Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD
SECOND DIVISION

Award No. 13505
Docket No. 13340
00-2-98-2-25

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

(Brotherhood Railway Carmen Division
(Transportation Communications International Union
PARTIES TO DISPUTE: (
(Grand Trunk Western Railroad Incorporated

STATEMENT OF CLAIM:

"Claim of the Committee of the Union that:

1. That the Grand Trunk Western Railroad Company/CN violated the terms and conditions of the current Agreement on January 1, 1997 when they failed to compensate seventy five (75) Extra Board Carmen, which were identified in the initial claim by name and Social Security Number, which are referred to as D. A. Anglerbradit, et al., their vacation pay due in 1997 for vacation earned in 1996.

2. That accordingly, the Grand Trunk Western Railroad Company/CN now be ordered to provide the following relief; that all of the seventy five (75) merger protected Extra Board Carmen, identified as D. A. Anglerbradit, et al., their vacation pay due in 1997 for the vacation earned in 1996."

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 were given due notice of hearing thereon.

This controversy arises from several Agreements and exchanges of correspondence, related and unrelated. The Claimants are 75 Grand Trunk Western ("GTW") Carmen whose seniority dated to June 25, 1980 or prior. On October 9, 1995, the Carrier notified all that effective October 16, 1995 their jobs were being abolished with the closure of the Port Huron Car Shops at Port Huron, Michigan Port Huron. Simultaneously the Claimants were advised that "[e]ffective October 17, 1995 you will be placed on the Employee Protection Extra Board per Agreement dated March 18, 1983."

On January 10, 1996, the parties reached Agreement on protective provisions setting forth lump sum payments, pay continuance and other benefits for the Claimants as the result of the assignment of covered heavy repair work at Port Huron to the Canadian National Railway Company (CN). That understanding required each Claimant to select one of the following options by April 1, 1996:

(a) 70% of the 1995 basic rate of pay for five years with all benefits.
(b) 60% of the 1995 basic rate of pay for seven years with all benefits.
(c) $60,000 severance pay.

The understanding with respect to vacations for options (a) and (b) was as follows: [1]

> "Employee will not be eligible for other than extra board pay commencing in the year 1996 except that employee will receive vacation pay that is due in the year 1996."

[1] Option (c), providing for a $60,000 severance payment without pay continuance, did not address vacation entitlements for obvious reasons. No employee selected option (c).

On March 15, 1996, while the Carrier and PDS Railcar Services of Calgary, Alberta (PDS) were negotiating over a lease of the Port Huron facility to PDS with an option to buy, the parties agreed to supplement their earlier Agreement by adding an additional option for the benefit of employees who elected employment with PDS. Option (d) provided as follows:

(d) 40% of the 1995 basic rate of pay for seven years with no benefits.

It is undisputed that each Claimant timely elected either option (a), (b) or (d) and was on the Extra Board from October 17, 1995 until January 1, 1997, when the options were implemented. Between those dates, the Organization characterizes their status as protecting their Extra Board assignments four days each week; the fifth day qualified for unemployment; the sixth and seventh were rest days. The Carrier emphasizes that each Claimant signed papers declaring that he was no longer subject to call for work effective April 3, 1996 as a precondition to eligibility for the separation and related benefits, and that no Claimant performed a single day of compensated service in 1996.

On February 27, 1997, the Organization submitted this claim contending that the Carrier erred in calculating vacation allowances due in 1997. According to the Organization, because each Claimant served on the Extra Board throughout 1996 and the Agreement provides that employees qualify for vacation if in service 100 days in a calendar year, both 1995 and 1996 service should be counted for vacation accrual purposes, and vacation pay earned in 1996 should have been awarded in 1997. By refusing to do so, the Carrier violated the terms of a March 18, 1983 protective Agreement.

The provisions of the 1983 Agreement extending displacement and dismissal allowances to employees adversely affected by a prior merger transaction modified certain terms of the standard New York Dock conditions. Entitlements to vacation and holiday pay for Extra Board employees were spelled out at Section 3 (a) as follows:

> "Days not worked by an employee on the extra board for which he is paid pursuant to the provisions of this Agreement shall be counted in computing days of compensated service and years of continuous service for vacation and Holiday pay qualifying purposes as the same class of employees who are employed full time."

The Organization asserts that because this understanding became part of the Agreement and remains in effect, and because the Claimants received Extra Board pay for days not worked during the period in dispute, the 1983 terms are controlling on the question at issue. And, lest there be any doubt that Section 3 (a) considered protection pay as the equivalent of compensated service for vacation purposes, the Organization cites a letter dated April 4, 1983 from the Carrier to two then General Chairmen confirming that fact:

> ". . . [the] Carrier was agreeable to counting protection pay employees received for months in 1982 as the equivalent to compensated service in determining days of compensated service and years of continuous service for vacation qualifying purposes in 1983 and subsequent years . . . ."

