Award No. 6055
Docket No. 5919
2-B&O-EW-'70

# NATIONAL RAILROAD ADJUSTMENT BOARD

## SECOND DIVISION

The Second Division consisted of the regular members and in addition Referee Don J. Harr when award was rendered.

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## PARTIES TO DISPUTE:

SYSTEM FEDERATION NO. 30, RAILWAY EMPLOYES' DEPARTMENT, AFL-CIO (Electrical Workers)

THE BALTIMORE AND OHIO RAILROAD COMPANY

DISPUTE: CLAIM OF EMPLOYES:

1. That Electrician Apprentice M. E. Burnham was denied one week vacation in 1968.

2. That accordingly, the Carrier be ordered to compensate Electrician Apprentice M. E. Burnham for one week vacation pay in lieu of his 1968 vacation.

EMPLOYES' STATEMENT OF FACTS: Electrician Apprentice M. E. Burnham, hereinafter referred to as the claimant, was employed by the Baltimore and Ohio Railroad Company, hereinafter referred to as the carrier, as an apprentice electrician on January 24, 1966, on which date his seniority was established.

The claimant rendered service on a sufficient number of days in 1966 for vacation entitlement in 1967. Vacation in 1967 was observed.

In May 1967, the claimant was inducted into the United States Armed Forces, serving for a period of seventeen (17) months. Upon his Honorable Discharge, he returned to the service of the carrier to resume his apprenticeship at Mt. Clare Shops, Baltimore, Maryland on October 1, 1968. The claimant rendered seventy-four (74) days of compensated service in the calendar year 1967.

This dispute has been handled with all officers of the carrier, up to and including the highest officer designated to handle such matters, with the result that each have declined to make a satisfactory adjustment.

POSITION OF EMPLOYES: It is the position of the employes, and we submit that the record will so reveal, that this claim should be sustained for any of the reasons hereinafter discussed.

Article V, Section 1 of the August 19, 1960 Agreement provides the method by which an employe would qualify for vacation purposes. The claimant rendered seventy-four (74) days of compensated service in the calendar year 1967.

(h) In instances where employes who have become members of the Armed Forces of the United States return to the service of the employing carrier in accordance with the Military Selective Service Act of 1967, as amended, the time spent by such employes in the Armed Forces subsequent to their employment by the employing carrier will be credited as qualifying service in determining the length of vacations for which they may qualify upon their return to the service of the employing carrier.

* * * * *"

It will thus be seen that even after handling for revision of the vacation agreement, the settlement reached therein by the September 2, 1969 agreement, the employes did not secure by agreement what they are here requesting in the Burnham case.

Carrier recognizes that the September 2, 1969 case is not applicable to the issue involved in the Burnham case except to show the fallacy of the employes' claim and the length to which they are endeavoring to stretch the rules which are applicable.

It has been clearly shown that the claim of the employes is without justification, either under applicable agreement rules or by-law, and carrier asks that the claim of the employes be denied in its entirety.

**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 waived right of appearance at hearing thereon.

Claimant was employed by the Carrier as an apprentice electrician on January 24, 1966. Claimant performed the required number of days of compensated service to qualify for vacation to be taken during the calendar year 1967.

Claimant was inducted into the military service on April 26, 1967. He was released from military service on October 1, 1968, and returned to Carrier's service as an apprentice electrician on October 8, 1968. Prior to his entry into the military service the Claimant performed seventy-four days of compensated service for the Carrier during 1967.

The Organization contends that the Claimant was qualified for five days' vacation to be taken during the calendar year 1968. Due to the fact that he was in military service a portion of the year 1967.

The Organization relies upon The Universal Military Training and Service Act to support their claim. One section of the Act reads:

"(2) It is declared to be the sense of the Congress that any person who is restored to a position in accordance with the provisions of paragraph (A) or (B) of subsection (b) of this section should be so restored in such manner as to give such status in his employment as he would have enjoyed if he had continued in such employment continuously from the time of his entering the armed forces until the time of his restoration to such employment."

The agreement of February 4, 1965, to which the Organization and the Carrier were parties, Mediation Cases A-7127 and A-7128 provides as follows:

"(a) Effective with the calendar year 1965, an annual vacation of five (5) consecutive work days with pay will be granted to each employe covered by this Agreement who renders compensated service on not less than one hundred twenty (120) days during the preceding calendar year.

(b) Effective with the calendar year 1965, an annual vacation of ten (10) consecutive work 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 preceding calendar year and who has three (3) or more years of continuous service and who, during such period of continuous service renders compensated service on not less than one hundred ten (110) days (133 days in the years 1950-1959 inclusive, 151 days in 1949 and 160 days in each of such years prior to 1949) in each of the three (3) of such years, not necessarily consecutive."

We cannot agree with the Organization's position. Decisions of various Courts and Awards of this Board have held contrary. In a **Memorandum and Order** dated November 20, 1967, Judge Nall of The United States District Court for the Southern District of Texas stated:

"It is undisputed that Dugger did not work 110 days either in 1964 or 1965. As a matter of law, therefore, plaintiff was not entitled to a paid vacation in 1965 and 1966. This interpretation places veterans and non-veteran employes on a parity, as required by the Act; to make an exception for returning veterans would be to discriminate against non-returning veterans."

See also Second Division NRAB Awards 3386, 3475, 3878, 3879 and 4645.

AWARD

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of SECOND DIVISION

ATTEST: E. A. Killeen
Executive Secretary

Dated at Chicago, Illinois, this 18th day of November, 1970.

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