Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD
SECOND DIVISION

Award No. 10686
Docket No. 10050
2-C&O-CM-'85

The Second Division consisted of the regular members and in addition Referee John J. Mikrut, Jr. when award was rendered.

Parties to Dispute: (Brotherhood Railway Carmen of the United States and Canada
(
(The Chesapeake and Ohio Railroad Company (Pere Marquette District)

Dispute: Claim of Employes:

1. That the Carrier violated the National Vacation Agreement when it improperly compensated two (2) Carmen employes for work performed by them during their respective vacation periods.

2. That accordingly, the Carrier be ordered to compensate Car Inspectors Louis Quondamatteo (I. D. No.2446263) and Ernest Brewster (I. D. No. 244254) at the straight time rate of pay, four (4) hours per day for five (5) days.

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 employes 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.

Claimants were regularly assigned as Car Inspectors at Carrier's Grand Rapids, Michigan Wyoming Yards.

In March of 1980, as per the parties' National Vacation Agreement, Claimants were notified they would be eligible for four (4) weeks of vacation for calendar year 1980 (earned in 1979). Claimants believed, however, that because of their total years of service with Carrier, they should have been qualified for five (5) weeks of vacation rather than four (4) weeks as assigned.

Shortly after Carrier's posting of the vacation assignments, Claimants expressed their concerns to their immediate Supervisor, the Car Foreman, and asked him to check into the matter for them. The extent of the Car Foreman's investigation cannot be deduced from the record at this time. The record does show, however, that on October 3, 1980, Car Department Manager C. E. Smithers sent letters to Carrier's Director of Payroll Accounting which stated in pertinent part:

> "...A check of our records and time documents reveals that . . . (Claimants have) . . . 25 qualifying years up to January 1, 1980, and is therefore entitled to 25 vacation days for the present year."

Said letters further stated, "Please advise if your records correspond and advise if . . . (Claimants) . . . should be allowed 25 days vacation in 1980." The record in this dispute does not indicate that Payroll Accounting responded to Mr. Smithers' inquiry.

The next significant development in this matter occurred sometime in February or March 1981 at which time Carrier posted a vacation eligiblity list for the ensuing 1981 vacation period. Upon reading said list, Claimants saw that their respective seniority dates were reported in such a manner so as to confirm that they (Claimants) each had in excess of twenty-five (25) years of seniority and that they qualified for five (5) weeks of vacation in the preceeding year's vacation eligibility period. Claimants again brought the matter to the attention of their supervisors.

On April 15, 1981, Mr. Smithers wrote another letter to Payroll Accounting which stated as follows:

> "The annual vacation eligibilty list for 1980 indicated that . . . (Claimants) . . . had 24 qualifying years for vacation purposes and was entitled to 20 days vacation in 1980.
>
> By our letter of October 3, 1980, we indicated that with . . . (Claimants') . . . service time he should be credited with additional years of service, and requested that you advise us if . . . (Claimants) . . . should be allowed the 25 days vacation in 1980.
>
> As no reply was received to this letter, we allowed . . . (Claimants) . . . only the 20 days indicated on the 1980 annual vacation eligibility list.

> The 1981 annual vacation eligiblity list indicates that . . . (Claimants are) . . . entitled to 25 vacation days with 26 years of service.
>
> In that . . . (Claimants were) . . . not allowed his additional five (5) vacation days for 1980, please advise how we should handle this vacation time now due him."

Subsequent to the receipt of Mr. Smithers' April 15, 1981 letter, Carrier's Payroll Accounting Department on May 5, 1981, issued each Claimant a check for forty (40) hours of vacation pay for the fifth week of vacation which had been improperly denied them in 1980.

On July 5, 1981, Claimants filed a Claim which contended that because they worked during their fifth week of vacation in 1980, then, as per Paragraph V of the National Vacation Agreement, they should be compensated at the rate of time and one-half for that week rather than straight time - - a difference of twenty (20) hours of pay. Said Claim, for reasons which will be developed more fully hereinafter, was denied by Carrier and is now the focus of this Award.

Carrier's position in this matter is two-fold.

