Award No. 5666
Docket No. CLX-5544

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Hubert Wyckoff, Referee

PARTIES TO DISPUTE:

BROTHERHOOD OF RAILWAY AND STEAMSHIP CLERKS, FREIGHT HANDLERS, EXPRESS AND STATION EMPLOYES

RAILWAY EXPRESS AGENCY, INC.

STATEMENT OF CLAIM: Claim of the District Committee of the Brotherhood that

(a) The agreement governing hours of service and working conditions between the Railway Express Agency and the Brotherhood of Railway & Steamship Clerks, Freight Handlers, Express & Station Employes, effective October 1, 1940, was violated when F. D. Black, Messenger, Arkansas Division, was refused and not allowed vacation with pay in 1948, and

(b) He shall now be compensated the amount equivalent to the vacation with pay due him in 1948.

EMPLOYES' STATEMENT OF FACTS: F. D. Black is a messenger in the Arkansas Division Train Service Seniority District, with seniority dating from September 15, 1915. He was the occupant of a regular position when on October 23, 1947 he became ill, which illness has continued, preventing his return to work. At the time of his illness, messenger Black occupied one of a pool of two positions, operating Clarendon, Arkansas-Memphis, Tennessee Route, Missouri Pacific Trains 841-334-335-840, and working as follows:

> 1st day, report Clarendon, Train 841, 6:40 A.M., release Memphis, Train 334, 12:15 P.M., report Memphis, Train 335, 3:15 P.M., release Clarendon, Train 840, 8:55 P.M.
>
> 2nd day—Layover at Clarendon.
>
> 3rd day—Repeat above schedule.

May 12, 1948 Black applied for a vacation, based on his length of service and work performed in the year 1947, such vacation to begin with Train 841, reporting Clarendon, Arkansas, 6:40 A.M., May 13. He would again take up his assignment with Train 841, reporting at Clarendon, 6:40 A.M., May 25. His schedule in May, 1948 was 16 trips of 11 hours and 15 minutes each, for a total of 180 hours, salary $250.60 per month, with an hourly rate of $1.3922. Black was entitled to 12 days' vacation with pay. Beginning his vacation with Train 841, May 13, he would again take up his work with Train 841, on May 25, as follows:

parties throughout the period the vacation rule has been in effect has been such as to leave no doubt that Rule 91 provides only that a vacation will be granted—a period of exemption from work, and that it does not contemplate a money grant in lieu of vacation. The vacation rule became effective January 1, 1938, and at no time in the nearly thirteen years which have elapsed has it been the practice to grant vacations to employes not actually working at the time, nor has it heretofore been urged that a money grant be made in lieu of vacation in circumstances such as we have here where an employe has performed no work because of disability subsequent to his last day of compensated service and who without again returning to work may have retired under the provisions of the Railroad Retirement Act.

In the field, Employes cited the language of Referee Frank P. Douglass in Decision E-1307 of Express Board of Adjustment No. 1 in support of their contentions in the instant case. That the holding of Referee Douglass in Decision E-1307 is not controlling in the instant case is perfectly clear. The claim in the case decided by Referee Douglass in Decision E-1307 was that "J. J. Ford, Brockton, Mass., shall be paid the equivalent of six days pay in lieu of the vacation he was entitled to have during the year 1941 but which vacation he did not receive due to being inducted into Military Service." Employe Ford was inducted into the Military Service on March 12, 1941, upon one week's advance notice. Referee Douglass' decision was predicated on the fact that Employe Ford's induction came before he received his vacation and that only a separation from the service could deprive him of such; that induction into the Military Service was not a separation from the service, and in such circumstances Ford was entitled to pay in lieu of vacation. The dissimilarity with the instant case is perfectly apparent. Decision E-1307 is not pertinent to the facts in the instant case and its application is restricted solely to claims arising under the same basic circumstances.

