**Award No. 1973**
**Docket No. 1832**
**2-MP-MA-'55**

## NATIONAL RAILROAD ADJUSTMENT BOARD

## SECOND DIVISION

**The Second Division consisted of the regular members and in addition Referee J. Glenn Donaldson when the award was rendered.**

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## PARTIES TO DISPUTE:

## SYSTEM FEDERATION NO. 2, RAILWAY EMPLOYES' DEPARTMENT, A. F. of L. (Machinists)

## MISSOURI PACIFIC RAILROAD COMPANY

DISPUTE: CLAIM OF EMPLOYES:

1. That under the current agreement Machinist Joe Lyons was improperly denied payment in lieu of vacation for the year 1952, which was earned in the year 1951.

2. That accordingly the Carrier be ordered to pay the aforesaid Machinist in lieu of vacation for the year 1952.

EMPLOYES' STATEMENT OF FACTS: Machinist Joe Lyons (hereinafter referred to as the claimant) was employed by the carrier as such on date of August 9, 1922. During the year 1951 the claimant performed compensated service on not less than 133 days, qualifying him for a vacation with pay or payment in lieu thereof for the year 1952. The claimant was dismissed from the service by the carrier on December 13, 1951. The dismissal was not accepted by the claimant, and his case was referred to the National Railroad Adjustment Board, Second Division, by the organization on behalf of the claimant. Award 1664 was rendered on April 24, 1953, by the Second Division, ordering the carrier to restore the claimant to service with seniority rights unimpaired.

The dispute was handled with carrier officials designated to handle such affairs, who all declined to adjust the matter.

The agreement effective September 1, 1949, as subsequently amended, is controlling.

POSITION OF EMPLOYES: It is submitted that the claimant by meeting the requirements of Articles 1 and 2 of the vacation agreement as amended September 1, 1949, earned an annual vacation or payment in lieu thereof for the year 1952 by rendering compensated service on at least 133 days in 1951. Article 8 of the vacation agreement provides the following:

> "No vacation with pay or payment in lieu thereof will be due an employe whose employment relation with a Carrier has terminated

did not give claimant what he is requesting here. As stated by the referee above—

> ". . . the argument entirely overlooks the fact that when a man is dismissed for just cause, it falls within the discretion of the carrier to leave him off the payrolls permanently or, as an act of leniency, to put him back on the payroll with seniority. (Or he may be put back by Board award.) However, it is such dismissal that constitutes the termination of employment; such an employee's return to service without loss of seniority . . . in no way modifies or changes the meaning of 'termination of employment relation' as it is referred to in Article 8 of the vacation agreement."

The inescapable conclusion from the above discussion is that the vacation agreement does not support the present claim but, rather, Article 8 of the agreement specially denies recovery on this claim.

**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.

The claimant, during the year 1951, performed compensated service of not less than 133 days, which would have qualified him for a vacation with pay or payment in lieu thereof for the year 1952 in the ordinary course of happenings. However, on December 13, 1951, claimant was dismissed from service after an investigation on the charge of sleeping while on duty. Subsequently, upon review by this Division with Referee assistance, we determined that dismissal from the service was excessive punishment for the offense committed under the circumstances there present. The Findings in Award No. 1664, read in part, "that the purposes of discipline have been adequately accomplished by suspension from service from December 13, 1951," and claimant was thereby reinstated with seniority rights unimpaired without compensation for the time lost.

The organization urges that the claimant is entitled to payment in lieu of vacation for the year 1952, arguing that it was **earned** in the year 1951. It also contends that his employment relationship was not terminated between the date of his dismissal and the entry of Award No. 1664, on April 24, 1953, within the meaning of Article 8 of the Vacation Agreement.

The carrier takes exception to the "earned" vacation theory. It also states that in face of the occurrences above related, claimant could not be considered an employe during the year 1952, and that such was necessary as a condition of liability under said Article 8.

Further, that under the second paragraph of Article 5, payment in lieu of vacation is conditioned upon carrier finding that it cannot release the employe for vacation because of requirements of the service. It points out that in the instant case, this situation obviously does not exist. Its final grounds for resisting the claim, namely, that it is barred by the time limitation appearing in Rule 31 (f) concerning grievances, is not valid as a case of this sort is removed therefrom by the express terms of the rule.

We first consider the status of claimant during the year 1952 as it bears upon Article 8 of the Vacation Agreement, reading:

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

We are inclined to agree with the organization that the carrier's action of dismissal does not become final and determinative of employment status until the appeal procedures under the agreement have run their course. If this were not so, the many awards of this Division granting restoration of seniority rights after earlier dismissal would be without validity as having nothing existent upon which to attach. We find that the employment relation had not terminated within the meaning of Article 8 during the period of suspension. The act of dismissal which, if upheld, would have brought this result was in effect declared a nullity by Award No. 1664. What we assessed in its place as discipline was suspension. While much of what is said in "G. Referee's Answer to Question Raised Under Article 8 of the Vacation Agreement" would appear to the contrary, Referee Morse did conclude by stating: "However, when a suspension is given as discipline (as distinguished from a dismissal), the employe relation shall not be deemed to have been terminated within the terms of Article 8 of the Vacation Agreement."

Whether or not one considers vacation **earned**, a point which we do not find necessary to decide, claimant had performed the conditioned precedent to be entitled to a vacation by virtue of working the required number of days during 1951. The action of this Division in Award No. 1664 in changing the penalty from dismissal to suspension, preserved as we have found, the necessary employment status. The right to vacation could not be exercised during the period of suspension by virtue of the mutual actions of the parties.

There is nothing in the second paragraph of Article 5 to justify a finding that the single circumstance covered thereby was intended to be the only circumstance under which payment in lieu of vacation could be made. It is merely one that required express treatment in the interest of maintaining proper uninterrupted service.

Awards No. 1474 and 1475 cited by the carrier are not in point. Death, we agree, bars compliance with one of the essential requirements under Rule 8. Awards in point and persuasive are Third Division Awards No. 4024 and 6769.

AWARD

Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Second Division

ATTEST: Harry J. Sassaman
Executive Secretary

Dated at Chicago, Illinois, this 30th day of June, 1955.