Award No. 1813
Docket No. TD-1740

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Sidney St. F. Thaxter, Referee

PARTIES TO DISPUTE:

AMERICAN TRAIN DISPATCHERS ASSOCIATION

SOUTHERN PACIFIC COMPANY (PACIFIC LINES)

STATEMENT OF CLAIM: (a) Claim of the Train Dispatchers that the action of the Management of the Southern Pacific Company (Pacific Lines) in refusing to grant permanently assigned train dispatcher, E. B. Curtiss, of the Bakersfield, California, office, annual vacation allowance of two (2) weeks, twelve (12) working days, during the year 1940, for services during the year 1939, is in violation of the letter, spirit and intent of the Train Dispatchers' Agreement in effect on this property.

(b) Claim of the train dispatchers that Train Dispatcher E. B. Curtiss be granted vacation allowance of two (2) weeks, twelve (12) working days, with compensation at rate of his assignment, for his services during the year 1939, during the year 1941, and in addition to his vacation allowance for 1941 which was earned for services in 1940.

EMPLOYES' STATEMENT OF FACTS: There is an Agreement between the Southern Pacific Company (Pacific Lines) and its Train Dispatchers, represented by the American Train Dispatchers Association, Governing the Hours of Service and Working Conditions of Train Dispatchers, Effective October 1, 1937, and Section (e) Article 3, of said Agreement reads as follows:

> "A train dispatcher who, on January 1st, has served in that capacity for one (1) year or more, will be allowed two (2) weeks, twelve (12) working days' vacation during the succeeding year, with pay at the rate of his assignment during time vacation is taken, or if unassigned, at trick train dispatchers' rate."

E. B. Curtiss was a permanently assigned train dispatcher in the Bakersfield, California office, San Joaquin Division, on January 1st, 1940, where he has served in that capacity for a number of years. He was off eleven days during April 1939 account illness and 22 days during May 1939 account illness and an operation in the Southern Pacific Hospital.

In a letter dated February 13, 1940, addressed to Chairman Stewart, Mr. Sullivan declined to allow the vacation allowance in the following language:

> "Mr. Curtiss having performed but 299 days' service as a train dispatcher during 1939, is not entitled to a vacation with pay during 1940 under the provisions of Article 3 (e), Train Dispatchers' Agreement. Your request therefore is respectfully declined."

Mr. Curtiss was not allowed vacation in 1940 because of time lost in 1939 and the matter was turned over to Vice General Chairman Stewart for handling. In a letter addressed to First Assistant Manager Personnel, J. J. Sulli-

The carrier asserts it has been more than reasonable, not only in its interpretation of Article 3 (e), supra, but in its application of the said Article. The carrier has not attempted to impose upon the petitioner a harsh or unwarranted interpretation or application, but on the contrary, has been decidedly liberal. The petitioner understands, and the carrier is confident this Board will understand, that it was necessary for the carrier to establish some criterion in order that Article 3 (e) would be applied fairly and uniformly. The criterion established, namely, requiring 240 days' service as train dispatcher, was a proper and reasonable one. If the petitioner should contend that the carrier agreed that it would give consideration to cases of train dispatchers who had not actually worked the required number of days during the preceding year, such a contention could not possibly bear fruit as far as the position of the petitioner is concerned in the instant case, or in any case where the carrier did not grant a vacation period to a train dispatcher who had not worked the required 240 days as such during the preceding calendar year, for the reason that the mere fact that the carrier agreed to give consideration to such cases, it would not follow that the carrier was bound to grant the vacation period unless it could be established—which it cannot—*that the carrier agreed that if certain factors were present it would, after* considering the case and having these factors brought to its attention, grant the vacation period. In other words, the mere consideration would mean nothing unless there was the subsequent obligation to grant the vacation period even though the train dispatcher had not served the required 240 days, *provided the petitioner could establish certain agreed on circumstances that* prevented such required service during the preceding calendar year.

The Board should note that, as pointed out in paragraph (7) of carrier's ex parte statement of facts, the carrier established the criterion of 240 days *immediately prior to the effective date of the current agreement* but subsequent to the agreement being negotiated and signed. The said agreement was signed on September 23, 1937, and the instructions establishing the 240-day criterion, as mentioned in paragraph (7), were issued on September 24, 1937; therefore, from the time the current agreement became effective, *namely, October 1, 1937, to the present time, or for a period of approximately* four years, the carrier has required, as was its right, that a train dispatcher must serve 240 days as such during the preceding calendar year to be entitled under Article 3 (e) to a vacation period with pay.

