Award No. 5664
Docket No. 5461
2-SCL-CM-'69

NATIONAL RAILROAD ADJUSTMENT BOARD

SECOND DIVISION

The Second Division consisted of the regular members and in addition Referee George S. Ives when award was rendered.

PARTIES TO DISPUTE:

SYSTEM FEDERATION NO. 39, RAILWAY EMPLOYES' DEPARTMENT, A. F. of L.-C. I. O. (Carmen)

SEABOARD COAST LINE RAILROAD COMPANY

DISPUTE: CLAIM OF EMPLOYES:

1. That under the applicable agreements the Carrier improperly denied Carman A. W. Levins, Jr., payment in lieu of four (4) weeks vacation for the year 1966.

2. That accordingly, the Carrier be ordered to pay the aforenamed Carman in lieu of vacation for the year 1966.

EMPLOYES' STATEMENT OF FACTS: A. W. Levins, Jr. hereinafter referred to as the Claimant was employed as carmen by the Seaboard Air Line Railroad Company hereinafter referred to as the Carrier, at Tampa, Florida on January 28, 1953.

During the year 1960 the Claimant performed compensated service in excess of 133 days thereby qualifying for a fifteen (15) day vacation, in accordance with the Vacation Agreement of December 19, 1941, as amended in the year 1954.

On April 4, 1960, the Claimant had charges placed against him and as a result thereof was dismissed on March 13, 1961 and was paid his vacation of which he had qualified for the year 1961. The dismissal was not accepted as conclusive and the case was referred to the National Railroad Adjustment Board, Second Division, which resulted in Award 4323 and the Second Division ordering the Carrier to restore the Claimant to service with all seniority rights unimpaired, and that he be compensated for the net wage loss resulting from his discharge. On December 10, 1963 the Carrier made reply to the General Chairmen's letter of December 4, 1963 making an inquiry as to their compliance with the Award 4323 by advising this Award was so palpably wrong as to Claimant Levins that they could not, in good conscience, carry it out. Therefore, it was not their intention to comply with the Award.

The Brotherhood of Railway Carmen's Organization and the Railway Employes' Department turned this case over to their attorneys to take the

Martin in his letter of September 20, 1966, did not render any service for the Carrier in 1965.

As set out in the record, Mr. Levins waived and abandoned in Court any and all claims for loss of wages or earnings and sought only the enforcement of the provisions of Award 4323 requiring reinstatement as an employe of the Carrier, on which basis Summary Final Judgment was issued. Such action left no basis whatever for a claim for a vacation allowance to Mr. Levins in 1966. To agree that when he was restored to service March 10, 1966, he was automatically credited with not less than one hundred days of **compensated service** in 1965 so as to qualify for four weeks vacation allowance in 1966, as claimed by the Organization, would certainly be paying him for lost time and loss of earnings which he had waived and abandoned in Court.

The record conclusively shows the claim to be without any merit whatsoever and it should accordingly be denied. While the burden of proof is upon the one making a claim, the Organization has presented nothing that would support this claim. As held in Third Division Award 3523, without a referee, involving a claim on the Seaboard, "The claimant in coming before this Board assumes the burden of presenting some consistent theory which, when supported by the facts, will entitle him to prevail."

(Exhibits not reproduced.)

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 fundamental facts involved in this dispute are not in issue. Claimant seeks four (4) weeks vacation allowance in the year 1966 even though he rendered no compensated service during the preceding year based on the theory that he had been unjustly withheld from service during 1965 by Carrier, and otherwise would have qualified for four (4) weeks vacation in the year 1966 under the provisions of Article I of the December 17, 1941 National Vacation Agreement, as amended by Section 1(d) of Article III of the National Agreement of November 21, 1964, which provides as follows:

> "(d) Effective with the calendar year 1965, an annual vacation of twenty (20) consecutive work days with pay will be granted to each employe covered by this Agreement **who renders compensated service on not less than one hundred (100) days during the preceding calendar year** and who has twenty (20) or more years of continuous service and who, during such period of continuous service renders compensated service on not less than one hundred (100) days (133 days in the years 1950-1959 inclusive, 151 days in 1949 and 160 days in each of such years prior to 1949) in each of twenty (20) of such years, not necessarily consecutive." (Emphasis ours.)

Carrier contends that Claimant had abandoned any and all claims for lost wages or earnings in Federal District court prior to reinstatement by the Carrier pursuant to a Summary Judgment issued by said court, and that Claimant did not render any service for the Carrier in 1965, which would qualify him for payment of a four (4) week vacation allowance in 1966.

The record discloses that Claimant was dismissed from Carrier's service on March 13, 1961, at which time he was compensated for accrued vacation benefits earned during the preceding year. The dismissal was appealed to this Division, and our earlier Award No. 4323 reinstated the Grievant with seniority rights unimpaired as well as the net wage loss resulting from his discharge. Carrier then refused to comply with the Award, and Petitioner instituted an action in the Federal District Court for enforcement. On August 30, 1965, the initial complaint was amended by expressly waiving and abandoning any and all claims for loss of wages or earnings as a result of Claimant's wrongful discharge on March 13, 1961 by the Carrier.

Claimant then filed a motion for Summary Judgment based upon the amended complaint, which was issued by the Court. Claimant was restored to service on March 10, 1966 with seniority rights unimpaired but without compensation for time lost.

The thrust of Petitioner's claim is that the benefits flowing from the vacation Agreement are separate and distinct from his initial claim for loss of wages and earnings, which admittedly was waived during the judicial proceeding. Therefore, Petitioner avers that Claimant was wrongfully denied a vacation allowance which would have accured during 1965, if he had not been unjustly withheld from service.

Analysis of Section 1(d) of Article III of the November 21, 1965 National Agreement clearly reveals that compensated service on not less than one hundred (100) days during the preceding calendar year is an explicit condition precedent to qualification for a four week vacation in 1966. Hence, Carrier is being asked to credit Claimant for lost time as well as resulting loss of earnings during 1965, which come within the purview of the money provisions of our earlier Award that were expressly waived and abandoned by Claimant during the enforcement proceedings before the Federal District Court. Accordingly, the instant claim must be denied.

AWARD

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of SECOND DIVISION

ATTEST: Charles C. McCarthy
Executive Secretary

Dated at Chicago, Illinois, this 18th day of April 1969.

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