Carrier first agrues that the instant Claim was not filed in a timely manner in accordance with Agreement Rule 32(a) and, therefore, should be denied as being procedurally defective. According to Carrier, Claimants knew or should have known of the precipitating incident in 1980 and thus should have filed their Claim at the time rather than waiting well over a year to do so. In support of this contention Carrier cites Second Division Awards Nos. 3865 and 4297 as controlling.

Regarding the merits portion of this dispute, Carrier maintains that Claimants did not perform any work during their respective vacation periods since such vacations were never scheduled and "Article V clearly contemplates that the Carrier pay a penalty when it is unable to 'release an employee' for a scheduled vacation due to 'the requirements of service'." According to Carrier, since Claimants were not scheduled for a fifth week of vacation in 1980, then they could not have been required to work during a vacation period. Carrier maintains "Article V is applicable in cases where the Carrier is forced to cancel an employee's scheduled vacation when the requirements of service are such that the Carrier is unable to release the employee." In summary of this area of argumentation, Carrier asserts that ". . . a penalty is only due an employee who is required to work during his scheduled vacation period and not in those instances in which it is found that an employee had been entitled to more vacation than he had received in a previous year."

Organization's position herein, simply stated, is that the instant Claim was filed as soon as Claimants were aware that the amount of their forty (40) hours of vacation pay had been calculated at the straight time rate rather than at the rate of time and one-half and that such filing is certainly well within the Agreement time limits (Second Division Awards Nos. 2480 and 6735).

As to the merits of this case, Organization argues that Carrier's error denied Claimants a fifth week of vacation in 1980; that ". . . Carrier had from March 1980, when vacations were assigned to determine if the Claimants had an additional week of vacation . . . (and) . . . had ample time from October 3, 1980, to schedule the Claimants an additional week which they did not do"; that Article V of the National Vacation Agreement clearly provides that an employee" . . . shall be paid the time and one-half rate for work performed during his vacation period in addition to his regular vacation pay"; and finally, that Carrier advanced Claimants' vacation period when they compensated Claimants in lieu of vacation in May 1981 and thus Claimants should be compensated" . . . for the half-time rate not because service requirements demanded it, but because of the advancement of the vacation periods and having worked their vacation period". In support of this latter point, Organization cites Second Division Award 4276.

The Board has carefully read and studied the complete record which has been presented by the parties in support of their respective positions in this matter, and is persuaded that Organization's position, in toto, is correct and, therefore, must be sustained.

Carrier's arbitrability contentions are unsupportable because the essence of the instant Claim herein is that Carrier failed to provide the proper amount of pay for Claimants' contested fifth week of vacation, not that Claimants had been denied the fifth week of vacation in the 1980 vacation eligiblity period. Since Claimants did not know or could not have known the specific amount of vacation pay which would be tendered to them by Carrier for the fifth week of their 1980 vacation until they received their pay checks on or about May 8, 1981, said date thus constitutes the beginning or "trigger" of the sixty (60) days counting period for the initial filing of a Claim as required in Rule 32 (a)(1) of the parties' Agreement. Claimants' filing of the Claim on July 5, 1981, was therefore within the contractually specified time period.

Regarding the merits portion of the dispute, Carrier's position is unsupportable for the following reasons: (1) the instant dispute has arisen solely because of Carrier's error and Claimants should not be forced to suffer a loss because of an error which was not of their own doing; (2) Carrier had more than ample time and opportunity in 1980 to detect and correct its error; (3) despite the surface appeal of Carrier's argument that Claimant's fifth week of vacation was not scheduled in 1980 and that Article V of the National Vacation Agreement authorizes the payment of premium pay only when an employee is forced to work during his scheduled vacation period, the fact remains that Claimant's additional week of vacation should have been properly scheduled by Carrier; and (4) even more significantly, failure on the part of this Board to remedy Carrier's obviously cavalier handling of Claimant's vacation scheduling in the instant case could encourage a situation wherein further vacation schedulings could be manipulated in such a way so as to avoid the payment of premium pay simply by claiming that vacations should have been scheduled but they were not - - - and since they were not scheduled, then Carrier is not obligated to pay the premium. This latter scenario was certainly not contemplated by the parties (certainly not the Organization) when Article V was negotiated, and this Board will not even remotely hint to such an application or interpretation by virtue of this Award.

A W A R D

Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Second Division

Attest: Nancy J. Dever - Executive Secretary

Dated at Chicago, Illinois, this 8th day of January 1986.