Award No. 232

Docket No. 202

2-Pac. Elec.-FT-'38

NATIONAL RAILROAD ADJUSTMENT BOARD

SECOND DIVISION

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

PARTIES TO DISPUTE:

RAILWAY EMPLOYES' DEPARTMENT, AMERICAN FEDERATION OF LABOR (FEDERATED TRADES)

PACIFIC ELECTRIC RAILWAY COMPANY

DISPUTE: CLAIM OF EMPLOYES: Claim of the general committee representing carmen, coach cleaners, machinists, blacksmiths, sheet metal workers, electrical workers including linemen, apprentices and helpers of the foregoing, firemen and oilers, and railway shop laborers on the Pacific Electric Railway Company, that all employes coming within the current agreements who were in the employ of the carrier on February 20, 1932, shall be paid at the rate of pay applicable at that time for any vacations earned prior to February 20, 1932, but not allowed them by said company.

EMPLOYES' STATEMENT OF FACTS: On or about July 1, 1918, annual vacations of 12 working days with full pay were established on the Pacific Electric Railway, applying to all employes after the completion of one year's service. February 20, 1932, annual vacations were discontinued and employes were not permitted to exercise vacation privileges covering the days to which they were entitled on that date.

POSITION OF EMPLOYES: PART 1—History: Exhibits 1 to 7 inclusive, containing data pertaining to the establishment of vacations on the property. The background of this question concerns efforts made by the employes of the carrier to effect an organization for the protection and advancement of the interests of the employes as relates to wages and working conditions, and it was because of these efforts of the employes that rates of pay were increased and vacations with full pay granted.

Exhibit 1 is, so far as we can determine, the original circular establishing vacations. It stipulates the twelve working days to be the length of time, full pay to be allowed for this period, and makes the employe eligible after the completion of one year's service. It names the effective date as July 1, 1918.

Exhibit 2 contains certain rules covering vacations under full pay. Paragraph one stipulates the annual vacation "shall be granted * * * under pay," defining the eligibility of the employes to their vacations. Paragraph two permits an accumulation of not to exceed twenty-four days' credit before taking the vacation. Paragraph five declares it the intention of the carrier not to compensate employes, who have been dismissed or resigned, for vacations earned and not enjoyed. We find that as relates to dismissed employes, the carrier has paid a claim in the case of one, Womack, who filed suit in small Claims Court, County of Los Angeles, California, and secured judg-

It is, therefore, the opinion of the management that upon the consummation of this agreement all previous controversies were, by this agreement, disposed of, as the gratuity vacation plan had been discontinued under authority of bulletin issued February 20, 1932, more than three years previous to the negotiation of that agreement.

As set forth in the statement of facts, this question was previously submitted to the Mediation Board, which Board evidently recognized the case as one within their jurisdiction. After the matter was submitted and ready for decision, the case was withdrawn by Mr. B. M. Jewell of the American Federation of Labor, and, in the opinion of the management, that action closed the controversies, and this Board is without jurisdiction under the provisions of the Railway Labor Act as amended.

It will be noted that the rules in regard to granting vacations made it contingent on the employes having completed one year of continuous service before vacation could be enjoyed. Vacations of six days for six months of service were not permitted. If an employe left the service before he had served the complete year of continuous service, he did not receive any vacation. Several such cases were referred by employes leaving the service, to the California Labor Commission in Los Angeles, and the ruling of the company was sustained in each case. It is, therefore, our opinion that the free twelve days' vacation was not to be allowed until after one full year of continuous service and that a division of the vacation period was never contemplated, and that payment for a portion would be contrary to the original rule.

It is further the opinion of the management that the original agreement with the employes of the mechanical department settled and determined all controversies then existing in connection with their relations with their employer, and that any claims now made in connection with back vacation pay must be based upon some legal principle, and is not now a grievance or claim to be handled under the provisions of the Railway Labor Act. As any such legal claim which is now made by virtue of the vacation plan discontinued under authority of bulletin issued February 20, 1932, must have at the latest arisen on that date, it is now barred by virtue of the provisions of Section 337 of the Code of Civil Procedure of the State of California, providing that any action upon any contract, obligation or liability founded upon an instrument in writing must be commenced within four years after the accrual of such cause of action, and by reason thereof any claim or claims now made are barred by the statute of limitations and are unenforcible. We therefore request the Board to deny the claim.

