

Award No. 1588

Docket No. 1494

2-PY-EW-'52

NATIONAL RAILROAD ADJUSTMENT BOARD

SECOND DIVISION

The Second Division consisted of the regular members and in addition Referee Carroll R. Daugherty when award was rendered.

PARTIES TO DISPUTE:

**SYSTEM FEDERATION NO. 41, RAILWAY EMPLOYES'
DEPARTMENT, A. F. of L. (Electrical Workers)**

POTOMAC YARD

DISPUTE: CLAIM OF EMPLOYES: 1. That under the Vacation Agreement Electrician P. R. Payne (deceased) qualified for ten (10) days vacation based on the performance of duties as Electrician during the year 1949 and the Carrier has refused to pay this vacation compensation earned by the deceased Electrician.

2. That accordingly the Carrier be ordered to make payment of the vacation allowance earned by the aforesaid deceased Electrician to the legally qualified representative of the estate of the deceased Electrician.

EMPLOYES' STATEMENT OF FACTS: Electrician P. R. Payne (deceased) was employed by the Richmond, Fredericksburg and Potomac Railroad Company and had 27 years of service when he retired from the carrier's service on December 20, 1949, under the provisions of the Railroad Retirement Act. During the year 1949, P. R. Payne, deceased electrician, did work the necessary number of days to qualify him for a vacation in the year 1950, or payment in lieu thereof. The deceased passed away to his reward on April 11, 1950, approximately four months after his retirement during which time and thereafter the carrier declined to pay the deceased or his heirs the vacation compensation due.

The agreement effective August 3, 1940, as subsequently amended is controlling.

POSITION OF EMPLOYES: It is submitted that under the vacation agreement signed December 17, 1941, and the supplemental agreement thereto, signed February 23, 1945, the pertinent part reads as follows:

"Effective with the calendar year 1945 an annual vacation of twelve (12) consecutive work days with pay will be granted to each employee covered by this Supplemental Agreement who renders compensated service on not less than 160 days during the preceding calendar year and who has five or more years of continuous service and who, during such period of continuous service,

ance. This is based on the fact that the employee having qualified for a vacation and having actually started on his vacation such vacation is no longer subject to defeat because of such contingencies as resignation, dismissal or death, and his right being complete cannot be subsequently defeated by his death.

The original Section 8 of the May 17, 1944 agreement was incorporated in the current Operating Vacation Agreement dated April 29, 1949, without revision, and the interpretation referred to follows the rule. The wording of this Section 8 of the Operating Vacation Agreement is practically identical to Article 8 of the Non-Operating Vacation Agreement, under which the deceased earned a vacation. For ready reference the two are quoted below:

Section 8, Operating Agreement:

"No vacation with pay, or payment in lieu thereof, will be due an employee whose employment relation with a carrier has terminated prior to the scheduled vacation period as provided in Section 6, except that employees retiring under the provisions of the Railroad Retirement Act shall receive payment for vacation due."

Article 8, Non-Operating Agreement:

"No vacation with pay or payment in lieu thereof will be due an employee whose employment relation with a carrier has terminated prior to the taking of his vacation, except that employees retiring under the provisions of the Railroad Retirement Act shall receive payment for vacation due."

CONCLUSION: The Management submits it has shown by decisions of the Vacation Committee and the National Railroad Adjustment Board that the estate of P. R. Payne is not entitled to payment in lieu of vacation earned and not taken by the deceased and feels that the Board will so find.

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.

The parties to said dispute waived right of appearance at hearing thereon.

Electrician P. R. Payne, covered by the National Vacation Agreement effective between the carrier and its shop craft employees, qualified during 1949 for a ten-day vacation in 1950. On June 14, 1949, he became subject to a disabling sickness, which, continuing, prevented his resumption of service and led him on February 3, 1950, to request the management's assistance in applying for a total disability annuity under the Railroad Retirement Act. On April 11, 1950, Payne died after reaching the age of 64 years. On April 22, 1950, the carrier was notified that, effective December 20, 1949, Payne had been granted an annuity by the Railroad Retirement Board.

The issue of whether the legal representative of Payne's estate is now entitled to be paid the vacation allowance earned by Payne in 1949 hinges on the answer to two questions: (1) Under the circumstances were the

provisions of Article 8 of the Vacation Agreement fulfilled? (2) If so, does payment in lieu of vacation properly accrue to Payne's heirs?

Our answer to the first question depends on our interpretation of the language of Article 8, which states that payment in lieu of vacation to an employe whose employment relation has terminated prior to the taking of his vacation shall be made only if the employe has retired under the Railroad Retirement Act. We deem that Payne's employment with the carrier was terminated by his retirement because of disability. Then the chief issue of interpretation is in respect to whether, at the time Payne died, he had retired under the provisions of the Railroad Retirement Act. The Retirement Board granted his request for an annuity shortly after he died. But the annuity was made effective as of December 20, 1949—almost four months before he died. If the former date is controlling, Payne technically did not retire under the Act and thereby is not entitled to vacation pay. If the latter date controls, Payne technically did retire under the Act, and vacation pay would be allowable under Article 8 (subject to determination of the second question posed above).

We think we must hold that, when Payne died, he had in effect retired under the Act. Not knowing of his death, the Retirement Board granted his annuity effective as of a date almost four months before the death. To us this fact means that Payne had retired on December 20, 1949, under the Act.

In respect to the second question, we find nothing in the record which persuades us that Payne's heirs should not receive his earned vacation pay. The Vacation Committee's ruling cited by the carrier had to do with the vacation agreement covering operating employes. Consequently it is not binding on us here. Nor are we convinced of its correctness in terms of this case's particular circumstances.

We think an affirmative award is in order, and we direct the carrier to pay the vacation allowance as requested in the claim.

AWARD

Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Second Division

ATTEST: Harry J. Sassaman
Executive Secretary

Dated at Chicago, Illinois, this 25th day of November, 1952.