Form 1

NATIONAL RAILROAD ADJUSTMENT BOARD
SECOND DIVISION

Award No. 8095
Docket No. 7882
2-MKT-SM-'79

The Second Division consisted of the regular members and in addition Referee Irwin M. Lieberman when award was rendered.

Parties to Dispute: (Sheet Metal Workers' International Association
(Missouri-Kansas-Texas Railroad Company

Dispute: Claim of Employes:

1. That the Missouri-Kansas-Texas Railroad Company violated the agreement, particularly Article 1(g) of the Agreement of August 21, 1954, and Article III, Sections (i) and (j) of the Agreement of May 12, 1972, when they arbitrarily denied Sheet Metal Worker J. B. Trotnic his third week of vacation in the Year 1977.

2. That accordingly, the Missouri-Kansas-Texas Railroad Company be ordered to compensate Sheet Metal Worker Trotnic in the amount of $305.02 for his third week of vacation for the Year 1977.

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 first employed by Carrier on August 18, 1965. On November 3, 1965 he entered military service and returned to Carrier's employ on September 8, 1967. The issue herein is whether his service with Carrier was sufficient to entitle him to three weeks vacation in 1977.

The relevant Sheet Metal Workers' National Vacation Agreement rules are as follows:

"1(g) In instances where employes have performed seven (7) months' service with the employing carrier, or have performed, in a calendar year, service sufficient to qualify them for a vacation in the following calendar year, and subsequently become members of the Armed Forces of the United States, the time spent by such employes in the Armed Forces 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."

"(i) In instances where employees 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 Act of 1967, as amended, the time spent by such employees 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.

(j) In instances where an employee who has become a member of the Armed Forces of the United States returns to the service of the employing carrier in accordance with the Military Selective Service Act of 1967, as amended, and in the calendar year preceding his return to railroad service had rendered no compensated service of had rendered compensated service on fewer days than are required to qualify for a vacation in the calendar year of his return to railroad service, but could qualify for a vacation in the year of his return to railroad service if he had combined for qualifying purposes days on which he was in railroad service in such preceding calendar year with days in such year on which he was in the Armed Forces, he will be granted, in the calendar year of his return to railroad service, a vacation of such length as he could so qualify for under paragraphs (a), (b), (c), (d), or (e) and (i) thereof."

Carrier states that when Claimant was reemployed he did not have the seven months of service nor the necessary qualifying days entitling him to vacation in 1968 (earned in 1967). The National Vacation Agreement was amended on September 2, 1969 (effective January 1, 1969) to eliminate the seven month requirement of the rule. However, according to Carrier, since the change took place subsequent to Claimant's return to service and was not retroactive, he was not entitled to the claimed three week vacation. Carrier argues that similarly, the 1972 amendment to the National Vacation Agreement is not relevant to this dispute since Claimant had returned to Carrier's service long before the January 1, 1973 effective date of that provision. Carrier also argues that if Claimant's position is correct, the Claim should have been filed for additional vacation in 1976; thus the instant claim is late and should not be considered by this Board.

The Organization relies on the language of article 1(g) of the August 1954 Agreement read in conjunction with Article II Sections (i) and (j) of the May 1972 Agreement. Petitioner also cites a Supreme Court decision (Magma Copper) and two Federal District Court decisions. The latter of those decisions, Barry v. Smith (U.S.D.C. Mass., 1968, 285 F. Supp. 801) dealt with an identical situation in which the Claimant had not been employed for seven months as required by the August 1954 Agreement. In that case the Court held that the parties could not deprive Claimant of the benefits which Congress had secured for him and sustained the vacation claim.

Initially it should be noted that Carrier's argument that the Claim herein is tardy and should have been filed a year earlier does not have merit. That argument would effectively preclude the filing of any Claim in which a continuing violation is alleged unless filed at the first instance of the alleged infraction. The Claim in this case was timely filed for the time period for vacation requested.

The essence of Carrier's position in this dispute is that the 1969 and 1972 amendments to the National Vacation Agreement have no bearing on this dispute since Claimant returned to service from the military in 1967. It is argued that the provisions of the amendments were not retroactive and cannot be applied to individuals who returned to Carrier's service prior to the effective date of those agreements. While we agree that the two amendments, supra, may not be applied retroactively, we cannot agree with Carrier's position. There is no retroactive Claim in this dispute, as we view it, but rather a Claim based on past events and a current agreement. It would be patently improper to ignore the provisions of current agreements in evaluating past service of employes, military or otherwise, for vacation purposes. In making this determination, we do not rely on the court decisions submitted, but merely the language of the currently applicable agreement. Past service must be calculated and credited, for vacation purposes, based on the terms of the applicable agreement at the time the vacation is applied for, not based on the agreement at some earlier date. This prinicple is clearly applicable to all aspects of vacation entitlement, including prior military service. Thus, the fact that Claimant would not have qualified for the third week of vacation based on the 1954 Agreement is not material; the terms of the current (1972) Agreement are controlling.

A W A R D

Claim sustained.

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 27th day of September, 1979.