

Award No. 3919

Docket No. 3725

2-CB&Q-CM-'62

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. 95, RAILWAY EMPLOYEES'
DEPARTMENT, A. F. of L. - C. I. O. (Carmen)**

CHICAGO, BURLINGTON AND QUINCY RAILROAD COMPANY

DISPUTE: CLAIM OF EMPLOYEES: (a) That Article 8 of the Vacation Agreement as amended August 21, 1954 is applicable to all employees of the crafts signatory thereto.

(b) That accordingly, the survivor and/or survivors of deceased Coach Cleaner Mrs. Julia Zabarauskas are entitled to be paid in lieu of her earned five days vacation unused in the year 1958.

EMPLOYEES STATEMENT OF FACTS: Mrs. Julia Zabarauskas was employed as a coach cleaner at Fourteenth Street, Chicago, Illinois by the Chicago, Burlington & Quincy Railroad Company, hereinafter referred to as the carrier, and had a seniority date as of May 3, 1950. On or about September 3, 1958, she became disabled on her way to work, and passed away on September 18, 1958. Primary cause of death was gangrene.

Mrs. Zabarauskas was reported to the carrier as being ill and not able to be at work during the time between September 3, 1958 and the date of her death. She had worked the required number of days in 1957 to qualify for a ten days vacation in 1958 and, prior to her death, had taken five days of the ten days vacation allotted her for 1958.

After the death of Mrs. Zabarauskas, claim was instituted in behalf of her survivor and/or survivors, one of whom is a minor child, for compensation in lieu of the remaining five days vacation due her in 1958.

This dispute has been handled from bottom to top with the designated officers of the carrier, each of whom has declined the claim.

The agreement effective October 1, 1953, as subsequently amended and the vacation agreement of December 17, 1941 as subsequently amended are controlling.

POSITION OF EMPLOYEES: It is the contention of the employees that

proceedings before Emergency Board No. 106, clearly show it was never intended to apply to female employees.

2. The subsequent attempts of the non-operating organizations to change this section of the vacation agreement, including the proceedings of Emergency Board No. 103, clearly show it does not cover the factual situation presented by this case.

3. A literal and reasonable construction of the language of Article 8 of the vacation agreement, as amended by the August 21, 1954 National Agreement, leads to the conclusion that pay in lieu of vacation is not to be made when a female employee dies and leaves a husband surviving her.

4. There are no equitable considerations in favor of the actual claimant herein, Mr. Stanley Zabarauskas, who has never had an employment relationship with the carrier.

In view of the above and foregoing, this claim must 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.

Parties to said dispute were given due notice of hearing thereon.

The issue posed by the instant claim is this: Under Article I, Section 5, of the National Agreement of August 21, 1954, is the surviving husband and/or surviving minor child of the deceased Mrs. Julia Zabarauskas entitled to the five days of vacation pay that remained from the amount she had earned in 1957 for a 1958 vacation?

There can be no doubt that Mrs. Zabarauskas was an employe of carrier; that, as such, she had earned and half-used a 1958 paid vacation; and that, if she had not become ill and died, she would have received the amount here in question. The above-stated issue thus comes down to whether given her death, the language of Section 5 authorizes said unused amount to be paid to any of her survivors.

Said language says "surviving widow" and not "surviving widower" or "surviving spouse." Carrier has made a persuasive submission to the effect that, following emergency board hearings and recommendations, the parties in negotiations purposefully did not write "widow" in the broad, generic sense of "spouse." Given this evidence plus the plain language of Section 5, the Division is forced to rule that the surviving widower of Mrs. Zabarauskas is not entitled to her unused 1958 vacation pay.

This finding leaves the question of whether her surviving minor daughter, Christine, is entitled to said sum. Article I, Section 5, says that, "in the absence of a surviving widow," payment of an unused vacation allowance is to be made "on behalf of a dependent minor child or children, if any." In respect

thereto, it would be possible to hold that in the instant case there was no surviving widow, and therefore the payment should go to said child, provided that she was a dependent of the deceased. If this approach were used, it would then have been necessary for petitioner to show that the child had in fact been such a dependent. But evidence to this effect is wanting in the record.

The Division deems it preferable to approach the question in the manner used in Third Division Award 9584. That is, from all the evidence of record as well as from the language of Article 1, Section 5, as a whole, the Division finds that the parties intended to limit the payment of unused vacation allowances to the surviving widows and/or minor children of deceased male and not of deceased female employees. Accordingly, the minor child here involved is not entitled to the amount here sought.

If this finding appears to produce an inequitable result, the remedy is to be found not here but at the conference table. The record shows that the parties have recently recognized this principle and developed the proper remedy.

AWARD

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of SECOND DIVISION

ATTEST: Harry J. Sassaman
Executive Secretary

Dated at Chicago, Illinois, this 22nd day of January, 1962.

DISSENT OF LABOR MEMBERS TO AWARD 3919

The carrier's submission, found to be so "persuasive" by the majority, might have been logically so found in the Dark Ages or in a dictatorship but it can hardly be so found in a democracy. In this country there is a presumption against injustice; a presumption that no one shall be unjustly affected in his rights by a judgment against which he could make no defense. The majority admit that if Coach Cleaner Mrs. Julia Zabarauskas had lived she would have received the remaining five days of her vacation pay but because she died her survivor is not entitled to the pay inasmuch as Coach Cleaner Zabarauskas was a female. This is a gross injustice and permits the carrier to keep money to which it is not entitled. Such irrational reasoning implies that supposedly intelligent men would make an agreement to deprive a person of a vested right.

The "reasoning" set forth in the findings is so absurd in this enlightened age as to embarrass the reader.

Edward W. Wiesner
C. E. Bagwell
T. E. Losey
E. J. McDermott
James B. Zink