The Carrier maintains that the 1983 Agreement was simply an amendment to New York Dock terms, and thus the Board lacks jurisdiction to construe its terms. Alternatively, under a March 15, 1996 Agreement between it and the Organization, (then represented by General Chairman Thornton) the parties memorialized a new, superseding Agreement providing that the Claimants would be paid their 1995 vacation in 1996, but not their 1996 vacation in 1997. The Carrier contends and the record reveals that Thornton signed this understanding on March 21, 1996, but after a change in union leadership, new General Chairman J. V. Waller repudiated it.

The Organization's reply is that there was never any Agreement with General Chairman Thornton over these issues, or at least none inconsistent with the 1983 understanding, and the Carrier's March 15, 1996 letter to him does not prove otherwise. Plainly, the only purpose of that letter was to add Option (d), above, for the benefit of such of the Claimants as elected to hire on with PDS, because the lease/purchase negotiations were still ongoing at the time and it was unclear when PDS would actually commence operations.

As the foregoing suggests, imposing order on this unwieldy dispute is a one-step-at-a-time process. Our compass sets first on the Organization's contention that these claims must be judged by the provisions of the 1983 protective Agreement, and the Carrier's opposing argument that jurisdiction over both that Agreement and the 1996 Agreement is lacking because they implicate New York Dock issues. Upon review of the record and the arguments of the parties, we conclude that both positions are somewhat extreme. In our view, the issues before us yoke together all the parties' understandings.

We see them as follows: First, what did the Carrier intend to accomplish with regard to vacation pay when it advised the Claimants on October 9, 1995 that they would be placed on the Employee Protection Extra Board effective October 17, 1995 "per Agreement dated March 18, 1983?" And second, what effect, if any, did the arrangements outlined in the parties' 1996 protective Agreement have upon that 1995 commitment? The terms of those Agreements are intertwined; the connecting dots from the issues before us run to all of them, and there is not a chance in a million that their resolution requires reference only to the 1983 or 1996 Agreements. In no event do these questions order such an interpretation of the protective Agreements as might arguably impose upon the jurisdiction of a New York Dock arbitration.

Thus, given the manner in which the arguments are framed, the Third Division has jurisdiction of this dispute.

By its terms, the 1983 Agreement expressly reached to and not beyond the universe of "[a]ll protected employees who are certified as adversely affected pursuant to Section 8 of Agreement 'F' dated September 23, 1981 who would otherwise stand to be furloughed as result of a reduction in force . . . ." By subsequent Agreement in 1983, protection pay received by such employees ". . . for months in 1982 . . ." (emphasis supplied) was to be counted as compensated service for purposes of vacation accrual in 1982 and subsequent years. Two conclusions can be drawn. First, nothing in that Agreement, standing alone, can be read to establish vacation entitlements for the present class of Claimants. And second, to the extent old murmurs from the 1983 Agreement continue to reverberate, it is clear that an arrangement comprehended only vacation accruals earned by reason of pay received for days not worked during the first year of the Agreement, i.e., 1982.

When, on October 9, 1995, the Carrier communicated its intentions with respect to prospective benefits for those affected by the Port Huron shutdown, it initially said those employees would be handled "per" the 1983 arrangement. By employing the Latinism meaning "by" or "through," it promised--or at minimum prompted the strong notion-that the Claimants were entitled to be paid vacation accruals for at least some period of days on which service was not performed. Knowing whether the intent was to precisely parallel the 1983 Agreement and limit accruals to time not worked during the

year in which the transaction occurred, or whether something broader was contemplated calls for a measure of guesswork. [2]

That speculation, however, is needless because conventional rules of construction demand that the Claimants' rights in this instance be determined by construing the 1983, 1995 and 1996 language. The protective Agreement signed by the Carrier and the Organization on January 10, 1996 specifically addressed the rights of "protected Port Huron Car Shop Active Employees including employees presently assigned to the Extra Board at Port Huron as of January 10, 1996 as the result of the close of the Port Huron Car Shop and assignment of heavy repair work to jurisdiction of CN." With regard to vacation entitlements, the terms of that Agreement are complete, self-contained, subsequent to Carrier's earlier communications and sufficiently definite so as to enable us to ascertain their full meaning with certainty. Accordingly, although competing aspects of the parties' understandings on the issue appear to spin the debate like a toy, the dominant instrument on the contretemps over benefits due from the Port Huron closure is the parties' last understanding on that subject. For the reasons that follow, we conclude that an Agreement unequivocally lifts the veils and, read in the context of the parties' other arrangements, makes it clear that the vacation pay claimed was never negotiated.

Options (a) and (b) afforded to Port Huron active employees contained the following language:

> ". . . Employee will not be eligible for other than extra board pay commencing in the year 1996 except that employee will receive vacation pay that is due in the year 1996."

