Award No. 5669
Docket No. 5480
2-B&O-CM-'69

NATIONAL RAILROAD ADJUSTMENT BOARD

SECOND DIVISION

The Second Division consisted of the regular members and in addition Referee George S. Ives when award was rendered.

PARTIES TO DISPUTE:

SYSTEM FEDERATION No. 30, RAILWAY EMPLOYES' DEPARTMENT, A. F. of L. - C. I. O. (Carmen)

THE BALTIMORE AND OHIO RAILROAD COMPANY

DISPUTE: CLAIM OF EMPLOYES:

1. The Baltimore and Ohio Railroad Company (hereafter referred to as the Carrier) failed to compensate Carman H. E. McWhorter (hereafter referred to as the claimant) for his vacation pay entitlement for year 1965.

2. The carrier be ordered to compensate the claimant two weeks vacation pay in lieu of vacation.

EMPLOYES' STATEMENT OF FACTS: The Claimant worked 97 full days during the year 1964 for a total of 115 days on which he rendered compensated service. Carrier's letter of declination dated June 7, 1966, is attached hereto as evidence thereof and referrd to as Exhibit A.

Th Claimant was discharged from service of the carrier as of September 18, 1964, following an investigation held on August 25, 1964.

The claimant was not paid vacation pay in lieu of vacation for the year 1965 as required by Article IV, Section 2 of the August 19, 1960 Agreement.

The handling of this claim is hereby attached and referred to as Exhibit B-1 through B-13.

This dispute has been handled with all officers of Carrier designated to handle such disputes, including Carrier's highest designated officer, all of whom as declined to make satisfactory adjustment.

The agreement revised September 1, 1926, reprinted November 1, 1952, as subsequently amended is controlling.

POSITION OF EMPLOYES: Article IV — Vacations, Section 2 of the August 19, 1960 Agreement reads in pertinent part:

grievances provided such action is instituted within 9 months of the date of the decision of the highest designated officer of the Carrier.

6. This rule shall not apply to requests for leniency."

In Award 24 of Special Board of Adjustment No. 192 (BRC v. B&O) the holding was:

"It is apparent that the claim filed by claimant and that filed by the Division Chairman involved the same occurrence and that there was no difference between the time claimed in either case.

Article V Section 1(a) of the August 21, 1954 agreement requires that if any claim is disllowed within 60 days from the date same is filed, the Carrier shall notify whoever filed the claim or grievance (the employe or his representative) in writing of the reason for such disallowance. The Carrier's Regional Accountant complied with that provision of the Agreement. If appeal was to be taken it was then incumbent upon the employe or her representative to appeal that decision to the Superintendent within 60 days from notice of disallowance, not to withdraw and then file a new claim covering the same occurrence and asking for the same relief. Obviously, the Agreement of August 21, 1954 did not intend that claims identical in nature could be filed, withdrawn at will and re-filed. **This would lead to chaos and place an undue burden on the Carrier where it could find itself in the position of having to decline the same claim over and over again or face the penalty of allowance.** The mere fact that the Division Chairman asserted a different theory in support of the claim does not alter the fact that it was the same claim. He would have been free to argue that same theory on appeal. It is well known that Genreal Chairmen very frequently and properly seek to support claims on final handling on a different basis than had been argued in the earlier steps of the grievance procedure.

We find that this claim is barred by reason of the time limitation rule." (Emphasis ours.)

The claim in this case at both parts 1 and 2 is wholly without merit. The Claim in its entirety ought to be denied.

(Exhibits not reproduced.)

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.

Parties to said dispute were given due notice of hearing thereon.

The underlying issue involved in this dispute is whether claimant's original claim for reinstatement and "paid for all time lost and all other rights called for in the agreements", which was denied on the property without further appeal to the Board, encompassed the substance of the instant claim for vaca-

tion pay in lieu of vacation for the year 1965 under Article IV, Setcion 2 of the August 19, 1960 National Agreement, and therefore, constitutes a bar to this claim under the time limit rule contained in the effective Agreement between the parties. Petitioner contends that claimant here seeks only accrued vacation pay as a discharged employe under Article IV of the August 19, 1960 National Agreement which is a separate claim not contemplated in his original claim for reinstatement. Moreover, Petitioner urges that Carrier has waived the right to raise this question because the mertis of the dispute were considered by the parties on the property.

Analysis of Article IV, Section 2 of the August 19, 1960 Agreement and the record herein reveals that a discharged employe is entitled to vacation pay in lieu of vacation which has accrued during the previous year, and that Carrier's principal averment while this dispute was considered on the property was that claimant rendered less than the requisite one hundred and ten (110) days of compensated service needed to qualify for a vacation in the succeeding year prior to his discharge in 1964. Contrary to Carrier's present position, we must conclude that Carrier endeavored to dispose of the instant claim on the merits without urging that the time limit rule barred consideration of the substantive issues which allegedly were encompassed by the original claim on behalf of the Claimant. Therefore, we find that Carrier is now barred from raising this issue before the Board. (Awards No. 1834, 3931 and 4102). Likewise, the participation of Petitioner in conference concerning the instant grievance subsequent to Carrier's failure to properly respond to the initial appeal by Petitioner effectively waived such procedural error on the part of Carrier.

As to the merits of the dispute, it is undisputed that Claimant worked at least part of eighteen (18) days in addition to ninety-seven (97) full days during the calendar year 1964. Article IV — Vacations, Section 1, Paragraph (b) of the August 19, 1960 Agreement in part provides as follows:

> "Effective with the calendar year 1961, an annual vacation of ten (10) consecutive days with pay will be granted to each employe covered by this Agreement who renders compensated service on not less than one hundred ten (110 days during the preceeding calendar year * * *."

Other requirements are included which have been met by claimant and the sole issue for determination is whether the part time days worked by claimant during 1964 may be included as days of compensated service under this provision. Petitioner relies on Interpretations if the Vacation Agreement propounded by Referee Wayne L. Morse on November 12, 1942 to support the instant claim. Examination of such interpretations support a finding that each calendar year for which an employe is paid for some time worked will be counted with exceptions not here applicable. Accordingly, the instant claim must be sustained.

AWARD

Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of SECOND DIVISION

ATTEST: Charles C. McCarthy
Executive Secretary

Dated at Chicago, Illinois, this 18th day of April 1969.

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