Award No. 5910
Docket No. CLX-5901

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

David R. Douglass, 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 Railway Express Agency, Inc., and the Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employes, effective September 1, 1949 was violated at the Seattle, Washington Agency when R. A. Pierson was denied payment in lieu of vacation not granted him in May 1950; and

(b) He shall now be compensated for vacation period between May 20, 1950 and May 31, 1950 inclusive at the rate of $284.04 basic per month.

EMPLOYES' STATEMENT OF FACTS: R. A. Pierson, with a seniority date of August 8, 1941, was the occupant of position titled Relief Export and Import Clerk at the Seattle, Washington Agency, Group No. 89 Position No. 3, with various assigned hours, salary $284.04 basic per month with Thursday and Friday as days of rest.

Employe Pierson made request for his vacation to begin on May 20, 1950 and end with June 1, 1950. Rest days and holidays are not counted as working days. Therefore the vacation requested by Pierson would include May 20, 21, 22, 23, 24, 27, 28, 29, 31 and June 1. His request for vacation covering this period was allowed.

In view of the fact that May 18 and 19 were rest days on the job held by Employe Pierson, he last worked on May 17 preceding the vacation period. On May 15, 1950, Pierson tendered his resignation in writing to General Agent R. M. Einer, such resignation to become effective on Wednesday, May 31, 1950 at 5:00 P. M.

Pierson took his vacation as indicated above, and his resignation became effective at 5:00 P. M. May 31, 1950. However, Carrier declined to pay him for the vacation period that had been allowed him, and has continued to decline payment. The amount due Pierson is still due and constitutes the basis for this claim.

June 14, 1950 Local Chairman A. J. Rickett filed claim with General Agent R. M. Einar in behalf of Employe Pierson. (Exhibit A.)

The Awards cited plainly support the position of the Carrier that Pierson's resignation was effective "as of the date submitted," May 15, 1950, (Award 4583) and that on the date, June 14, 1950, when Local Chairman Rickett entered claim in Pierson's behalf "there was no agreement between him and the Carrier" (Award 4002). For the above reasons Carrier asserts that the claim for a money grant in lieu of vacation, entered a month after the employe had resigned, is invalid and should be denied.

Without waiving its position that when Pierson "elected to resign and leave the employment of the Carrier, he not only relieved himself of all responsibilities under the contract, but he relieved the Carrier of all duties towards him as well" (Award 4002), Carrier asserts that there is no support under Rule 91 of the Agreement for a money grant in lieu of vacation. The vacation rule does not so provide, neither does any other rule of the Agreement, past practice, or understanding, contemplate that a vacation is other than a period of exemption from work. It follows naturally that a vacation or period of exemption from work cannot be accorded an employe who has resigned, is not working, and is in fact an employe of another employer. To allow a money grant in lieu of vacation to a former employe in such circumstances would in effect be a gift and a perversion of the intended purpose of the Rule.

Having demonstrated that there is no support under the rules of the Agreement for the claim here attempted to be asserted, the conduct of the 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 fourteen 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 resigned from the service in order to accept work for another employer.

The claim of Employes in the instant case for a money grant in lieu of vacation is wholly unsupported by any rule or rules of the Agreement. What the Employes are seeking 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 Employes 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 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.

All evidence and data have been considered by the parties.

(Exhibits not reproduced.)

OPINION OF BOARD: The claimant was entitled to his annual vacation and asked that it be scheduled to commence on May 20, 1950 and to

last through and including June 1, 1950. The claim is made only for the period from May 20, 1950 to May 31, 1950 inclusive for reasons that will appear later in this opinion. It seems clear to this Board that this scheduled vacation period was met with approval by the Carrier, at least up until the claimant tendered his resignation in writing to the agent on May 15, 1950. The resignation bore an effective date of May 31, 1950.

The claimant became employed by Northwest Airlines on May 18, 1950. The Carrier contends that such action ended his employment with them as soon as he went to work for the airline.

It is generally accepted that an employe earns his vacation and is entitled to it as a result of performing certain work during the year preceding the vacation.

The main question with which we are here concerned is whether the claimant ended his employment when he went to work for the airline or did it not end until May 31, 1950, the effective date of his resignation.

It is our opinion that as far as this Carrier is concerned the claimant's employment did not end until May 31, 1950. There is nothing in the agreement to prohibit an employe from accepting temporary work during his vacation. The same applies to work of a permanent nature as is this present case. The fact that this claimant took this other work does not, in itself, destroy the employe relationship between the claimant and this Carrier.

The claimant made it clear to the Carrier that he did not wish to terminate his employe status until May 31, 1950. He did all that was required of him up until May 31, 1950. It has not been shown that claimant was called and turned down a call on May 18 or May 19, his regular rest days prior to his actual vacation days.

The action taken here amounts to an arbitrary dismissal, without any basis under the terms of the agreement.

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 the Carrier violated the Agreement.

AWARD

Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: (Sgd.) A. Ivan Tummon
Acting Secretary

Dated at Chicago, Illinois, this 7th day of August, 1952.