Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD
SECOND DIVISION

Award No. 12827
Docket No. 12765
95-2-93-2-120

The Second Division consisted of the regular members and in addition Referee James E. Mason when award was rendered.

PARTIES TO DISPUTE: (International Association of Machinists
(and Aerospace Workers
(
(Missouri Pacific Railroad Company

STATEMENT OF CLAIM:

"That the Missouri Pacific Railroad Company (hereinafter referred to as Carrier) violated the provisions of the vacation agreement of the Current Controlling Agreement as well as custom and past practice between the International Association of Machinists and the Missouri Pacific Railroad Company dated June 1, 1960, as subsequently revised and amended when it paid Machinist A. Gozez Jr. (hereinafter referred to as Claimant) his 1992 vacation pay in lieu of vacation and consequently denying Claimant his contractual right to his health insurance benefits associated with the Carrier's payment of his vacation.

RELIEF REQUESTED:

That the Missouri Pacific Railroad Company adjust its vacation pay records to reflect that Claimant was paid his 1992 vacation pay as vacation pay. That the Carrier accord Claimant all benefits associated with his vacation pay including health insurance benefits and credit toward railroad retirement."

FINDINGS:

The Second Division of the Adjustment Board, upon the whole record and all the evidence, finds that:

The carrier or carriers and the employee or employees involved in this dispute are respectively carrier and employee 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 fact situation in this case is reasonably clear and, in general, is without contradiction. The Claimant was employed as a Machinist at Carrier's North Little Rock, Arkansas, shop facility. In calendar year 1991, Claimant performed sufficient service to qualify for a paid vacation in 1992. This basic fact was influenced by the additional fact that in May 1991, Claimant allegedly sustained a personal injury. There is nothing in the case record to indicate that Claimant was actually scheduled for a specific vacation period in calendar year 1992. The record does indicate that Claimant was on a medical leave of absence for most, if not all, of the calendar year 1992. On October 16, 1992, Claimant submitted to Carrier a form entitled "REQUEST FOR CHANGE IN VACATION DATE." On this form there was no indication of a previously scheduled vacation period which was to be changed. Rather, Claimant's request on the form was to "re-schedule my vacation for 20 days to begin 10-19-92." Carrier denied this request because Claimant was at that time on a medical leave of absence. Subsequently, on the payroll of February 15, 1993, Claimant was paid in lieu of his 20 vacation days.

In the meantime, the Organization initiated the claim as outlined in the Statement of Claim, supra. In its presentation and progression of the claim, the Organization argued that "Claimant needs his vacation pay account being on medical leave. Also the carrier's payment to claimant will extend his insurance benefits." It also contended that ".. it has been a long historical policy at the North Little Shops (sic) . . . that employees on medical leave were paid their vacations when requested." In support of its contention of "long historical policy," the Organization presented the record of a single exchange of correspondence between the Organization's Local Chairman and the Carrier's Locomotive Shop Director in which an employee who was on medical leave of absence was permitted to receive vacation pay as requested while still on medical leave. The Organization additionally argued that its position in this case had support in the "PROCEDURE FOR HANDLING VACATIONS" as promulgated by Carrier for the North Little Rock facility, specifically, Item XII REQUEST FOR CHANGE IN VACATION DATE, Paragraph "E" thereof which reads in pertinent part as follows:

"E. If an employee who has been off during current month account illness, he may request that the sick time he was off be allowed as vacation, in which case vacation could start any day of the week, not necessarily first work day of his work week. THIS IS THE ONLY EXCEPTION TO NOT STARTING VACATION FIRST WORK DAY OF WORK WEEK."

Finally, the Organization contended that Carrier was in violation of the provisions of the National Vacation Agreement as well as the Travelers Insurance Group Policy Contract No. GA-23000 by "... not allowing the Claimant his contractual right to extended insurance coverage provided when an employee is accorded vacation pay."

