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

Award No. 14185
Docket No. 14055
17-2-NRAB-00002-150019

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 William Houston five (5) days vacation without his knowledge or consent while he was on FMLA leave.

2. Accordingly, Machinist William Houston, 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, 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 William Houston. 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 William Houston 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 June 2, 2014, it was brought before the machinist local committee, that Machinist William Houston was approved for FMLA leave for the dates of, 3-7-14 through 3-11-14. When Mr. Houston returned to work after taking his FMLA leave, he was charged 5 days vacation 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.**
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> **In view of the above listed violation of the agreement, we request payment of 5 days vacation pay for the Claimant."**

On August 25, 2014, the Director Labor Relations issued a written response to the General Chairman. The Carrier denied the claim for the following reasons:

- **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 – Child Bonding. Under the Carrier's FMLA Policy, employees may take up to 12 weeks of leave in a rolling 12 month period for child birth; to care for a child after birth or placement for adoption or foster care as long as other requirements are met for approval under the FMLA. While employees are on such leave, it is the Carrier's policy to require employees to exhaust all paid leave available to them. This includes vacation, sick and personal days.**

- **FMLA documents provided to the Claimant at the time he requested FMLA leave clearly placed him on notice that he would be required to use his available paid sick, vacation or other leave during his FMLA absence. This is exactly what occurred when the Carrier paid the Claimant his compensated days for his period of 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.**

- **The Claimant requests that he be paid five vacation days. 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 five 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 five vacation days. According to the Organization:

- **The Claimant was approved for FMLA leave from 3/07/14 through 3/11/14. Upon his return from leave he was charged 5 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."

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 has already been paid for the five days of vacation and, therefore, is not entitled to the relief requested. While employees are on leave for certain reasons, including child bonding, it is the Carrier's policy to require employees to exhaust all paid leave available to them, including, vacation, sick and personal days. The Claimant was on notice that he would be required to use his available paid sick, vacation or other leave during his FMLA absence. This is exactly what occurred when the Company paid him his compensated days for his leave period.**

- **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 reviewed the extensive record before us. We find no procedural errors preventing our review of the instant dispute with regard to the merits. The claim was properly handled by the parties at all levels of appeal. As to the merits, the Board has additionally closely reviewed the positions of the parties as documented in the on-property record and as reinforced within their arbitration submissions and during oral argument at hearing. Upon our detailed review of the record, the Board finds that the Organization's claim lacks substantial evidence. Our reasons follow.

On February 5, 1994, the FMLA became effective for the Carrier's unionized employees. In April 1994, the Carrier distributed a written FMLA policy to all employees. The policy expressly stated that employees would be required to use available paid leave when taking FMLA leave, including, taking FMLA leave to care for a newborn or newly placed child. According to the record, each policy update has expressly included substitution language, as the October 2005, August 2006 and January 2009 updates clearly indicate.[1] The second paragraph of the 1995 Family and Medical Leave Request Form utilized by employees applying for FMLA leave reads: "All leave is to be unpaid except for all unused vacation time which must be used as part of the Family and Medical Leave."

The Board finds that the evidence supports the Carrier's position that, until November 4, 2013,[2] the Organization did not question or object to the Carrier's policy of requiring employees to use paid leave when taking FMLA leave. Again, the record establishes that the Carrier imposed a substitution policy as early as 1994, when the Carrier first distributed its written FMLA policy to its employees. The record establishes that prior to early November 2013, the Carrier's unwavering practice of substituting paid leave for FMLA leave had been carried out without questions or challenges from the Organization for nearly 20 years.

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[1] See, Exhibit 7 (FMLA Policy Last Revised: 10/04/05); Exhibit 8 (FMLA Policy Last Revised: 8/01/06); Exhibit 9 (FMLA Policy Last Revised: 1/01/09).

[2] See Exhibit 14 – Carrier e-mail dated November 4, 2013, concerning IAM&AW's questioning of Carrier's position regarding the substitution of paid leave for unpaid FMLA leave.

The Organization contends that the above-referenced court decisions and subsequent arbitration awards arising from the adoption of FMLA substitution policies by one Class I freight railroad, in 2001, and by four Class I freight railroads, in 2004, required the KCSR to abide by those rulings and rescind its substitution policy, which again, dates back to 1994. As previously stated, the Organization acknowledges that the KCSR was not a party to any of that litigation.

The Board finds that a recitation of the history relevant to the other railroads' litigation over requiring certain craft employees to substitute paid leave for unpaid FMLA leave would unduly burden this decision. The parties' have adroitly presented the factual background and arguments in support of how the outcomes of those disputes, which did not involve the KCSR, support their positions in the instant case.

The Board finds that the court decisions and arbitration awards rendered in response to the lawsuits brought against the Class I freight railroads for adopting FMLA leave substitution policies long after the FMLA became effective have no bearing upon the instant dispute involving the Carrier and the Organization. Again, the Carrier was not a party to that litigation. The determinations of the tribunals adjudicating the disputes to which the Carrier was not a party cannot be applied with a broad brush simply because the it is a Class I Carrier holding Agreements with the same Organizations whose members are likewise covered by the FMLA.

The Board finds that the record before us contains strong evidence in support of the Carrier's position that it has maintained an enduring and consistent practice of substituting paid leave for unpaid leave under its FMLA policy. The lack of any claims, grievances or questions concerning the FMLA policy as applied until late 2013, supports the Carrier's position that, from 1994 to the close of 2013, the Organization has acquiesced to the Carrier's substitution policy.

Moreover, the Organization has failed to cite any specific provision of the Collective Bargaining Agreement, the National Vacation Agreement, or the Railway Labor Act in support of its allegation that the Carrier wrongfully substituted five paid vacation days for five unpaid leave days while the Claimant was out on FMLA leave. The Organization bore the burden of perfecting its claim by including specific rule

citations in support of its position that the Claimant allegedly was aggrieved when the Carrier substituted five paid vacation days for five unpaid days while taking FMLA leave from March 7 through 11, 2014. The Board concludes that instant claim does not establish that the Carrier's actions violated any Agreement rule or provision, or the RLA statute.

The Board also finds insufficient proof in support of the Organization's assertion that the vacation day payments were disbursed to the Claimant "without his knowledge or consent while he was on FMLA leave." Again, the substitution language has been shown to have existed in all of the iterations of the Carrier's FMLA policies promulgated subsequent to 1994. Moreover, the FMLA Request for Family and Medical Leave form, which the Claimant likely would have completed as the first step of his FMLA leave application process, contains similar language as regards the substation of leave.

Therefore, the Board rules that the instant claim lacks merit, is unsupported by substantial evidence, and, accordingly, 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.