

Award No. 6133
Docket No. CLX-5954

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

Paul G. Jasper, 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, Inc., and the Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employes, effective September 1, 1949, was violated at the Philadelphia, Pennsylvania Agency when Carrier refused to pay into the estate of Theodore Haas vacation pay due deceased for year 1949; and

(b) The estate of Theodore Haas shall now be allowed vacation pay due deceased at rate of \$60.77, basic per week.

EMPLOYEES' STATEMENT OF FACTS: Theodore Haas with an established seniority date of March 27, 1923 was prior to November 18, 1949, the regular occupant of a position titled Platforman at the Philadelphia, Pennsylvania Agency. Effective that date he was granted a leave of absence due to illness. Haas was entitled to a vacation for work performed in 1949 but died before getting the benefit of it. Local Chairman, J. J. Doyle requested vacation allowance in conference with Chief Clerk to Superintendent J. J. McClory and W. E. McQuillis, Supervisor of Terminals. He was to be advised in due time as to whether or not this would be granted. After waiting a reasonable period the Local Chairman wrote the Superintendent May 24, 1950. (Exhibit A).

June 8, 1950 Superintendent McClory wrote Local Chairman Doyle denying the claim. (Exhibit B).

June 13, 1950 General Chairman J. J. McGarrigle appealed Superintendent McClory's decision to General Manager Robert C. Hendon. (Exhibit C).

July 7, 1950 General Manager Hendon wrote General Chairman McGarrigle sustaining decision of Superintendent McClory. (Exhibit D).

terminated by death his employment relation with the Carrier on April 22, 1950, would constitute an unwarranted construction of the Agreement between the parties and constitute contract making rather than contract interpretation, which is not the function of the Board. If the provisions of the Agreement rule do not represent the intention of the parties, the remedy lies in the negotiation of a new rule under Section 6 of the Railway Labor Act. Rule 91 is clear and unambiguous, that a vacation of a certain number of days will be granted. A vacation is a period of exemption from work. A period of exemption from work cannot be accorded an employee whose employment relation has been terminated by death.

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 holdings of Referees in the precedent decisions cited that this Board is without authority to decide cases upon the basis of equity, and that the claim should be denied in its entirety.

All evidence and data has been considered by the parties in correspondence and conference.

(Exhibits not reproduced).

OPINION OF BOARD: This claim is filed by the Organization on behalf of the Estate of Theodore Haas, who, at the time of his death, was an employee of the Carrier. It is for two weeks' vacation pay.

Theodore Haas was employed by the Carrier as a Platform man, with a seniority date March 27, 1923.

Due to illness, Haas was granted a leave of absence on November 18, 1949, and on April 22, 1950, he died.

Under Rule 91, Haas had service which entitled him to a vacation of ten (10) days with pay. Rule 91 provides:

"Annual Vacation—Rule 91. Vacations will be granted to all employees upon the following basis and conditions:

"(a) Employees having more than one (1) year's service but less than five (5) years' service—five (5) working days with pay.

"(b) Employees having five (5) years' service or more—ten (10) working days with pay.

"(c) Furloughed employees to be allowed vacation where they have worked in excess of 508 hours during the preceding calendar year.

"Employee status employees to be allowed vacation where they have worked on some part of 127 days, thus accumulating more than 508 hours, during the preceding calendar year.

"In the case of furloughed or employee status employees they will be granted such proportion of the vacation allowance as the hours worked bear to 2,032 hours."

Haas had not requested a vacation, nor was a vacation programmed or scheduled for him prior to his death.

Theodore Haas, having five or more years' of service, and having rendered service during the year 1949, earned ten days' vacation with pay.

It is well settled that vacation with pay is not a gratuity, but, by contract, is earned compensation for service rendered.

Rule 91 does not provide that the employe must be living, nor that a vacation with pay shall not be due to an employe whose employment relationship has terminated prior to the taking of his vacation.

The Carrier has cited awards involving vacations. However, these cases were governed by the National Vacation Agreement, which Agreement provides, in substance, that a vacation with pay shall not be due an employe whose employment relationship has terminated prior to the taking of his vacation. The Awards cited by the Carrier are controlled by this specific prohibition. The National Vacation Agreement is not involved in the case at bar. Therefore, the Awards of the Carrier are not in point.

Theodore Haas earned a vacation with pay during the year 1949. In 1950 he died prior to the taking of a vacation. His death obviously ended his right to the ten days' vacation. However, Haas was not only entitled to the ten days' vacation, but he had earned ten days' pay. The personal representative of the estate of Theodore Haas was entitled to collect the earned compensation of ten days' pay. The earned compensation was a part of the assets of Theodore Haas, and therefore the Carrier is ordered to pay the vacation allowance to the personal estate of Theodore Haas.

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 Agreement was violated.

AWARD

Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: (Sgd. A. Ivan Tummon
Secretary

Dated at Chicago, Illinois, this 13th day of March, 1953.

DISSENT TO AWARD NUMBER 6133, DOCKET CLX-5954

This is not a court of probate jurisdiction. We have no authority to order the payment of funds to the estate of a decedent nor to any representative thereof. The National Railroad Adjustment Board is limited in its jurisdiction by the terms of the Federal Statute (USCA Title 45, Sec. 151 et seq.) to "... disputes between an employe or group of employes and a carrier or carriers ...". A dead man is not an employe.

In enacting the Federal Statute conferring jurisdiction upon this Board, the Congress did not make any provision for revivor and we have no authority to insert such a provision.

The majority in this award dwell upon the finding that a vacation with pay arises out of contract. While it is inconceivable that the right to a vacation with pay, or pay in lieu thereof, did not abate with the death of the former employe in this case, whatever rights in that connection may belong to his estate can only be enforced by the representative of that estate presenting an action in the proper court.

Abatement and revivor have been held to arise under the law of the several states (System Federation No. 59, AFL v. Ark. Ry. Co. 57 F. Supp. 151).

This award is incompetent for the reasons set forth above and we dissent.

/s/ R. M. Butler

/s/ W. H. Castle

/s/ E. T. Horsley

/s/ C. P. Dugan

/s/ J. E. Kemp