FINDING OF FACTS: The Board finds that vacations were granted to all employes of the Pacific Electric Railway Company in 1918 amounting to twelve calendar days per year for employes who had been in the service of the company for one continuous year. At the time the vacations were granted the company offered the option of employes to accept one cent an hour in lieu of such vacations. Employes individually signed statements of their choice. Such an overwhelming majority preferred the vacation that the plan to increase the hourly rate was dropped. The vacation plan continued in effect until February 20, 1932, when the company discontinued vacations without providing for the accrued vacation on the current year.

There is nothing in the record to show what steps were taken by the employes to protest the discontinuance of vacations. The employes were unorganized and there was no adjustment board on this carrier. After the passage of the amendment to the Railway Labor Act, creating the National Railroad Adjustment Board, the men in the mechanical department were organized and on February 2, 1935, the representatives of the employes requested of the carrier that the cancelled vacations be paid for. The carrier replied on February 11, 1935, that the matter could be taken up for consideration when the agreement was being discussed. The agreement was signed in September, 1935, but contained no provision for payment for the cancelled vacations. The record does not show that the subject was discussed.

Thereafter, in October, 1935, the representatives of the employes demanded of the company that the cancelled vacation for 1931 and 1932 be paid for. The carrier then replied that it considered that the matter had been settled by the fact that a new agreement had been signed. The employes' representatives replied that the agreement could not have affected the accrued vacation.

The representatives of the employes then proceeded to take up the matter in the regular order and carried the dispute to the chief operating officer of the carrier, designated to handle such disputes. The carrier refused to accede to the demands of the representatives of the employes who then presented the case to the National Railroad Adjustment Board.

Three other events should be noted in these findings, namely, that the train service men received an adjustment for the cancelled vacations in their agreement entered into in 1935; the signal men as a part of a mediation proceeding before the National Mediation Board received an adjustment also from the carrier; one employe who had left the service of the company sued the company in the Courts of California and recovered a judgment for the cash equivalent of the vacation.

FINDINGS OF JURISDICTION: The jurisdiction of the Board is challenged in this case on the ground that the case is not one "pending and unadjusted on the date of approval" of the Act. The question of jurisdiction must, therefore, be settled before the merits of the case can be considered.

Whether the case comes within the jurisdiction of the Board or not depends upon the meaning of Section 3, Paragraph (i) of the Railway Labor Act, which reads:

> "(i) The disputes between an employe or group of employes and a carrier or carriers growing out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions, including cases pending and unadjusted on the date of approval of this Act, shall be handled in the usual manner up to and including the chief operating officer of the carrier designated to handle such disputes; but, failing to reach an adjustment in this manner, the disputes may be referred by petition of the parties or by either party to the appropriate division of the Adjustment Board with a full statement of the facts and all supporting data bearing upon the disputes."

The obvious intention of this provision was to carry over existing disputes and settle them under the provisions of the amended Act and thus to protect the rights of anyone who had an interest in a pending dispute.

The question before the Board is whether the present case was a dispute "pending and unadjusted" at the time of the approval of the Act. A fair reading of the words of the section above indicates that all disputes in existence in various stages were to be handled under the provisions of the new Act. The language is clear that the provision was intended to cover all disputes pending and unadjusted, as well as all disputes occurring after the passage of the Act. In either case, the Act declares that the dispute "shall be handled in the usual manner up to and including the chief operating officer of the carrier designated to handle such disputes" and if an adjustment is not reached "the disputes may be referred by petition of the parties or by either party to the appropriate division of the Adjustment Board." There can be no doubt that the Act was intended to function in the same way for existing disputes as for future disputes. Whether a dispute was still in the process of being adjusted on the property or was before one of the old adjustment Boards, it could be appealed to the National Railroad Adjustment Board.

The matter narrows down to this, therefore, that if a dispute was a live dispute in any stage on June 21, 1934, it could be carried up through the

regular channels on the property and then to the National Railroad Adjustment Board. This does not mean that any dispute could be resurrected out of the past when, through the lapse of time or other circumstances, it could no longer be said to exist.

