Award No. 6571
Docket No. TE-6482

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Hubert Wyckoff, Referee

PARTIES TO DISPUTE:

THE ORDER OF RAILROAD TELEGRAPHERS

NEW YORK CENTRAL RAILROAD (Line West of Buffalo)

STATEMENT OF CLAIM: Claim of the General Committee of The Order of Railroad Telegraphers on the New York Central Railroad, Line West of Buffalo; that

1. The Carrier erred in its failure to assign vacation dates to, and relieve for vacation purposes during the year 1951, G. C. Morgan and L. B. Hunter, regular assigned operator-clerks at Streator, Illinois, and Morocco, Indiana, respectively; and

2. In consequence of the failure set forth in paragraph (1) the Carrier shall compensate, on the basis of eight (8) hours each day, Extra Operator-Clerks who were available but not used to perform the vacation relief work in question, as follows:

R. E. Palinski—December 1, 2, 3, 4, 7, 8, 9, 10, 11 and 14, 1951, at Streator, Illinois.

R. J. Mailloux—December 5, 6 and 8, 1951, at Morocco, Indiana.

EMPLOYES' STATEMENT OF FACTS: G. C. Morgan, regularly assigned Clerk-Operator, Streator, Illinois, earned ten days' vacation in the calendar year of 1951, by having performed the required number of days of compensated service during the year 1950. The Carrier did not assign Morgan a definite date to take his vacation and with the arrival of December 1, 1951, Morgan notified the Carrier that he desired to work and receive his vacation allowance in money rather than take the vacation. This the Carrier permitted him to do, paying him in lieu of vacation not granted.

Extra Telegrapher R. E. Palinski was idle and available to perform vacation relief work during December but was not assigned to do so. He filed time claim for 10 days' pay account being deprived of the right to perform the vacation relief work at Streator, Illinois.

L. B. Hunter, regular assigned clerk-operator-switch tender, Morocco, Indiana, upon the arrival of the month of December 1951, had 3 days' vacation coming to him and the Carrier permitted Hunter to work these 3 days and paid him therefor in lieu of vacation not granted.

Extra Telegrapher R. J. Mailloux likewise was idle and available to relieve Clerk-Operator-Switch Tender Hunter at Morocco, for the remaining

of vacations in 1948, 1949 and 1950; and 20 other operators in Districts 7 and 8 were also paid in lieu of vacations in that same payroll period—1st half December, 1951.

4. Operators Morgan and Hunter did not request vacations and fixed vacation dates had never been established for either of them prior to completion of 1952 vacation schedules, the first complete Vacation Schedules ever compiled for Seniority Districts Nos. 6, 7 and 8;

5. Complete vacation schedules for employes in Seniority Districts 7 (including Morocco) and 8 (including Streator) never existed until vacation schedules for 1952 were compiled by joint action of representatives of Management and of the employes;

6. No protest was ever received because Operators G. C. Morgan and L. B. Hunter did not request vacations and were paid in lieu thereof in 1948, 1949 and 1950 and no protest was forthcoming from any source regarding similar payments in the 1st half of December, 1951 to Operators Morgan and Hunter until claimant Extra Operators submitted the instant claims in the second half of December after such payments in lieu of vacations had been approved;

7. The fact that the claimant extra operators were idle on dates in the first half of December, 1951 for which Operators G. C. Morgan and L. B. Hunter were paid in lieu of vacations does not support the claims;

8. The claims in this docket are without support in any Telegraphers' Agreement rules and not supported by the December 17, 1941 Vacation Agreement, are manifestly unreasonable, without basis in equity and without merit on any logical basis. They should be denied.

All evidence and data set forth in this ex parte submission have been considered by the parties in conference.

(Exhibits not reproduced.)

OPINION OF BOARD: These claims by two Extra Operator-Clerks present the question whether the Carrier improperly gave two regular assigned Operator-Clerks pay in lieu of time off in the year 1951 and whether the two Extra Operator-Clerks are entitled to vacation relief work pay for days when they were available.

Prior to the year 1951 no cooperative assignment of vacation dates was ever made as required by Article 4 (a).

At a conference held on April 27, 1951, the Superintendent Personnel and the General Chairman agreed, and instructions were accordingly issued to all division superintendents, that vacation schedules would be made up for the balance of the year 1951 for vacations earned during 1950; and that, not later than approximately 30 days before the end of that year, vacation schedules would be made up for the year 1952 to cover vacations earned during 1951. The Carrier suggested to each superintendent that the matter be handled jointly with the Local Chairman in each district.

The understanding reached on April 27, 1951, was confirmed by letter dated June 8, 1951, outlining the terms of the understanding and stating that the 1951 vacation schedules for Districts 1, 2, 9 and 10 had been completed and that those for Districts 3, 4, 5, 6, 7 and 8 "are now being made up." The two claims before us arose in Districts 7 and 8.

Apparently some time in June or July the Carrier completed and made available to the General Chairman a 1951 list for Districts 6, 7 and 8

containing 46 names of employes, their positions and their assigned vacation dates, the first one to commence July 16, 1951. This list so submitted was not a list "showing the date assigned to each employe entitled to a vacation" as required by Answer to Question 1 Interpretations dated July 20, 1942, Article 4 (a). It was a list showing only vacations then still due employes who had submitted requests for 1951 vacations. Although the two regular assigned Operator-Clerks in question were then entitled to 1951 vacations, the Carrier did not list either of them and indeed did not list any employe, including them, who had not submitted requests for vacations. The list also of course excluded those who had already therefore taken vacations in 1951.

