim.

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

The carrier or carriers and the employe or employes involved in this dispute are respectively carrier and employe 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.

The parties to said dispute were given due notice of hearing thereon.

This claim is being made on behalf of retired Boilermaker B. V. Lee. It is claimed that carrier erred when it paid claimant for only ten (10) days' vacation pay for 1954 when, under the agreement dated August 21, 1954

which revised certain vacation agreement provisions effective January 1, 1954, he was entitled to fifteen (15) days.

Claimant had been in the employment of the carrier since 1923, working at its Armourdale Shops in Kansas City, Kansas. He was, at the time he retired on disability annuity, sixty-one (61) years of age. On April 24, 1953 claimant was injured in an accident which occurred while he was in service. Although the injuries suffered were disabling he worked off and on until October 16, 1953, working one hundred and thirty-six (136) days in 1953. In April of 1954 he applied for a full retirement annuity, retroactive to October 16, 1953, based on a claim of total disability which he had suffered as a result of injuries received in the accident he had on April 24, 1953. This was permissible under the provisions of Section 2 (a), subsection 4 (c) of The Railroad Retirement Act. He was, based on his application, granted a full retirement annuity effective as of October 17, 1953.

Article I—Vacations—Section 1 (c) of the agreement dated August 21, 1954 makes the following conditions a prerequisite to the right to receive for the calendar year of 1954 an annual vacation of fifteen (15) consecutive work days with pay:

- (1) that he must be an employe covered by the agreement,
- (2) that he has rendered compensated service on not less than 133 days during the preceding calendar year, and
- (3) that he has fifteen (15) or more years of continuous service within the terms as therein set forth.

The evidence is without dispute that claimant had the latter two provided he can bring himself within the first. In this respect we think his retirement effective as of October 17, 1953. (See Award 1588 of this Division.) Whether or not he was an employe covered by the agreement depends on the provisions of the Railroad Retirement Act relating thereto.

The Act defines "The term 'employe' " as meaning "any individual who is in the employment relation to one or more employers." "Definitions" section 1, subsection (b). It then goes on to provide, under a factual situation such as here presented, as follows: "If after cessation of his disability annuity the employe will have acquired additional years of service, such additional years of service may be credited to him with the same effect as if no annuity had previously been awarded to him." Section 2, subdivision 5 of subsection (a).

And, further, that: "An annuity shall be paid only if the applicant shall have relinquished such rights as he may have to return to the service of an employer and of the person by whom he was last employed; but this requirement shall not apply to the individuals mentioned in subdivision 4 and subdivision 5 of subsection (a) prior to attaining age sixty-five." Section 2, subsection (b).

We think, because these rights were reserved to claimant, that he was, up until he resigned in September 1954, an employe covered by the parties' agreement and entitled to a fifteen (15) day vacation with pay in 1954. Since carrier has only paid for ten (10) days, the claim here made should be allowed.

AWARD

Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of SECOND DIVISION

ATTEST: Harry J. Sassaman
Executive Secretary

Dated at Chicago, Illinois, this 19th day of June, 1956.