Form 1 **NATIONAL RAILROAD ADJUSTMENT BOARD**
SECOND DIVISION

Award No. 14183
Docket No. 14053
17-2-NRAB-00002-150017

The Second Division consisted of the regular members and in addition Referee Lynette. A. Ross when award was rendered.

PARTIES TO DISPUTE: (International Association of Machinists and Aerospace (Workers
(Kansas City Southern Railway (KCSR)

STATEMENT OF CLAIM:

"1. Kansas City Southern Railway violated, in particular but not limited too [sic], the National Vacation Agreement and the RLA when they assigned Machinist Howard Mims eleven (11) days vacation without his knowledge or consent while he was on FMLA leave.

2. Accordingly, Machinist Howard Mims, should receive eight (8) hours pay for each day the Carrier erroneously assigned Vacation pay without the employees [sic] consent."

FINDINGS:

The Second Division of the Adjustment Board, upon the whole record and all the evidence, finds that:

The carrier or carriers and the employee or employees involved in this dispute are respectively carrier and employee 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.

On June 23, 2014,[1] the Local Chairman for the IAM&AW District 19 Local 1343 submitted a claim to the KCSR Superintendent of Locomotives, in Shreveport, Louisiana, on behalf of Machinist Howard Mims. The claim reads as follows:

> **"In accordance with rule 29 of the current and controlling agreement, effective April 1, 1980, as amended, the Machinist Committee hereby places with you for handling, this claim filed on behalf of Machinist Howard Mims for the below listed violation of the referenced Agreement, in particular but not limited to Special board of adjustment JS case no. 3750 opinion and award.**
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> **On August 1, 2014, it was brought before the machinist local committee, that Machinist Howard Mims was approved for FMLA leave for the dates of, 8-1-13 through 8-23-13. When Mr. Mims returned to work after taking his FMLA leave, he was charged 16 vacation days without his knowledge or consent.**
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> **On December 28, 2005, Federal District Court Judge, J. Wayne R. Anderson ruled, The FLMA [sic] does not allow employers to violate pre-existing contractual obligations. If CBA provisions grant employees the right to determine when, or in what manner, they utilize certain types of paid vacation and personal leave, those CBA provisions prevent employers from substituting such leave for FMLA leave.**
>
> **In view of the above listed violation of the agreement, we request payment of 16 days vacation pay for the Claimant."**

On November 7, 2014, the Director Labor Relations issued a written response to the General Chairman. The Carrier denied the claim for the following reasons:

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[1] The June 23, 2014 date of claim appears to be a typo. The second paragraph of the claim conveys that the IAM&AW Local Committee was not made aware of the issue until August 1, 2014.

- **Rule 29(b) of the Agreement states that a claim or claim must be presented within 60 days from the date of the occurrence. The claim relates to a matter that occurred during the period of August 1 through August 23, 2013, well beyond the 60-day requirement noted in Rule 29(b)[2].**

- **The claim does not allege any specific violation of the CBA other than Rule 29. Thus, no relief is warranted under the CBA.**

- **The Claimant requested and was approved for FMLA for his own medical condition. According to the Mechanical Department, the Claimant requested to use his available compensable time which included vacation to cover part of that leave.**

- **With respect to the court case referenced in the Organization's claim, the KCSR was not party to litigation culminating in the Seventh Circuit's decision in *Brotherhood of Maintenance of Way, et al. v. CSX, BNSF, UPRR, et al*. decided March 7, 2007. The KCSR was not party to the ensuing arbitration in Special Board of Adjustment JS Case No. 3740, dated December 2, 2008. Accordingly, the KCSR is bound by neither.**

- **Even if the Carrier were to attempt to apply the Organization's interpretation of the court decision (i.e., that substitution of paid leave is prohibited when doing so "violate[s] pre-existing contractual obligations"), the present claim does not even allege that any other provision of the Agreement is violated when the Carrier substitutes paid leave.**

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[2] Rule 29(b) reads in pertinent part: "All claims or grievances must be presented in writing by or on behalf of the employee involved, to the officer of the Carrier authorized to receive same, within 60 days from the date of the occurrence on which the claim or claim is based."

- **The Claimant requests that he be paid 16 vacation days. Carrier payroll records indicate the Claimant used only 11 vacation days during the period of the leave. The Claimant's request for compensation is contrary to his claim that the substitution and exhaustion of vacation was improper under the circumstances. The Claimant was paid for the 11 days of vacation, and, for this reason, he is clearly not entitled to the relief requested.**

On November 27, 2014, the General Chairman appealed the decision of the Director Labor Relations denying the instant claim requesting payment of 11 vacation days. According to the Organization:

- **The Claimant was approved for FMLA leave from August 1 through 23, 2014, and upon return from leave was charged 11 days of vacation without his knowledge or consent.**

- **This is a violation of the National Vacation Agreement between the Organization and Carrier and the Railway Labor Act.**

- **The Federal Courts have already ruled on this matter. On December 28, 2005, Judge Anderson of the United States District Court for the Northern District of Illinois granted judgment to the Unions and entered the following declaration: "The FMLA does not allow employers to violate pre-existing contractual obligations. If CBA provisions grant employees the right to determine when, or in what manner, they utilize certain types of paid vacation or personal leave, those CBA provisions prevent employers from substituting such leave for FMLA leave."**

- **The decision was then appealed to the Seventh Circuit Court of Appeals which unanimously upheld the District Court's ruling when it concluded: "In short, the FMLA does not allow the carriers to violate contractual obligations protected by the RLA**

regarding paid vacation and personal leave time. Accordingly, we Affirm the judgment of the district court."

