Award No. 5443

Docket No. TE-5504

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Jay S. Parker, Referee

PARTIES TO DISPUTE:

THE ORDER OF RAILROAD TELEGRAPHERS

MICHIGAN CENTRAL RAILROAD

(The NYC RR Co., Lessee)

STATEMENT OF CLAIM: Claim of the General Committee of The Order of Railroad Telegraphers on the Michigan Central Railroad that:

1. The Carrier violated the agreement between the parties when it required the Claimant S. E. Andrus, occupant of second trick position, Nichols, to absent himself from his assigned position for three days in excess of the vacation time due him in 1950 and refused to pay him for these three days, and

2. The Carrier shall now compensate Claimant Andrus for three eight-hour days, or a total of 24 hours at the straight time rate.

EMPLOYES' STATEMENT OF FACTS: Claimant Andrus was the regular assigned occupant of the position of second trick at Nichols.

On December 14, 1948, the following information was given the Claimant and others by a Carrier representative.

"L. H. Wehrle
C. A. Thorne
O. K. Renner
C. E. Andrus

Jackson, Dec. 14, 1948

Phone conversation date with Wehrle and Renner.

C. A. Thorne, O. K. Renner and C. E. Andrus will start their 1949 vacation Monday, January 3rd.

L. H. Wehrle will start his vacation January 24th.
cc: K. F. Lougee

C A S."

The advice contained in the next above communication was superseded by the following telegram issued by a Carrier representative:

"XN Jackson, December 29, 1948

C. E. Andrus
Nichols Tower

A. F. Salerno relieves J. E. Robeson 3rd trick Battle Creek December 31st, January 1st, 2nd, 3rd then on second trick Nichols

under Section 2 of the National Vacation Agreement. The said agreement is specific in providing for nine days' vacation for the two years but less than three years' service which Andrus had at the time. Accordingly, there is no merit to his claim for three additional days' pay and it should be denied. To sustain the claim in this case would encourage disloyalty and would not be conducive of good morale or justice.

(Exhibit not reproduced.)

OPINION OF BOARD: Claimant Andrus, a telegrapher, assigned to the second trick position at Nichols Tower, Nichols, Mich., was entitled to nine (9) days vacation in the year 1949 for service rendered in 1948.

On December 29, 1948, the Chief Dispatcher directed a wire to claimant which was received by him at Nichols Tower. This wire read:

> "A. F. Salerno relieves J. E. Robeson 3rd Trick Battle Creek December 31st, January 1st, 2nd, 3rd, then on second trick Nichols Tuesday, January 4th for two weeks C. E. Andrus will resume duty January 18th."

While the wire from which we have just quoted does not expressly so state, there can be no question, under the confronting facts, that Andrus understood it was intended to and did have reference to his 1949 vacation period. Nor can there be dispute that at the time such message was received he was entitled to only nine days vacation under terms of the National Vacation Agreement and arrangements which had been consummated prior to that date. In fact the parties so concede. By the same token it cannot be denied the wire stating in substance that Andrus was to have two weeks vacation instead of nine days was an error on the part of the Chief Dispatcher sending it.

Andrus commenced his vacation January 4th and did not return to work until January 18th. In the meantime the Chief Dispatcher discovered his error and on January 14th made an attempt to locate him through Agent-Operator Wood, who states he was instructed to get in touch with him, tell him his vacation was up and ask him if he was going to work or wished to take more time off. Wood complied by calling the Andrus' home and then going to the house at the noon hour but failed to get in touch with anyone.

Following claimant's return to work the Carrier refused to pay him for three of the twelve working days he had been on vacation on the ground he was only entitled to nine such days under the Vacation Agreement, and that he knew at the time he had taken the additional three days he was not entitled thereto under the vacation assigned him.

Subsequently, the dispute as to whether claimant was entitled to pay for such three days was submitted to the committee established by Article 14 of the Vacation Agreement which rendered a decision to the effect the Vacation Agreement provided only nine days vacation for the complaining employe, hence the dispute was not within its jurisdiction. Thereafter Andrus filed a claim with the Carrier, which all parties understood and treated as being based on the premise the Carrier had violated the current rules agreement when it required him to absent himself from his assigned position for three days in excess of the vacation time due him in 1949 and refused to pay him the rate of his position for that time.

Some complaint is made by the Carrier that the claim originally filed with this board, as was true on the property, refers to vacation time due in 1950 instead of 1949. We are not disposed to labor a contention this obvious error deprives the board of jurisdiction. The claim was amended to show the proper year involved some time after it was filed here and it is clear from the record that at all times, both on the property and here, the parties were fully aware the controversy was over 1949 vacation time. Under such conditions it would be hypertechnical, indeed, if we were to take

the position such error, particularly when it resulted in no prejudice to Carrier, precludes the claimant from a hearing on the merits of his claim.

The claimant bases his right to a sustaining award on Rules 9(a) and 12 of the current Agreement.

Rule 9(a) so far as here pertinent reads:

> "Employes will not be required to suspend work during regular hours * * *."

Applicable provisions of Rule 12 provide:

> "Except as provided in Rule 11 (not here involved) **regularly assigned** employes will receive one day's pay within each twenty-four (24) hours, according to location occupied or to which entitled, if ready for service and not used, * * *."

The essence of the claimant's position is that he was required to suspend work and the gist of every contention advanced by him in support thereof is that the wire, which he concedes to be a mistake on the part of the Chief Dispatcher, establishes that fact because it stated his vacation would commence January 4th and that he would resume duty January 18th.

