

Award No. 2231

Docket No. 1988

2-IC-BM-'56

NATIONAL RAILROAD ADJUSTMENT BOARD

SECOND DIVISION

The Second Division consisted of the regular members and in addition Referee Adolph E. Wenke when the award was rendered.

PARTIES TO DISPUTE:

**SYSTEM FEDERATION NO. 99, RAILWAY EMPLOYEES'
DEPARTMENT, A. F. of L. (Boilermakers)**

ILLINOIS CENTRAL RAILROAD COMPANY

DISPUTE: CLAIM OF EMPLOYEES: 1. That under the current Vacation Agreement, retired Boilermaker Thomas Clark has been improperly denied payment in lieu of an additional five days' vacation due him in the year 1954.

2. That accordingly the Carrier be ordered to additionally compensate the aforesaid retired employe in the amount of forty (40) hours' pay in lieu of his additional five days of vacation in the year 1954.

EMPLOYEES' STATEMENT OF FACTS: Retired Boilermaker Thomas Clark, hereinafter referred to as the claimant, was employed by the carrier at Paducah, Kentucky, having more than fifteen (15) years of continuous service with the carrier. He retired from the service of the carrier July 16, 1953, after having performed not less than 133 days of compensated service in the year 1953. Upon his retirement, he was paid in lieu of his vacation for the year 1954, which was earned in the year 1953, in the amount of eighty hours' pay. This payment was in lieu of ten days' vacation. Claimant requests an additional forty hours pay in lieu of the additional five days vacation provided for in the August 21, 1954, agreement.

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

The agreement of April 1, 1935, as amended, and the vacation agreement of December 17, 1941 as subsequently amended, are controlling.

POSITION OF EMPLOYEES: The employes contend that Article 8 of the vacation agreement of December 17, 1941, is controlling in the instant case and reads as follows:

"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."

act defines the term "employee" as follows (Section 1 Fifth): "The term 'employee' as used herein includes every person in the service of a carrier (subject to its continuing authority to supervise and direct the manner of rendition of his service) who performs any work defined as that of an employe or subordinate official in the orders of the Interstate Commerce Commission . . ." There is no intent expressed in the August 21, 1954 agreement by the negotiators thereof to negotiate for any individuals not employes, and in the absence of such intent it may be conclusively presumed that the August 21, 1954 agreement applies only to employes as that term is defined in the Railway Labor Act. Mr. Thomas Clark was not such an employe because his relationship with the carrier ended on the date of his resignation, July 16, 1953. The amended Section 1 (c) in the August 21, 1954 agreement limits itself to the period "effective with the calendar year 1954," and at no time during the effective period, the calendar year 1954 and thereafter, was Thomas Clark an employe of the carrier.

Carrier contends that upon his retirement on July 16, 1953, Mr. Thomas Clark had received all rights accruing to him under the vacation agreement in effect at that time, and that he has no rights under Section 1 (c) of the August 21, 1954 agreement, which by its plain terms has no application prior to January 1 of the calendar year of 1954.

There is no basis for the claim and it should be denied.

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.

Boilermaker Thomas Clark contends he was improperly paid for the vacation due him for 1954 and, because thereof, asks that carrier be required to pay him for five (5) additional days.

Claimant was employed by carrier at Paducah, Kentucky. He retired under the Railroad Retirement Act as of July 16, 1953. Upon retiring carrier paid him for ten (10) days in lieu of a two (2) weeks' vacation for 1954. This was in accordance with the provisions of the vacation agreement then in effect. However, by an agreement entered into on August 21, 1954, certain changes were made in the vacation agreement and it is upon the provisions of Article I, Section 1 (c) thereof that this claim is based. This section provides:

"Effective with the calendar year 1954, an annual vacation of fifteen (15) consecutive work days with pay will be granted to each employe covered by this Agreement who renders compensated service on not less than 133 days during the preceding calendar year and who has fifteen or more years of continuous service and who, during such period of continuous service renders compensated service on not less than 133 days (151 days in 1949 and 160 days in each of such years prior to 1949) in each of fifteen (15) of such years not necessarily consecutive."

The foregoing section of the August 21, 1954 National Agreement makes the following conditions a prerequisite to the right to receive an annual vacation of fifteen (15) consecutive work days with pay for 1954:

- (1) that he must be an employe covered by the agreement,
- (2) that he has rendered compensated service on not less than 133 days during the preceding calendar year, and

(3) that he has fifteen (15) or more years of continuous service within the terms as therein set forth.

Admittedly claimant met the requirements of (2) and (3). However, it is the carrier's thought that when claimant retired under the provisions of the Railroad Retirement Act as of July 16, 1953, he thereby severed his employment relationship with the carrier and therefore could not meet the requirements of (1). That claimant had severed his employment relationship by retiring is beyond question. However, the question is, had the carrier waived the requirement of (1) by its construction and application of Article 8 of the vacation agreement when, as here, an employe retired under the Railroad Retirement Act but, before doing so, met the requirements of (2) and (3)? Article 8, above referred to, which was in force and effect at the time claimant retired, provided:

"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."

The rule is not too clear as to just what the rights of a retiring employe would be as to vacation rights for the year following his retirement. It does provide he "shall receive payment for vacation due." Carrier has always applied this Article, as it did here, to mean that if the retiring employe has met the requirements of (2) and (3) that he would then be entitled to an earned vacation for the following year and be paid in lieu thereof to the extent it had contractually obligated itself to do so. The organization acquiesced in and accepted this application. In view thereof we find the parties are now bound by the construction they placed thereon by this practice. By doing so we think Article 8 waived requirement (1) and, when an employe retired under the provisions of the Railroad Retirement Act, it only required that (2) and (3) be met in order to entitle the retiring employe to the benefit of an earned vacation for the following year.

But carrier contends it paid claimant all that was due him at the time he retired and, since the agreement of August 21, 1954 did not become effective until January 1, 1955, no additional payments are required. See Article I, Section 7 thereof. But it is not "when" such payment is made that is controlling, but for what year it is earned that controls. Under the parties' construction and application of Article 8 claimant was entitled to be paid for an earned vacation for 1954. At the time it was paid the contractual obligation of carrier was for ten (10) consecutive workdays with pay. Subsequently, by the agreement of August 21, 1954, this was increased to fifteen (15) consecutive workdays with pay. There is no exception in Article I, Section 1 (c) and it applied to all employes of the carrier who qualified for and were entitled to an earned vacation for 1954, which included the claimant. For awards coming to the same conclusion see 2151 of this Division and 7336 and 7368 of the Third Division.

In view of the foregoing we find the claim should be sustained.

AWARD

Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of SECOND DIVISION

ATTEST: Harry J. Sassaman
Executive Secretary

Dated at Chicago, Illinois, this 17th day of September, 1956.