Option (d) was added by the Carrier's March 15, 1996 letter that was signed by General Chairman Thornton about a week later. The modification was apparently necessary because without it the Carrier might not be able to assure PDS that it could make available a sufficient number of Carmen to be employed by it for servicing the Port Huron Heavy Repair facility. Thus, this addendum to the January 10, 1996 Agreement adds an option allowing those who chose employment as a Carman with PDS

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[2] That conclusion is premised upon our finding that, as the Organization correctly argues, the 1983 Agreement remains in effect until changed in accordance with the Railway Labor Act.

to receive 40 percent of their 1995 compensation for up to seven years; receive no health and welfare benefits; and "receive vacation pay that is due in 1996." It thus established terms for vacation substantially identical with those applicable to the other options, i.e., all vacation pay generated by service in 1995 would be paid in 1996. Having had a second look at the vacation issue several months after the initial Agreement, the parties reiterated their earlier understanding on vacation accrual for compensation earned in 1996.

The Organization raises three arguments opposing that interpretation. First, it insists that because the parties thought that PDS would be up and operating early in 1996 (it did not operate until December 31, 1996) there was no need at the time the March Agreement was concluded to address 1997 vacations. Whether that call was prudent is no business of the Board; the crucial fact is that no Agreement was ever reached negating or overriding the January 10 1996 Agreement creating rights to have vacation earned in 1996 paid in 1997. Not surprisingly, then, the March understanding reaffirms the meeting of the minds the parties reflected in their January Agreement that no vacation would be earned as a result of pay for work not performed in 1996.[3] And those Agreements clearly superseded any prior, more generalized understandings, including the arguably conflicting provisions of section 3 (a) of the 1983 protective conditions.

Second, the Organization argues that if the parties had meant to exclude vacation pay earned in 1996 they would have expressly so stated in the referenced Agreements. But they expressly included the 1995 vacation. And, by application of the old sawhorse, the inclusion of one is the exclusion of the other. So the Organization's formulation turns the normal rule of construction upside down; having included vacation pay for 1995, if the parties had meant to include vacatin pay for 1996 in 1997, they were obligated to so state.

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[3] "Not surprisingly" because the weight of prior authority on the issue of vacation pay for time paid pursuant to protective conditions was overwhelming and necessarily known to both sides. See, inter alia, Third Division Award 30848 ("Receipt of protective payments does not constitute compensated service within the meaning of the National Vacation Agreement"); First Division Award 24293 ("It is well settled in the industry that dismissal or displacement allowances cannot be calculated with earnings received in qualifying for vacation pay.") (Citations omitted.); Second Division Award 12907 (quoting Third Division Award 28655: "To be sure, in an isolated sense, monthly guaranteed time is compensated, and it may be argued that it is service in some sense of the word, but when one contemplates a requirement that a person 'render compensated service' there is a strong indication that the employee must actually perform certain action, which is not the case here.")

Along similar lines, the Organization contends that because PDS did not open promptly, by making provision for vacation payments in 1996 the Carrier implied that it would also make payments for 1997. But a different reality boils beneath the crust of that argument: it would have been an unconventional Agreement that generated vacation accruals when services were not performed. Thus, if vacation pay was to be earned in 1996 for the ensuing year, as the year rolled along without PDS cranking up operations, as hinted above, a better raft on which to cling would have been to recognize the need for a codicil to add the year 1997 to the year 1996, not reliance on fictive assumptions concerning what the Carrier meant to imply.

Third, the Organization cites the Carrier's letter dated November 8, 1996 from its Senior Manager Labor Relations rejecting an appeal of another claim relating to work entitlement in support of its position in this dispute. Their Carrier argued that the parties' April 1, 1996 understanding provided that if any of the four options were implemented before PDS operations commenced, Port Huron Carmen covered by their elections would not be eligible to fill Carmen vacancies. Because implementation of the options was delayed, and pay for the Claimants was thus not reduced from Extra Board rates to some applicable percentage thereof until the end of 1996, it was appropriate for the Port Huron Carman who worked the position in dispute to do so. Said another way, the Carrier argued in this letter that the quid pro quo for its Agreement to refrain from utilizing the Carman was lacking. The Organization thus contends the Carrier cannot have it both ways: either the Claimants were available to be used during the time frame in question, and thus accrued service time for purposes of vacation accrual, or the Carrier's November 8, 1996 denial of this other claim for the reasons asserted was in error.

The argument may well have persuasive power, but if so we believe it is in the context of the other claim. While the Board recognizes the apparent tension between the Carrier's position in this claim and that, the record proof here is to the effect that the compensation received by the Claimants solely in consequence of their protective status generally did not qualify them for the vacation benefits sought. If the facts of record in the other claim establish that an individual employee falls outside that broad generalization by reason of having performed sufficient actual service to have earned vacation days, it is conceivable that he may fare differently in the resolution of such claim. For the above reasons, this claim is denied.

AWARD

Claim denied.

ORDER

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 17th day of April, 2000.