CONCLUSION

The carrier asserts that it has completely established that E. B. Curtiss was not, under the agreement, entitled to a vacation period during the year 1940 for services performed during the year 1939, for the reason that he did not perform the required number of days' service as to bring his services within the provisions of Article 3 (e) of the current agreement between the petitioner and the carrier. The carrier further asserts that in not granting Curtiss a vacation period based on service performed during the year 1939, it was merely doing that which it had a right to do under the provisions of the current agreement between the petitioner and the carrier and therefore it is incumbent upon this Board to deny the alleged claim.

OPINION OF BOARD: This case involves the interpretation of Article 3. Section (e) of the current agreement effective October 1, 1937. The section reads as follows:

"VACATIONS

> (e) A train dispatcher who, on January 1st, has served in that capacity for one (1) year or more, will be allowed two (2) weeks, twelve (12) working days' vacation during the succeeding year, with pay at the rate of his assignment during time vacation is taken, or if unassigned, at trick train dispatcher's rate."

The claimant was a permanently assigned train dispatcher on January 1, 1940, a position which he had held for a number of years. During the year

1939 he lost a considerable amount of time on account of illness, working during this year a total of two hundred and twenty-nine days. Because of this loss in the number of days worked the carrier refused to grant him the vacation of twelve working days with pay as provided in the rule.

It is obvious that the applicable rule makes no mention of the case of the man who may have worked but part time during the year, and discussions seem to have taken place between the management and representatives of the men in an attempt to cover such a situation. There was never, however, any meeting of minds on the subject. The committee for the employes submitted a proposal for vacations, the length of which would have been on a scale graduated in accordance with the time worked. This suggested addition to the rule was not agreed to. All that came out of negotiations on this particular point was an acknowledgment by the carrier that full vacation allowances would be granted to men who had performed "240 days train dispatching service in the preceding calendar year." This admission by the carrier does not, however, imply as seems to be suggested that the employes have agreed that no vacation will be given unless an employe has worked at least 240 days.

No modification of the rule having been made and no interpretation of it having been agreed to, we must apply it as writtten to the facts of this case. The carrier seems to concede that such is our duty when it says in its submission: "Article 3 (e) has not been amended or repealed since October 1, 1937, and is and has been since October 1, 1937, the sole and therefore controlling provision of the collective agreement with regard to the allowance of vacation periods to train dispatchers." We concur in that statement.

The carrier then argues that there are two alternatives,—the first, to construe the rule literally, and the second, to accept the carrier's suggested concession to grant vacations only to those who had worked a minimum of 240 days during the year preceding January 1st of the year in which the vacation would be given. A literal construction, according to the carrier, would mean that no train dispatcher would be entitled to a vacation "who had not served in that capacity continuously for a perior of one year, and by serving continuously, we mean serving each day of his assignment."

The carrier by its suggested construction seems to pose for this Board a dilemma. It is not necessary, however, that we should be impaled on either horn of it. There is certainly nothing in the rule which makes any minimum service by the employe a condition precedent to the allowance of a vacation, and apparently the carrier does not so contend. And as we have pointed out, there was no such modification of the rule ever agreed to by the parties. We therefore have before us the rule as written.

We are not in accord with the carrier's interpretation of it which in our opinion does violence to both its letter and its spirit. The rule applies to "a train dispatcher who, on January 1st, has served in that capacity for one (1) year or more." Where does the carrier find warrant for its interpretation that the train dispatcher must have "served in that capacity continuously for a period of one year"? His status is fixed, it seems to us, not by continuous service every day for a year, but by having served as a train dispatcher for the carrier for at least a year. The rule has reference not to his service from day to day but to his status as a train dispatcher over a period of at least a year prior to January 1st. We read language not in a vacuum but in the light of the problems with which we are dealing and as applied to life's every day affairs. Only by so doing can we save it from absurdity. We may say of an employe: "He has served me faithfully for a year or more." Does anyone understand us by that to mean that he has worked each day during the preceding year, that there has been no lay-off even for a day on account of illness or other justifiable cause?

This rule means simply that a train dispatcher who has held that status with the company for a year or more prior to January 1st is entitled to his

vacation with pay. It is not for this board to read into the rule any qualification however equitable it may be. To do so would be to amend the rule, not to apply it.

FINDINGS: The Third Division of the Adjustment Board, after giving the parties to this dispute due notice of hearing thereon, and upon the whole record and all the evidence, finds and holds:

That the carrier and the employe involved in this dispute are respectively carrier and employe within the meaning of the Railway Labor Act, as approved June 21, 1934;

That this Division of the Adjustment Board has jurisdiction over the dispute involved herein; and

That the carrier violated the agreement by not granting the claimant a vacation with pay during the year 1940.

AWARD

Claim (a) sustained.

Claim (b) sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: H. A. Johnson
Secretary

Dated at Chicago, Illinois, this 19th day of May, 1942.