Award No. 2926
Docket No. 2757
2-L&N-CM-'58

NATIONAL RAILROAD ADJUSTMENT BOARD

SECOND DIVISION

The Second Division consisted of the regular members and in addition Referee James P. Kiernan when the award was rendered.

PARTIES TO DISPUTE:

SYSTEM FEDERATION NO. 91, RAILWAY EMPLOYES' DEPARTMENT, AFL-CIO (Carmen)

LOUISVILLE AND NASHVILLE RAILROAD COMPANY

DISPUTE: CLAIM OF EMPLOYES:

1. That under the controlling agreements the Carrier has improperly denied Carman J. F. Holder payment in lieu of vacation for the year 1952.

2. That, accordingly, the Carrier be ordered to pay the aforenamed Carman in lieu of vacation for the year 1952.

EMPLOYES' STATEMENT OF FACTS: Carman (Car Inspector) J. F. Holder, hereinafter referred to as the claimant, was employed by the Louisville and Nashville Railroad Company, hereinafter referred to as the carrier, as such, with a seniority date of February 21, 1946.

During the year 1951 the claimant performed compensated service in excess of 133 days. The claimant further rendered the required number of compensated days of service in the years of 1946, 1947, 1948, 1949 and 1950, thereby qualifying for a ten (10) day vacation, in accordance with the Vacation Agreement of December 17, 1941, as amended, in the year 1952.

On December 21, 1951, the claimant had charges placed against him and as a result thereof, was dismissed on January 21, 1952 by the carrier's master mechanic. The dismissal was not accepted as conclusive and the case was referred to the National Railroad Adjustment Board, Second Division, which resulted in Award 2228 and the Second Division ordering the carrier to restore the claimant to service with all seniority rights unmpaired. On February 17, 1957 the claimant was restored to service as ordered by the Adjustment Board.

The dispute was handled with the top carrier official designated to handle such matters, who declined to adjust the matter. General handling was waived by the parties.

Finally, carrier submits that if for any reason the Board should conclude that the instant claim has not already been denied, or that it is not barred by time limit rule, then it is not due and should be denied because of Sections 8 and 9 of the vacation rule, reading as follows:

> "8. No vacation with pay or payment in lieu thereof will be due an employe whose employment relation with a Carrier has terminated prior to the taking of his vacation, except that employes retiring under the provisions of the Railroad Retirement Act shall receive payment for vacation due.
>
> "9. Vacations shall not be accumulated or carried over from one vacation year to another."

Holder's employment relation was terminated prior to taking his 1952 vacation and under section 8 of the vacation rule quoted above he was not thereafter due a 1952 vacation with pay or payment in lieu thereof. Furthermore, rule 9 prohibits carrying vacations over from one year to another, so that although Holder's employment relation was re-established in 1956 when his seniority was restored in compliance with this Board's Award 2228, the vacation which was forfeited in 1952 cannot be carried over and allowed or paid in 1957.

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 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.

Carman Holder was dismissed from the service of the carrier on January 19, 1952. The dismissal resulted in an appeal to this Board. Carman Holder's claim in that docket was : (1) That under the current agreement Carman J. F. Holder was unjustly discharged from service on January 19, 1952, (2) That accordingly the carrier be ordered to restore this employe to service with all seniority rights unimpaired and with compensation for all time lost retroactive to the aforesaid date. In that case the Board, in Award 2228, sustained the claim, asking restoration to carrier's service with all seniority rights unimpaired, but claim for "compensation for all time lost" was denied. In that award the Board said, "While we think, under the circumstances here shown, that the delay in handling this claim would defeat all monetary claim made, nevertheless, we do not think it precludes our consideration of the cause for Holder's dismissal." Quoting again from Award 2228, the Board said, "We think, if he is now restored to carrier's service with his seniority rights fully restored but without allowance of any compensation for time lost, that his punishment will be adequate."

We are not asked to interpret that award. This is a claim for payment in lieu of vacation. The parties are in agreement as to the number of days worked to qualify for a vacation. Article 8 of the Vacation Agreement reads:

"No vacation with pay or payment in lieu thereof will be due an employe whose employment relation with a Carrier has terminated prior to the taking of his vacation * * *."

Claimant, in his submission, contends that his employment relation with the carrier has not been terminated, cited Award 1973 of this Division:

"We are inclined to agree with the organization that the carrier's action of dismissal does not become final and determinative of employment status until the appeal procedures under the agreement have run their course."

Claimant either did have an employment relation with the carrier from the time of dismissal until he was reinstated, or he did not have such relation. If he did not have employment relation, then the claim must be denied by reason of Article 8 of the Vacation Agreement. If he did have employment relation, then he was bound by the time limit rule of the property effective October 1, 1955, as reproduced in carrier's submission, and too lengthy to reproduce here.

AWARD

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of SECOND DIVISION

ATTEST: Harry J. Sassaman
Executive Secretary

Dated at Chicago, Illinois, this 30th day of July, 1958.

DISSENT OF LABOR MEMBERS TO AWARD NO. 2926

The majority disclose in their findings that they were unable to reach any actual determination on which to base a justifiable denial award but imply that the important thing is that the claim be denied. The first sentence of the last paragraph is an either/or proposition and the last two sentences beginning with "if" expose the doubt of the majority and are apparently written simply for rhetorical effect. Let us deal with the first "if" sentence:

"If he did not have employment relation, then the caim must be denied by reason of Article 8 of the Vacation Agreement."

That the claimant DID have an employment relation was determined by Second Division Award 2228 which held that the instant claimant should be restored to the carrier's service with all seniority rights unimpaired. In other words, the act of discharge was in effect declared a nullity by Award 2228.

The majority then state "If he did have employment relation, then he was bound by the time limit rule on the property . . ." They thus ignore the statement made by the carrier in its brief that " We did advise the General Chairman that in the circumstances we would waive the provision of the time limit rule with respect to the vacation claim . . ."

We believe that it is clear from the foregoing that the claim should have been sustained.

/s/ James B. Zink
/s/ R. W. Blake
/s/ C. E. Goodlin
/s/ T. E. Losey
/s/ Edward W. Wiesner