

The Second Division consisted of the regular members and in addition Referee Irving R. Shapiro when award was rendered.

Parties to Dispute: (System Federation No. 97, Railway Employees'
(Department, A. F. of L. - C. I. O.
((Electrical Workers)
(
(The Atchison, Topeka and Santa Fe Railway Company
(- Eastern Lines -

Dispute: Claim of Employees:

1. 1. That the Atchison, Topeka and Santa Fe Railway Company erred and violated the terms of the July 1, 1969 Agreement and Appendix 1 of that Agreement (Vacation Agreement) when they failed to properly compensate Electronic Technician J. J. Konicki for his vacation of 1971.
2. That, accordingly, Electronic Technician J. J. Konicki be compensated at the rate of \$4.76 per hour for such vacation time.

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 had, in 1970, satisfied the requirements of Section 1 (d) of Appendix No. 1 of the controlling agreement between the parties and was entitled to twenty days vacation in 1971. On October 29, 1970 Claimant was granted a leave of absence from his position as Electronic Technician with the Carrier due to his having suffered a severe illness. Claimant never returned to active compensated service with the Carrier, having elected to retire and accept an annuity under the provisions of the Railroad Retirement Act which was approved in February, 1972, effective November 1, 1971. Approximately three months after commencement of Claimant's leave of absence, namely on January 23, 1971, Carrier abolished the position of Relief Non-Licensed Electronic Technician, which was Claimant's regular assignment at the time he went on leave, and the second shift Technician position, at its 18th Street (Chicago, Illinois) Radio Shop. One new position with hours different than those of the eliminated

ones was established and advertised for bid. The occupant of the former second shift assignment, who had less seniority than Claimant, bid for and was awarded the bulletined new position. In December, 1971, Carrier paid Claimant twenty days pay, at the rate of his bulletined position which was in effect on October 29, 1970. On February 19, 1972, Claimant wrote Carrier's Superintendent, Communications Department, as follows:

"I have received my vacation pay for 1970 in December of 1971 at the rate of \$4.78 per hour.

After mailing my semi-monthly forms for vacation pay, a new contract was ratified. Therefore, I am filing a claim for the difference from the old contract, which amounts to 50¢ per hour."

Carrier denied the claim on the ground that the rate paid was correct and in accordance with the Rule of the controlling agreement applicable to Claimant's circumstances.

Petitioner contends that Carrier invoked the wrong Rule in determining the rate of vacation pay due Claimant in December, 1971. It argues that Section 7(a) of Appendix 1, which reads: "An employee having a regular assignment will be paid while on vacation the daily compensation paid by the Carrier for such assignment.", is controlling, and not Section 7(e) which reads: "An employee not covered by paragraph (a) ... of this Section will be paid on the basis of the average daily straight time compensation earned in the last pay period preceding the vacation during which he performed service," as averred by Carrier. The thrust of Petitioner's position is that by virtue of Claimant's seniority he retained the right while on leave of absence to displace the employee junior to him who secured the position bulletined in January, 1971. Therefore that was claimant's "regular assignment" being worked temporarily by the successful bidder until Claimant's application for his annuity was approved which occurred subsequent to December 30, 1972. The contractual rate of compensation for the vacation period Carrier assigned to Claimant was \$4.76 per hour and Claimant should have received that rate for his earned and accrued vacation pay.

Carrier submits that on and after January 24, 1971 the position which Claimant held when he went on leave of absence was abolished. Claimant, not having been eligible because of his disability to bid for the new position bulletined at that time, had no "regular assignment" as of December, 1971. Therefore he was not "covered by paragraph (a) of" Section 7 of Appendix 1 of the Agreement. Such rights which Claimant may have had to displace the Technician, who had less seniority than he did, to the job which he never worked, did not establish the position filled pursuant to the January, 1971 advertisement of a vacancy as Claimant's "regular assignment". Therefore he was only entitled to the rate provided for in paragraph (e).

Essentially the validity of the claim herein is dependent upon whether in fact Claimant had "a regular assignment" while on "vacation" during the period December 4 through December 29, 1971. There is a material difference between a seniority right to a position which an employee may or may not assert and utilize and regular assignment to a position filled through posting of a new job for bid. Petitioner does not put in question the validity of Carrier's action in changing the operations at the Radio Shop. Nor did it controvert Carrier's assertion, "As you know it has been the practice in the Communications Department that when an employee was on leave of absence and his job was abolished he was not allowed to declare himself until he returned to service." (Employes' Exhibit F.)

Claimant did not have a "regular assignment" on December 4, 1971, and therefore was not entitled to the provisions of paragraph (a) of Section 7.

A W A R D

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Second Division

Attest: Executive Secretary
National Railroad Adjustment Board

By Rosemarie Brasch
Rosemarie Brasch - Administrative Assistant

Dated at Chicago, Illinois, this 8th day of May, 1974.