

**Award No. 2011
Docket No. 1874
2-FGE-CM-'55**

NATIONAL RAILROAD ADJUSTMENT BOARD

SECOND DIVISION

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

PARTIES TO DISPUTE:

**RAILWAY EMPLOYEES' DEPARTMENT, A. F. of L.
(Brotherhood Railway Carmen of America)**

FRUIT GROWERS EXPRESS COMPANY

DISPUTE: CLAIM OF EMPLOYEES: 1) That under the provisions of the current agreement, Carman T. A. Spiegel (deceased) qualified for ten (10) days' vacation based on the performance of duties as a carman during the year 1952.

2) That accordingly, the Carrier be ordered to make payment of the vacation allowance earned by the aforesaid deceased carman to the legal representative of the estate of the deceased carman.

EMPLOYEES' STATEMENT OF FACTS: Carman T. A. Spiegel (deceased) was employed by the Fruit Growers Express Company and had 30 years of service when he retired on September 2, 1952 under the provisions of the Railroad Retirement Act. During the year 1952, deceased Carman T. A. Spiegel worked the necessary number of days to qualify him for a vacation in the year 1953 or payment in lieu thereof.

Carman Spiegel died on February 20, 1953, approximately five months after he retired during which time, and thereafter, the carrier declined to pay the deceased or his heirs or legal representative the vacation allowance due.

This dispute has been handled in accordance with the controlling agreement effective July 1, 1945 as subsequently amended up to and including the highest carrier officer to whom such matters are subject to being appealed without satisfactory adjustment thereof.

POSITION OF EMPLOYEES: It is submitted that under the provisions of Rule 42(a) of the agreement effective July 1, 1945, as revised effective September 1, 1949 and reading:

"Effective with the year 1950 each employee covered by this agreement who has rendered compensated service with the Company of not less than 151 days in the year 1949 will be granted an annual vacation of 5 consecutive work days with pay; thereafter such

revocably severed to qualify the employe for Railroad Retirement Act benefits (45 U.S.C.A. Sec. 228b). Still enjoying employe status in the year following retirement on disability, the claimants in the cited awards were allowed vacation pay for that year. The claims being sustained on that basis, the strong inference is that employe status must exist to warrant vacation pay in the year following retirement. In the instant case, employe status was ended on September 2, 1952 (the claim is for vacation for 1953).

SUMMARY

1. Employe retired September 2, 1952.
2. Prior to retirement, employe received a vacation with pay in 1952. He was not paid in lieu of a 1953 vacation because such vacation was not "due" when he retired and severed his employment relation.
3. The company was not a party to the National Vacation Agreement of December 17, 1941, and is not, and can not be held to be, bound by the individual practices of the railroads which were parties to that agreement.
4. Neither the wording of the subject rule, nor any agreed upon interpretation thereof, require the payment here claimed. The interpretation sought by the Brotherhood here was not made effective on individual railroads until each railroad decided as matter of policy to grant pay to a retired employe for following year's vacation.
5. Such decision by the company is a prerequisite to sustaining the brotherhood's position herein, and no such policy decision has been made.
6. This Honorable Board is without power to amend the working rules agreement or to force the required policy determination.

CONCLUSION

The company respectfully requests that the Board deny the claim herein.

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 employees 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.

This claim is before us to determine whether the legal representative of the estate of a deceased employe is entitled to receive payment for the deceased's 1953 vacation.

The deceased qualified for a 1953 vacation during the year 1952, but retired under the provisions of the Railroad Retirement Act prior to January 1, 1953. Death occurred February 20, 1953.

Rule 42(g) of the effective agreement reads that "No vacation with pay or payment in lieu thereof will be due an employee whose employment relation with the company has terminated prior to the taking of his vacation, except that employees retired under the provisions of the Railroad Retirement Act shall receive payment for the vacation due." (Emphasis ours.)

It is our opinion that Rule 42(g) is clear and unambiguous. It certainly does not limit retirement under the provisions of the Railroad Retirement Act to a retirement because of physical disability.

Second Division Award 1588 does not limit payment to physical disability retirements. In that case, the employe died before his request for annuity was granted, but the annuity was subsequently granted retroactively to December 20, 1949, the year preceding his death of April 11, 1950. The Board in Award 1588 stated that "* * * 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." In applying the retroactive date the Board determined that the deceased had retired during the last year in which he worked and that his estate was entitled to the pay in lieu of deceased's vacation.

AWARD

Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Second Division

ATTEST: Harry J. Sassaman
Executive Secretary

Dated at Chicago, Illinois, this 16th day of November, 1955.