Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD Award No. 12004
SECOND DIVISION Docket No. 11797
91-2-89-2-95

The Second Division consisted of the regular members and in addition Referee John C. Fletcher when award was rendered.

PARTIES TO DISPUTE: (Brotherhood Railway Carmen/ Division of TCU
(
(Norfolk and Western Railway Company

STATEMENT OF CLAIM:

1. That the Norfolk and Western Railway Company violated the current Vacation Agreement, Article 3, Section 1.H, December 17, 1941 and amended October 7, 1971, effective January 1, 1973 when they refused to allow Carmen M. Hicks, Jr. any sick days toward qualifying for a vacation in 1987 for three (3) weeks vacation in 1988. The Carrier also was irresponsible in their Medical Department when Carman M. Hicks, Jr. was recalled in 1987 prior to August 26, 1987. The Company's Medical Examiner did not review his return to work physical until some ten (10) days had elapsed.

2. That because of such violation the Norfolk and Western Railway Company be ordered to compensate Carman M. Hicks, Jr. for three (3) weeks vacation, that he would have earned in 1988, at the pro rata rate, had he been allowed to return to work prior to August 26, 1987, by a reasonable review of his physical examination well within the confines of a ten (10) day period by the Carrier's Medical Examiner.

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 employes 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 furloughed from Carrier's service on February 15, 1985. In early August 1987, Claimant was recalled to service. He underwent a return to duty physical examination on August 10th and was approved for service on August 26th. During the remainder of 1987 Claimant performed service on 97 days. This left him three days short of the 100 days of compensated service needed to qualify for a vacation with pay in 1988.

His Claim before this Board contends that if Carrier had acted within a reasonable time, five days for example, in handling the approval of his return to work physical he would have been able to qualify for a vacation. He asks that the days that he was not allowed to return to duty, between the date of the physical and the date certified as medically able to resume service, be designated as days he did not work because of sickness. If this were done they could be counted toward the 100 qualifying days needed by reason of Article 1 (h) of the National Vacation Agreement, reading:

> "(h) Calendar days in each current qualifying year on which an employee renders no service because of his own sickness or because of his own injury shall be included in computing days of compensated service and years of continuous service for vacation qualifying purposes on the basis of a maximum of ten (10) such days for an employee with less than three (3) years of service; a maximum of twenty (20) such days for an employee with three (3) but less than fifteen (15) years of service; and a maximum of thirty (30) such days for an employee with fifteen (15) or more years of service with the employing carrier."

While we can sympathize with an employee missing qualifying for a vacation by three days we, nonetheless, are unable to grant the relief requested because if we were to do so we would be required to make substantial alterations in the language of the National Vacation Agreement, a privilege beyond our scope of authority.

No matter what the equities may appear to some to be we cannot, constructively or otherwise, by Board Award, reduce the number of qualifying days from 100 to 97, or any other number for that matter. When a mark is established, 100 days in this case, it makes no difference by how near or far the mark is missed. Missing by three days is the same as missing by thirty and the Board is powerless to change the result.

Additionally, Article 1 (h) explicitly limits the inclusion of "sick days" to those days on which an employee did not work because of his own sickness or injury. In the circumstances present here, it has not been demonstrated, indeed not even alleged, that Claimant was sick or injured on any days he did not work between August 10, 1987, and August 26, 1987. Moreover, it has not been indicated or alleged that Claimant would have worked in any event during this period. However, in order to consider the days held out of service awaiting the results of a back to work physical examination as qualifying days for vacation purposes we would have to read Article 1 (h) as including such days. This we are unable to do in a fair and uncomplicated fashion.

The Claim is not supported by the language of the National Vacation Agreement. It will be denied.

A W A R D

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Second Division

Attest: Nancy J. Dever - Executive Secretary

Dated at Chicago, Illinois, this 20th day of February 1991.