Award No. 4064

Docket No. 3771

2-DW&P-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. 148, RAILWAY EMPLOYES' DEPARTMENT, A. F. OF L. — C. I. O.
(Carmen)

DULUTH, WINNIPEG & PACIFIC RAILWAY COMPANY

DISPUTE: CLAIM OF EMPLOYES:

1. That under the provisions of the controlling agreement the Carrier unilaterally and improperly applied February 23, 1959 — a day on which Carman Harlan Behn was entitled to 8 hours holiday pay — as a day of Carman Behn's earned annual vacation.

2. That accordingly, the Carrier be ordered to either grant Carman Harlan Behn an additional day's vacation with pay or compensate him in lieu thereof in accordance with the provisions of the controlling agreement.

EMPLOYES' STATEMENT OF FACTS: Carman Harlan Behn, hereinafter referred to as the claimant, was regularly employed by the Duluth, Winnipeg and Pacific Railway Company, hereinafter referred to as the carrier, as a millwright on the 7:00 A.M. to 3:30 P.M. shift Monday through Friday with Saturday and Sunday as rest days.

On each day, February 19, 20 and 24, 1959, claimant called his foreman and reported off sick. After returning to work, the claimant requested that February 19, 20 and 24, 1959 be considered as days of his vacation as per the provisions of Rule 11 of the vacation agreement. The carrier granted his request and he was paid for February 19, 20 and 24 as vacation days. Claimant was not, however, paid 8 hours holiday pay for February 23, 1959 (Washington's Birthday) which he was entitled to under the provisions of holiday rules.

Claim was filed on April 24, 1959 with the car foreman, who declined the claim by a letter dated April 30, 1959.

This dispute was then appealed to master mechanic and General Car Foreman Mr. C. M. Lundeen, who declined the claim on June 10, 1959. Exhibit C. In that letter, Mr. Lundeen took the unilateral and improper action of assigning February 23, 1959 as a vacation day to the claimant.

pensated service on not less than one hundred thirty-three (133) days during the preceding calendar year."

It will be noted that the agreement states the annual vacation will be five **consecutive** work days. Similarly, clauses (b) and (c) provide for ten and fifteen **consecutive** work days.

Section 11 of the vacation agreement dated December 17, 1941, provides:

"11. While the intention of this agreement is that the vacation period will be continuous, the vacation may, at the request of an employe, be given in installments if the Management consents thereto."

The impact of the two immediately foregoing provisions, therefore, is that while the vacation days must be consecutive they may nevertheless be taken in installments when mutually agreed to.

In the instant case when the employe requested that he be given vacation time for time off account sickness, management consented to this request in accordance with Section 11 above and granted him as an installment on his vacation time off from February 19th to February 24th inclusive. However, there is no provision in the agreement which gives an employe the right to select individual days on a piecemeal basis as part of his vacation. Not only would this be inconsistent with the provisions of the vacation agreement, but it would provide the employe with an opportunity to select for vacation, certain days before and after a specified holiday and then make claim for the holiday pay in addition. If such a claim were allowed, this employe would be treated more favorably than an employe who did not take his vacation in installments and where a specified holiday fell within his vacation period, as provided in Section 3 above.

In the present situation the employe was granted an installment on his vacation from February 19th to February 24th inclusive. During this period a specified holiday occurred on February 23rd and this holiday was counted as a work day for vacation purposes in accordance with Section 3 of the vacation agreement and paid for as part of his vacation.

Irrespective of whether the employe takes his vacation as a whole or by installments the provisions of Section 3 must apply.

The carrier contends that there is no justification in the employes' claim that Behn should have been paid February 23, 1959, as a holiday, rather than as part of his vacation, and that he should be granted an additional day's vacation with pay or compensation in lieu thereof.

Therefore, this claim should be dismissed or 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 waived right of appearance at hearing thereon.

The material facts here are not in dispute: Claimant, with work week of Monday - Friday and rest days Saturday - Sunday, reported off sick on February 19, 20, and 24, 1959 (Thursday, Friday, and Tuesday). Washington's Birthday, a holiday calling for pay if not worked under the agreement, fell on Sunday and was officially celebrated on Monday, February 23. Claimant did not work on said holiday. After returning to work, claimant requested that February 19, 20, and 24 (but not February 23) be counted as installments on his earned vacation, and carrier granted same. Carrier paid claimant for February 23, 1959, as a day of vacation and not as a holiday.

The issue then is whether, under the applicable provisions of the 1941 and 1954 vacation and holiday agreements, carrier was obligated to treat the said February 23 as a day of holiday rather than vacation. If so, claimant is entitled to an additional day of vacation with pay or to compensation in lieu thereof for the year involved.

Article I, Section 3, of the 1954 agreement says in effect that when, during an employe's vacation period, any one of the seven specified holidays falls on what would have otherwise been a work day of the employe's regular work week, he is to receive vacation rather than holiday pay for said day. In other words, he cannot collect double for said day.

Section 1 (a), (b), and (c) of said Article speaks of paid vacations as periods composed of (respectively) five, ten, and fifteen consecutive work days. Section 11 of the 1941 agreement also stresses continuous vacation periods but goes on to say that, if an employe requests and a carrier agrees, paid vacations may be given in installments. The language of Section 11 is entirely clear: If an employe's vacation is to be noncontinuous, same can happen only if the employe first requests that he get it in installments and second only if management grants the request. In short, there must be mutual agreement thereon. Section 11 does not say that piecemeal vacations must be granted on an employe's demand. And it does not say that management can require an employe against his will to break up his vacation in accordance with management's own wishes.

The effect of carrier's action here was to declare that claimant had a vacation period of four consecutive work days — February 19, 20, 23, and 24. If carrier had the right to do so, then under Article 1, Section 3, claimant had to consider February 23 as a day of paid vacation and not as a paid holiday. But under Section 11 of the 1941 agreement it was claimant and not carrier who had the right to initiate action as to the disposition and characterization of February 23. Carrier did not have the unilateral right to make said day retroactively a vacation day within a four day vacation period or installment.

Carrier did have a clear right to refuse claimant's request to treat his sick days (February 19, 20, and 24) as vacation days. And the Division can appreciate carrier's feeling of inequity over having to pay double for February 23 as a result of its kindness. But the Division is not empowered to redress inequities; it can only interpret the rules as written, equitable or otherwise.

Given all of the above and given the further finding that, in accordance with the requirements of Article II, Section 3, of the 1954 agreement, claimant was credited with compensation by carrier for the workdays imme-

diately before and after February 23, it must follow that the instant claim has merit.

AWARD

Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of SECOND DIVISION

ATTEST: Harry J. Sassaman
Executive Secretary

Dated at Chicago, Illinois, this 21st day of September 1962.