Award No. 4024

Docket No. TD-3937

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

James M. Douglas, Referee

PARTIES TO DISPUTE:

AMERICAN TRAIN DISPATCHERS ASSOCIATION

THE SOUTHERN RAILWAY SYSTEM

STATEMENT OF CLAIM: Claim of the American Train Dispatchers Association that:

The Southern Railway System now compensate O. R. Cravey of the Selma, Alabama office in accordance with the provisions of Section 5 of the Mediation Agreement of March 14, 1944, in N.M.B. Case A-1572, for the vacation earned by said O. R. Cravey during the year 1945 but which the carrier failed to afford him in 1946.

EMPLOYES' STATEMENT OF FACTS: In the Selma, Alabama train dispatching office of the carrier, O. R. Cravey was employed and regularly assigned as a trick train dispatcher during the entire year 1945 and continued in such capacity up to April 26, 1946. On the latter date he was dismissed from service as train dispatcher but on June 2, 1946 was reinstated to the same position held prior to April 26, 1946 and with seniority rights unimpaired. The circumstances causing the dismissal of Cravey above-referred to are not here recited because they are not relevant to a determination of whether he was or was not entitled to a vacation or compensation in lieu thereof as provided in Mediation Agreement Case A-1572.

Section 5 of that agreement reads as follows:

> "Effective with the calendar year 1944, an annual vacation of two weeks (12 working days) with pay will be granted to each dispatcher, covered by the scope of each respective agreement, who rendered compensated dispatcher's service on not less than one hundred sixty (160) days during the preceding calendar year, under the following conditions:"

Items (2) and (4) of those conditions read:

> "(2)—**When Vacations Are Not Afforded**
>
> If a vacation is not afforded, payment in lieu thereof will be made not later than the first payroll period in January of the following year, computed on the following basis:"
>
> "(4)—No vacation with pay, or payment in lieu thereof, will be due an employe whose employment relation with a carrier has terminated prior to the taking of his vacation, except that employes retiring under the provisions of the Railroad Retirement Act shall receive payment for vacation due."

In conclusion, the carrier submits that the evidence in this case does not support the claim as presented by the employes. For the reasons given, the claim should be denied, and the carrier respectfully requests that the Board so decide.

Exhibits not reproduced.

OPINION OF BOARD: The question for decision is whether claimant has forfeited his right to a vacation under the terms of the applicable rule because of his previous dismissal from Carrier's service although subsequently reinstated.

Claimant was dismissed for cause on April 26, 1946. He was restored to service as a train dispatcher on July 2, 1946 with full seniority rights but without pay for time lost. After being reinstated he requested a vacation from July 26 to August 10, 1946. This was denied him because of his previous dismissal.

Under a Mediation Agreement effective March 14, 1944, in N. M. B. Case A-1572, the parties are bound by the following rules governing vacations:

"Section 5

Effective with the calendar year 1944, an annual vacation of two weeks (12 working days) with pay will be granted to each Dispatcher, covered by the scope of each respective Agreement, who rendered compensated Dispatcher's service on not less than one hundred sixty (160) days during the preceding calendar year, under the following conditions:

(1) * * * *

(2) * * * *

(3) * * * *

(4) No vacation with pay, or payment in lieu thereof, will be due an employe whose employment relation with a Carrier has terminated prior to the taking of his vacation, except that employes retiring under the provisions of the Railroad Retirement Act shall receive payment for vacation due.

(5) * * * *."

The decision here turns on the condition expressed in Sub-paragraph (4) above.

The wording of Sub-paragraph (4) is identical with Rule 8 of the National Vacation Agreement entered into by certain Carriers and Fourteen Co-operating Railroad Labor Organizations. The Petitioner in this case was not a party to that Agreement. The fact that Agreement covered non-operating groups seems to us to have no bearing on the interpretation of the rule involved.

Since that Agreement was effective December 17, 1941 or more than two years prior to the Agreement under consideration, Carrier contends the interpretation of Rule 8 was inferentially adopted by the parties when they agreed on the identical provision in Sub-paragraph 4. Referee Morse interpreted Rule 8 to mean where an employe had been dismissed and later returned to service without loss of seniority that his employment relation had been terminated within the meaning of the rule, so that he forfeited his vacation. But under still another Vacation Agreement with the operating groups an Arbitration Board considering the same question under a similar rule reached the opposite conclusion.

In this case we will make our own interpretation of Sub-paragraph 4. The contrary interpretations of the other similar rules are persuasive only, not binding.

Claimant fulfilled the requirements of Section 5 by working not less than 160 days of 1945, the preceding year. By doing so he earned the right to two weeks' vacation in 1946 if then employed. Then in 1946 he was dismissed, but later reinstated, and at the time he requested his vacation he was employed by Carrier.

Did his previous dismissal forfeit his right to a vacation? We hold it did not. We are of the opinion the intent of Sub-paragraph 4 is to limit vacation rights to those in the employ of the Carrier at the time the vacation, or its equivalent is taken. The stated exception itself would indicate this. It expressly excepts only those employes not then employed who have retired, and authorizes vacation benefits to them.

The use of the word "terminated" emphasizes the idea of placing some sort of a limit. The limit here is the end of the employment relation, and no vacation or benefit is authorized so long as that relation does not exist, subject of course to the exception stated.

So long as the vacation was earned in accordance with Section 5, and is to be taken while the employment relation is continuing, we do not find the rule requires its forfeiture by a previous temporary interruption of the employment relation such as occurred here. Of course an employe could waive his vacation privileges but the record shows no waiver in this case.

Accordingly the claim must be sustained.

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 Employes involved in this dispute are respectively carrier and employes 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 Carrier violated the Agreement.

AWARD

Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: A. I. Tummon
Acting Secretary

Dated at Chicago, Illinois, this 30th day of July, 1948.