On the other hand, the Carrier, while it concedes the mistake, takes the position claimant (1) knew he was entitled to but nine days vacation, (2) was perfectly aware of the fact the Chief Dispatcher had made a mistake when he received the wire and (3) notwithstanding that knowledge made no attempt to correct the error but on the contrary, after he had bragged to fellow employes of his intention to permit it to inure to his benefit, took advanage thereof by leaving on his vacation and purposely keeping out of the Carrier's way until January 18th in order that it would have no opportunity to correct an inadvertent error on the part of another of its employes. Carrier then argues that under such conditions it cannot be said to have required the claimant to suspend work for the involved three-day period in violation of Rule 9 and that claimant cannot be heard to say that he was deprived of three days' pay in violation of Rule 12.

In support of the Carrier's position the record discloses a verified statement by William A. Beer, Day Operator-Leverman at Nichols Tower, one of claimant's fellow employes, which reads as follows:

> "In answer to your letter of recent date relative to claim of Opr. Leverman, C. E. Andrus for three days additional vacation during January 1949 covering his vacation due him for work performed in 1948.
>
> I hereby state that Mr. C. E. Andrus, Operator-Leverman at Nichols Tower, knowingly and boastfully with deliberate intent took more than the number of days vacation to which he was entitled for the year 1948.
>
> This was at the time he received his notification that his vacation was to start January 4th, 1949.
>
> In my presence he, at this time, flagrantly stated that he was not only cognizant of the number of days which he had coming for this vacation but that he intended to take 12 days vacation despite the knowledge that he had only 9 days due him for said vacation.
>
> I, the undersigned, make this statement of my own volition and without duress."

In addition to the above the Carrier asserts that when the Chief Dispatcher talked to Agent-Operator Wood, heretofore mentioned, with respect

to correcting his error, the latter told the former he did not believe he would be able to contact Andrus because that individual had indicated he intended to keep out of the Chief Dispatcher's way. This assertion is supported by a verified statement from the Chief Dispatcher which reads:

> "Referring to File 6934-7115, relative to the claim of Operator C. E. Andrus at Nichols Tower, Battle Creek, for three days' vacation pay in 1949.
>
> I talked with Agent P. C. Wood at Nashville just before Andrus' nine days' vacation terminated and asked him if he could get word to Andrus that he was supposed to resume duty at the expiration of the nine days, which was all the vacation he was entitled to, with pay. Mr. Wood advised me on the telephone that Andrus had gone to Florida and that he was keeping strictly out of my reach."

The only thing in the record which can be regarded in the nature of evidence denying either of the foregoing statements is an unverified letter written by Andrus to the President of the Organization wherein he states, obviously referring to the statement first quoted, he does not know who originated the statement, that it is false and without grounds nor basis, and is denied.

Faced with the unfortunate duty of deciding whether Andrus knew how much vacation he was entitled to and whether with knowledge of the Carrier's error he made the statements attributed to him and deliberately took advantage thereof, we are constrained to give credence to the verified statements and hold that he did. Nevertheless, the question remains whether, and notwithstanding, the claimant, under either or both of the two rules on which he relies, would be entitled to three days' pay as claimed.

In approaching decision of this question, even though the claim is based on a violation of the Rules Agreement, it should be kept in mind it nevertheless springs from a bona fide effort on the part of the Carrier to conform to requirements of existing provisions of the National Vacation Agreement. Therefore it is proper that rules and interpretations of the latter agreement, if they have a legitimate bearing on the issue now in question, should be given consideration.

Turning to that Agreement we note Article 12(a) which provides that unless otherwise provided, a Carrier shall not be required to assume greater expense because of granting a vacation than would be incurred if an employe were not granted a vacation and was paid in lieu therefor under the provisions thereof. Here it is certain that if Andrus had not been granted a vacation he would have received pay for only nine days. In the interpretations (see page 58 of the Agreement and Interpretations thereon) by Referee Morse we find the following statement:

> "The parties should never forget that the primary purpose of the vacation agreement was to provide vacations to those employes who qualified under the vacation plan set up by the agreement. Any attempt on the part of either the carriers or the labor organizations to gain collateral advantages out of the agreement is in violation of the spirit and intent of the agreement."

Here, in view of our announced conclusions, it is apparent Andrus is attempting to gain collateral advantages growing out of the agreement, in violation of its spirit and intent.

In the instant case we are convinced that Andrus (1) knew he was entitled to only 9 days vacation, (2) was aware of the error made by the Chief Dispatcher when he received his wire, (3) instead of attempting to correct that error laid back and deliberately took advantage thereof for his own personal gain and benefit, (4) if he had made any reasonable effort to correct the error, would have been able to correct it immediately and

would not have been required to lay off the three days, in question and (5) purposely kept away from the Carrier's representatives in order that such error could not be corrected. Viewed in the light of that situation, and the intent and purpose of the Vacation Agreement, to which we have referred, we do not believe it should or can be said that under the confronting facts and circumstances the Carrier's action resulted in requiring the claimant "to suspend work during regular working hours" within the meaning of that term as used in Rule 9. Of course, if he was not required to suspend work the record discloses no violation of Rule 12 for he was not ready for service on the days in question and hence not used. The result is that he has not established sound grounds for a sustaining award.

FINDINGS: The Third Division of the Adjustment Board, upon the whole record and all the evidence, finds and holds:

That both parties to this dispute waived oral hearing thereon;

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 under the existing facts and circumstances the Carrier did not violate the Agreement.

AWARD

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: A. I. Tummon
Acting Secretary

Dated at Chicago, Illinois, this 6th day of September, 1951.