The Carrier contended that there is no agreement in existence on this property which gives an employee on a medical leave of absence a demand right to be permitted to interrupt the medical leave of absence to receive vacation time and payment. Carrier insisted that the National Vacation Agreement specifically provides that the "Carrier shall not be required to assume greater expenses because of granting a vacation than would be incurred if an employee were not granted a vacation and was paid in lieu thereof." Carrier argued that the evidence of historical practice submitted by the Organization was merely a one-time example of a subordinate official's erroneous decision made without the knowledge or authorization of the Carrier official responsible for interpreting the negotiated contracts. It claims that this one-time decision is not precedential or controlling in any subsequent similar situation.

The Board will first address the issue of an alleged historical practice or policy and the single incident as cited by the Organization. The Board has consistently held that an erroneous allowance made without the knowledge or approval of the officer of Carrier authorized to make and interpret agreements has no effect on the rules of the agreement. The record in this case does not establish that the Shop Director is the officer of the Carrier authorized to make or interpret agreements. For obvious reasons, his single erroneous decision is irrelevant. As was decided by Award 4 of Public Law Board No. 3499:

"The Organization is also dependent upon past practice in this instance. The record discloses that in the past, payments have been made as claimed in this instance. However, it further reflects that these payments were made as a result of a mistake in the payroll department of carrier. The Payroll Department does not interpret agreements, and the fact that erroneous payments were made in the past does not change the agreement. The rule cannot be changed by a payment shortage nor an overpayment."

Similar decisions were made by Third Division Award 18064 as well as First Division Awards 6361 and 15485. Therefore, it is the conclusion of the Board in this case that the Organization has not sustained its contention relative to a "long historical policy."

The Board has examined the language of the National Vacation Agreement as well as the provisions of Travelers Group Policy Contract GA-23000 as presented by the Organization. The GA-23000 booklet is not a negotiated contract but rather is the insurance company's statement of eligibility for benefits which is beyond the authority or jurisdiction of this Board to interpret. The National Vacation Agreement is subject to the Board's jurisdiction and interpretation. The specific portion of that Agreement, Articles 4(a) and 9 thereof, which are relied upon by the Organization, do not support its arguments and contentions in regard to this case. On the other hand, the provisions of Article 12 of the National Vacation Agreement clearly do apply to the instant situation and is dispositive of the issue here involved.

The Organization's reliance on Item XII, Paragraph E of the Procedures for Handling Vacations is not convincing in this case. That paragraph, by its language, applies only to an employee who is off due to illness in a "current month" who wishes to have his vacation currently allowed. Such an employee may accomplish this without regard to the day of the week on which the vacation allowance begins. Paragraph E specifically states that "THIS IS THE ONLY EXCEPTION TO NOT STARTING VACATION FIRST WORK DAY OF WORK WEEK" (sic). Paragraph E has no application to a situation such as exists in the instant dispute.

The Board is impressed and convinced by the logic of the decision reached in Award 9 of Public Law Board No. 4768 which ruled:

> "Paid vacations refer to those days on which an employee would otherwise be working if not on vacation. Here, the furloughed employee did not have the seniority to work but had not yet taken his vacation. He was entitled to pay for the amount of time he would otherwise be taking as vacation if employed. In this instance, the employee could not take 'vacation' as such, but was obviously entitled to pay in lieu thereof. This did not permit the Claimant to say that he would otherwise be at work if not on vacation."

That opinion was endorsed and repeated in Third Division Award 29936. It is again endorsed and adopted in this Award.

The Board concludes from the case record in this case that Claimant was never actually scheduled for a vacation period in 1992, therefore, he could not properly change something which had never been scheduled. The Board further concludes that Carrier did not violate either the National Vacation Agreement or its published procedures for handling vacations when it declined to permit Claimant to unilaterally interrupt his medical leave of absence and return to the payroll for vacation payment during a period in which he would not otherwise have been working. The Organization has failed in its responsibility to prove otherwise.

AWARD

Claim denied.

O R D E R

This Board, after consideration of the dispute identified above, hereby orders that an award favorable to the Claimant(s) not be made.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Second Division

Dated at Chicago, Illinois, this 26th day of January 1995.