In its appeal, the Organization stated it "realizes that the Carrier was not party to the above-mentioned litigation." However, the Organization averred, "it is clear that the Carrier's policy of requiring employees [to] exhaust their Vacation and Personal Leave, without their consent, while on FMLA leave is a blatant violation of the CBA and Federal Law." The Organization furthermore asserted that consistent with the Court rulings, "the relief due the affected employees would be 8 hours pay for each day the Carrier erroneously assigned Vacation or Personal Leave pay without the employees [sic] consent."

As regards the timeliness issue raised by the Carrier, the Organization contended that "a review of dates cited by the Carrier in its denial will affirm the time limits were adhered to." The Organization thus requested that Claimant Mims be paid 88 hours in lieu of the 11 vacation days "illegally assigned."

By letter of January 20, 2015, the Director Labor Relations responded to the General Chairman's appeal, again denying the claim. The Carrier reiterated its earlier position that the claim lacked merit for the reasons already stated, emphasizing the following points:

- **The Claimant only utilized 11 FMLA days, not 16 days as requested, and has been paid for the 11 days of vacation.**

- **The Claimant requested and was approved for FMLA for his own medical condition. According to the Mechanical Department, "<u>the employee requested to use his available compensable time which included vacation to cover part of that leave and the Carrier complied with this request</u>." (Emphasis supplied.)**

- **Although the Organization avers that "Federal Courts have already ruled on this matter…," the Carrier was not bound by the Seventh's Circuit's decision in *Brotherhood of Maintenance of***

> ***Way, et al. v. CSX, BNSF, UPRR, et al*. decided March 7, 2007, or the subsequent arbitration in Special Board of Adjustment JS Case No. 3740, dated December 2, 2008. The claim as presented does not allege that any other provision of the CBA is violated when the Carrier substitutes paid leave.**

The Board has carefully considered the instant claim properly before us. We find that the key issues for consideration in Claimant Mims' case involve the substantive question of whether the Claimant actually requested that the Carrier substitute paid leave for his FMLA leave and the procedural question of the claim's timeliness.

The Board finds that credible documentary evidence consisting of Carrier e-mail messages dated August 7 and 8, 2013, supports the Carrier's position that Claimant Mims requested paid leave in lieu of unpaid FMLA leave for the August 2013 absence dates. According to that documentation, the Claimant's work week was from Tuesday through Saturday, with Sundays and Mondays as rest days, and he asked the Carrier to start paying his vacation on Tuesday, August 6, 2013. According to the documentation, the Carrier arranged for the Claimant to be compensated for his available paid leave upon approval of his FMLA leave, again, for reason of his own medical condition. Given the evidence showing the Claimant requested to receive paid leave in lieu of taking unpaid FMLA leave, the Organization's fundamental premise for the claim – that the Claimant was charged 11 vacation days without his knowledge or consent – is not supported by the factual record.

Moreover, the Board has considered the timeliness argument raised by the Carrier. The Claimant's FMLA leave ended on August 23, 2013. Again, the e-mail correspondence establishing the Claimant's request for paid leave is dated August 7 and 8, 2013, and the initial claim received by Labor Relations on September 8, 2014, asserted, "When Mr. Mims returned to work after taking his FMLA leave, he was charged 16 days vacation without his knowledge or consent." That assertion establishes that the Claimant received payment shortly after his return to work, following the expiration of his FMLA leave, on August 23, 2013. However, the record makes plain that the instant claim was not filed until some 13 months later. The

Board finds no evidentiary support for the Organization's position, as stated in its November 27, 2014 appeal that, "A review of the dates cited by the Carrier in its denial will affirm that the time limits were adhered to." Hence, the Board rules that the instant claim is defective under Rule 29(b) of the Agreement.

For the foregoing reasons, the Board concurs that the instant claim as submitted to this Board must fail on both substantive and procedural grounds. In light of the above, the Board rules that the Organization's claim alleging that the Carrier violated the National Vacation Agreement and the Railway Labor Act when it assigned Machinist Howard Mims 11 vacation days without his knowledge or consent while he was on FMLA leave must be denied in its entirety.

AWARD

Claim denied.

ORDER

This Board, after consideration of the dispute identified above, hereby orders that an award favorable to the Claimant(s) not be made.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Second Division

Dated at Chicago, Illinois, this 21st day of February 2017.