Was this dispute on the Pacific Electric Railway a live dispute on June 21, 1934, or had it lapsed by time or other circumstance. If it was an existing dispute, it could be carried through the channels indicated in the Act to this Board. The facts indicate that the dispute was a live one and one that had not been adjusted nor closed by lapse of time or other circumstance. If the claim of the employes was justified and they were entitled to compensation for the cancelled vacations, there would have to be some clear indication that they had cancelled their right to the claimed compensation or the dispute would continue until adjusted. If the employes were entitled to compensation, the right to claim it was not taken away from them by the Act.

So we come to the consideration whether or not this case was a live case when the Act was passed. The vacation plan was entered into after the wishes of the employes were ascertained as to whether they desired the vacations or an increase in the hourly pay. Practically all the employes signed individual statements accepting vacations, and the idea of the alternative increase of hourly pay was dropped. Over a period of ten years or more, the plan continued in operation. When it was cancelled by the company in February, 1932, several months of a new year had elapsed. Payment for the cancelled vacation became at once a matter of dispute. There was no adjustment board on this property and the only recourse that employes could have for redress was to appeal to the company for payment or to take a strike vote and create an emergency which might result in a special mediation board being appointed. Employes in all departments of the company were affected. The company adjusted the matter with respect to some of these groups, but failed or refused to do so with respect to the mechanical departments.

The agreement with the train service men in 1935 expressly took care of the situation for them. Through mediation proceedings, the signalmen were compensated for the cancelled vacation. The carrier claimed that the agreement of September, 1935, settled all pending matters, including the cancelled vacations, but there is nothing in the agreement to that effect. The employes' representatives denied that the old claim for vacation pay had been settled by the agreement. A letter was sent by the employes' representatives on February 2, 1935, requesting compensation. The company replied that the subject could be taken up during the negotiations for a new agreement. The employes' representatives again demanded on October 21, 1935, that payment for the cancelled vacation be made. The company replied that it considered that the matter was closed by the agreement of September 1, 1935. There is, however, no evidence in the record that the matter had been closed by the agreement and there is nothing in the agreement about the subject.

In the meantime, in other directions the dispute was kept alive by at least one of the former employes, no longer employed, going into Court in California and securing a judgment for the cash equivalent of the vacation.

It cannot be said in the light of these circumstances that the matter was a dead issue. It could not be a dead issue if property rights had accumulated for the employes in the form of unpaid compensation.

When the agreement of 1935 failed to take care of the matter, the unions handled their case "in the usual manner up to and including the chief operating officer of the carrier designated to handle such disputes" and, failing to get an adjustment, they carried the matter to this Board. These facts indicate that this Board has jurisdiction over the instant case, because it was a dispute pending and unadjusted at the time of the passage of the Act.

FINDINGS ON THE MERITS: Coming to the merits of the claim of the employes we are faced with a comparatively simple issue. The company

offered an alternative at the beginning of the plan, whereby employes could take a two weeks' vacation or, in lieu thereof, receive additional hourly compensation. Practically all chose to take the vacation and the alternative plan was not used. Each employe signed his name to statements given him by the company and, thereby entered into an agreement accepting vacations rather than the increase in hourly wage. No change was made in the understanding, either written or verbal, and the vacation plan continued to be an accepted part of the employment arrangement. Under the circumstances, it was not a gratuity as claimed by the carrier's representatives. The employes were legally entitled to it and when the company cancelled the vacations, after a portion of the yearly period had elapsed, it was obligated to compensate employes for the amount of vacation due them.

No question is raised as to the right of the company to cancel the arrangement as to the future, but clearly the employes were entitled to that which had accumulated, for it they had accepted the alternative plan of receiving an hourly increase, the money would have been paid to them in regular installments and they would have received payment in full at the time the arrangement was cancelled.

GENERAL 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.

The parties to said dispute were given due notice of hearing thereon.

Free vacations were suspended by the carrier on February 20, 1932. The employes were entitled to free vacations for vacation time earned prior to February 20, 1932, not heretofore provided for.

AWARD

The claim of the employes is sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Second Division

ATTEST: J. L. Mindling
Secretary

Dated at Chicago, Illinois, this 20th day of May, 1938.