The claim of Petitioner in the instant case for a money grant in lieu of vacation is wholly unsupported by any rule or rules of the Agreement. What it is seeking here is an interpretation of the Agreement which will have for its effect the reading into the vacation rule of something that does not appear in the rule, and is in fact an attempt upon the part of the Petitioner to secure by means of an award from the National Railroad Adjustment Board, Third Division, a new rule, which properly should be progressed under Sec. 6 of the Railway Labor Act.

Carrier submits that it has amply demonstrated that there is no merit for the claim on the facts, the rules of the applicable Agreement, or the practices followed by the parties since the vacation rule became effective January 1, 1938, and respectfully asserts that it must be denied in its entirety. The facts are plain, that nowhere is a money grant in lieu of vacation contemplated by the rule. The Division is fully aware of the injunction laid down in many awards of the various Divisions of the National Railroad Adjustment Board that if the plain and unambiguous provisions of the Agreement do not represent the intention of the parties, negotiations afford the only remedy; that where the contract is plain and unambiguous no basis for construction exists, and to do so constitutes contract making rather than contract interpretation.

(Exhibits not reproduced).

OPINION OF BOARD: This case involves the vacation rights of a disabled employe.

Claimant had worked regularly for the Carrier for 32 years until October 23, 1947 when he suffered a heart attack and applied for and was granted disability annuities under the Railroad Retirement Act which continues his status as an employe and requires him from time to time to submit proof of the continuance of disability with a view to resumption of service should the disability terminate.

May 13, 1948 Claimant made request for twelve days' pay but the request was denied upon the ground that he was not working then and had not worked since October 23, 1947.

The Vacation Rule reads:

"Anuual Vacation—Rule 91. Vacations will be granted to all employes upon the following bases and conditions:

"(a) Employes having more than one (1) year's service but less than ten (10) years' service—six (6) working days with pay.

"(b) Employes having ten (10) years' or more service but less than fifteen (15) years' service—nine (9) working days with pay.

"(c) Employes having fifteen (15) years' service or more—twelve (12) working days with pay.

"(d) Furloughed employes to be allowed vacation where they have worked in excess of 561 hours during the preceding calendar year.

"Extra List employes to be allowed vacation where they have worked on some part of 153 days, thus accumulating more than 561 hours, during the preceding calendar year.

"In the case of furloughed or Extra List employes they will be granted such proportion of the vacation allowance as the hours worked bear to 2,244 hours."

FIRST. The Rule fixes a qualifying period for furloughed and extra list employes, but none for regular employes. The qualifying period is 561 hours of work; and furloughed and extra list employes are entitled only to such proportion of the vacation allowance as the hours worked in excess of 561 bear to 2,244 hours.

If the Rule means that regular employes can qualify for the vacation allowance only by a full year of service, no less, the Rule puts them at a disadvantage with furloughed and extra list employes. But the Carrier states that regular employes do not suffer deductions for sick leaves of the duration involved here. We therefore treat the case as if Claimant had worked the full calendar year 1947.

SECOND. The annual vacation is not a mere money grant paid for annual cycles of service; nor is it a mere period of exemption from work. It is both. It is a period of exemption from work "with pay."

The annual vacation is not a gratuity, because both the duration of the vacation and the grant itself are measured in terms of the amount of service rendered by the employe.

It may be that part of what the Carrier expected to receive for the grant of vacations was better service from vacation-refreshed employes but the Rule does not say so. What the Rule does say is that the grant is to "all employes" without restriction or exception; and Claimant was admittedly an employe during 1948. Moreover, he has complied with all of the specified "bases and conditions" upon which the vacation is agreed to be granted.

It is too much of a strain on plain language to conclude that "all employes" means only those who continue in active service, or that a grant given in exchange for one year's service means one year's service plus additional service the succeeding year.

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 Agreement was violated as above found.

AWARD

Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: A. Ivan Tummon
Acting Secretary

Dated at Chicago, Illinois, this 29th day of February, 1952.