Award No. 5124
Docket No. 4417
2-GN-CM-'67

NATIONAL RAILROAD ADJUSTMENT BOARD

SECOND DIVISION

The Second Division consisted of the regular members and in addition Referee Paul C. Dugan when award was rendered.

PARTIES TO DISPUTE:

SYSTEM FEDERATION NO. 101, RAILWAY EMPLOYES' DEPARTMENT, AFL-CIO (Carmen)

GREAT NORTHERN RAILWAY COMPANY

DISPUTE: CLAIM OF EMPLOYES:

1. That the Carrier violated Article V of the August 21, 1954 Agreement, and accordingly claim should be allowed as presented.

2. That the current agreement was violated when the Carrier failed to compensate Carman Welder James Folsom for holiday pay of eight (8) hours for September 4, 1961 (Labor Day).

3. That accordingly, the Carrier be ordered to compensate Carman-Welder Folsom eight (8) hours pay for September 4, 1961.

EMPLOYES' STATEMENT OF FACTS: Carman-Welder James Folsom, hereinafter referred to as the claimant, was regularly employed as such by the Great Northern Railway Company, hereinafter referred to as the carrier, prior to July 31, 1961.

On July 31, 1961, the entire car department force at St. Cloud Shops was furloughed from the services of the carrier, with the exception of four employes. The claimant was included in the furlough notice. Claimant had three (3) weeks paid vacation (earned in 1960) which he was scheduled to take August 14 through September 1, 1961. Although claimant was furloughed and did not desire to take his vacation while furloughed, local supervision arbitrarily placed him on vacation as per schedule and compensated him therefor August 14 through September 1, 1961.

Carrier failed to compensate claimant holiday pay for Labor Day, September 4, 1961 as provided for by Article III of the August 19, 1960 agreement.

Claimant has a seniority date in excess of 60 calendar days preceding the holiday September 4, 1961. Claimant had compensation paid him by car-

pensation for service was not credited to 11 of the 30 calendar days immediately preceding the holiday.

4. The claimant did not satisfy either of the qualifications contained in Article III, Section 3 of the August 19, 1960 National Agreement applicable to "other than regularly assigned employes," because he received no compensation for service paid by the carrier on the workday preceding or the workday following the holiday, and he was not "available" on those days "pursuant to the rules of the applicable agreement."

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 Organization has raised the jurisdictional question, claiming that Carrier failed to state the reason for disallowance of the claim within 60 days from the date the claim was filed, as required by Article V, Section 1(a) of '54 Agreement.

The pertinent provisions of said Article V 1(a) provide as follows:

> ". . . should any such claim or grievance be disallowed, the Carrier shall, within 60 days from the date same is filed, notify whoever filed the claim or grievance (the employe or his representative) in writing of the reasons for such disallowance. . . ."

The Organization cites the letter of General Car Foreman Zierden (Organization's Exhibit "D") to Local Chairman Miller, dated October 10, 1961, as not complying with requirement of ". . . in writing of the reasons for such disallowance. . . .":

> "Here by returning time card for James Folson as this matter is beyond my jurisdiction now. S/Leo Zierden, General Car Foreman."

The Organization argues that this letter of General Car Foreman Zierden did not give a valid reason for declination of the claim.

In reply to the above alleged procedural defect, Carrier submits the letter of Superintendent Snyder, dated October 13, 1960 to Local Chairman Miller (Carrier's Exhibit C-2), as being in compliance with pertinent provisions of Article V 1(a) of '54 Agreement. In said letter, Mr. Snyder refers to the claim being based on Agreement of August 19, 1960, Section 3, and ". . . A furloughed employe is not specified nor does he qualify for consideration under the rule. . . ." Said letter is within the 60-day time limit period for notifying the employe or his representative of the declination of his claim and said letter sets out the reasons for such disallowance.

The Organization's contention is that General Car Foreman Zierden's failure to allege reasons for such allowance is fatal to the procedural requirement. If said letter did not comply with pertinent provisions of said Article V 1(a), then the defect was cured by letter of Superintendent Snyder, dated October 13, 1960, referred to above. Article V 1(a) does not require that the officer receiving the claim must, in the case of declination, make the notice of disallowance and state the reasons for such disallowance. Article V 1(a) says the "carrier shall . . . notify . . .". Therefore, inasmuch as the Carrier, through Superintendent Snyder, within 60 days from date claim was filed, did notify claimant's representative, Mr. Miller, in this instance, in writing and gave reasons for such disallowance, then the Organization's claim of a procedural defect must be rejected.

In regard to the merits of the claim, Carrier raises two objections: (a) that claimant did not have the necessary "compensation for service" credited to 11 of the 30 calendar days immediately preceding the holiday, and (b) that claimant was not "available for service" on the workday preceding and following the holiday "pursuant to the rules of the applicable agreement", which Carrier alleges is Rule 5 (d); that said Rule 5 (d) gives a furloughed employe 15 days to return to service after being called, and thus Claimant could not be called for service, which amounts to being "unavailable"; that Rules 4(d) and 6(a) and (b) permit a furloughed employe to be considered for temporary vacancies and do not require that he be so used, and Rule 6 provides for transfer to other point for vacancies, Carrier contending that failure of claimant to comply with Rules 4 (d) and 6 prevent him from being considered "available for service" within the intent and meaning of Section 3, Article III of the '60 Agreement, applicable herein.

In regard to the first issue on the merits as to whether claimant had the necessary "compensation for service" credited to 11 of the 30 calendar days immediately preceding the holiday, the record discloses that claimant was furloughed on July 31, 1961 and he was paid vacation pay from August 14, through September 1, 1961.

This Board has previously held in Third Division Award No. 14816 that vacation pay is "compensation for services" to be credited to the 11 of the 30 calendar days period, and since Award No. 14816 is controlling, claimant therefore complied with Section 1, Article III of '60 Agreement in regard to 11 or more compensated days within 30 day period prior to the holiday.

As to the second issue on the merits in regard to "availability" of claimant on the workday immediately preceding and following the holiday, Carrier argues that because of Rule 5 (d) claimant had 15 days to return to work after being called by Carrier for service and that claimant did not comply with Rules 4 (d) and 6 in that he failed to request temporary work or transfer to another point, and therefore he was not "available for service" within the intent and meaning of applicable provisions of Section 3, Article III of the '60 Agreement.

This Division has held previously that the test for determining "available for service" within the intent and meaning of Section 3 (ii) and the "Note" therein of Article II of the '60 Agreement is not whether an employe is not required to respond to a call for service, but whether a call for service was made by Carrier and the employe did or did not respond to such a call. Further, there is nothing in the "Note" in Section 3, Article III of

'60 Agreement that says that Rules 5 (d), 4 (d) and 6 (a) and (b) are the controlling "rule of the applicable Agreement", and must therefore be complied with by claimant before he can be considered "available for service". There being no such requirements in the pertinent provisions of said '60 Agreement, these rules cited by Carrier are not a condition precedent to being considered "available for service" within the intent and meaning of Section 3, Article III of the '60 Agreement, and this contention of Carrier must be rejected. Inasmuch as Claimant did not lay off of his own accord and did not fail to respond to a call for service from Carrier, he was "available for service" within the intent and meaning of Section 3(ii) and the "Note" therein of Section 3, Article III of the '60 Agreement.

Therefore, it is the opinion of this Division that the claim will be sustained.

AWARD

Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of SECOND DIVISION

ATTEST: Charles C. McCarthy
Executive Secretary

Dated at Chicago, Illinois, this 31st day of March, 1967.

Keenan Printing Co., Chicago, Ill. Printed in U.S.A.