The list is before us and there is nothing on its face to indicate the omission of employes who were still then entitled to vacations but who had not submitted requests. Nor is there any evidence in the record to show that the fact of these omissions was communicated to the General Chairman. It is true that, by letter of August 27, 1951, to the Superintendent Personnel, the General Chairman complained about the fact that the list for Districts 6, 7 and 8 was not mimeographed and distributed and was bunched and not segregated into separate lists for each of the three Districts; and that he concluded by saying "However, as I have the information I am merely calling this to your attention and you need not handle it further." The fair meaning of this sentence is that mimeographing and segregating the lists need not be handled further by the Carrier. We are unable to conclude, as the Carrier now contends, that this letter manifests the General Chairman's awareness that the lists were incomplete or that it constitutes his approval of the incomplete lists as such.

Moreover, contemporaneously with these activities in respect to the 1951 list, the parties were jointly preparing the 1952 schedules which were completed some time in December of 1951. In the preparation of the 1952 schedules the Carrier sent out explicit instructions that "operators who have been in the habit of never asking for vacations but have been satisfied to accept vacation pay in lieu of time off" should be included in the 1952 schedule. But it does not appear that any such instruction was given with respect to the 1951 schedule.

Finally the Carrier asserts that "the Organization representatives were fully familiar with the fact that complete vacation schedules had never been made for Districts 7 and 8 prior to the schedules for 1952 and were also thoroughly familiar with the fact that employes in those Districts who did not ask for vacation time off had always been paid in lieu of vacations ever since the December 17, 1941, Agreement was made effective." While this is true, this is not to say that the Organization sanctioned the continuation of practices in violation of the Vacation Agreement at the conference of April 27, 1951, or thereafter. Nor is it to say that the agreement reached on April 27, 1951, contemplated any different handling of pay in lieu of time off as between the 1951 and 1952 lists. Indeed the plain underlying purpose of the understandings reached at the conference of April 27, 1951, was to put an end to a long period of non-compliance with the Vacation Agreement and to do this for the balance of the year 1951 as well as for the full year 1952.

In consequence of all of the foregoing the two Operator-Clerks in question were not assigned vacation dates and were given pay in lieu of time off for the payroll periods which are the subjects of the claims. The availability of both Claimants on the days for which claim is made is established by the record.

First. It is quite clear that Article 4 (a) requires cooperation between the parties in the assignment of vacation dates and that there is, therefore, a general joint responsibility for the administration of the Vacation Agreement. But this is not to say that every action taken must be joint.

Cooperation is what the Agreement calls for and this involves some mutually understood unilateral action as well as some joint action. Thus, the Organization is in no position to compile a list; and the July 20, 1942, Interpretation of Article 4 (a) accordingly requires the Carrier to prepare a list of employes entitled to a vacation and to make this list available to the Organization. This requirement of Article 4 (a) places upon the Carrier the sole obligation to provide a complete and accurate list. The incomplete 1951 list submitted by the Carrier was, therefore, a failure on its part to furnish the cooperation required by Article 4 (a) and was not a failure for which the Organization was jointly responsible.

The conclusion accordingly is that the Carrier violated Article 4 (a).

Second. The Answer to Question 1 Interpretations dated July 20, 1942, Article 5 lays it down that an employe may not at his option forego the taking of a vacation, remain at work and accept pay in lieu thereof. Yet this is exactly what happened.

The Carrier may not have offered any such option to the employes; and the Carrier was under no obligation to compel any employe to specify a vacation date preference. But the Carrier was under the obligation to prepare a list of the employes entitled to a vacation whether they had submitted a request or not. The inevitable consequence of the breach of this obligation by the Carrier was to give to those employes, who submitted no requests, the option proscribed by the Interpretation.

It is true, of course, that requirements of service or some other good and sufficient reason may justify pay in lieu of time off; and Article 5 and the Interpretations recognize these necessities.

But no such necessity appears here. There is neither showing nor even claim made by the Carrier that requirements of service prevented the release of these two Operator-Clerks for vacations. The only excuses offered by the Carrier are the failure of the two Operator-Clerks to submit requests for vacations and the past practice of giving pay in lieu of time off to all employes who failed to submit such requests.

The conclusion accordingly is that the Carrier violated Article 5.

Third. Rule 6 requires the Carrier to provide vacation relief workers and then goes on to say that the vacation system shall not be used as a device to make unnecessary jobs for other workers. Thus, the Rule provides that the Carrier shall not be required to provide a relief worker: "where a vacation relief worker is not needed in a given instance and if failure to provide a relief worker does not burden those employes remaining on the job, or burden the employe after his return from vacation."

Nothing in this record establishes any justification for not providing vacation relief, had the Carrier observed the Agreement and had the two Operator-Clerks taken their time off instead of pay.

In dollars and cents it would have cost the Carrier no more to pay four men once than two men twice. Moreover, the two Operator-Clerks both worked during the period for which they were given pay in lieu of time off; and it does not appear that, if they had taken time off, vacation relief would not have been needed for their positions or that, if no relief had been provided, either they upon return from their vacations or those remaining on the job would not have been burdened. Finally, it appears that relief was generally provided under the 1952 vacation schedules; but it does not appear that no relief was provided for the two Operator-Clerk positions in question.

Unavailing is the Carrier's argument, made under Article 5 as interpreted, that these particular claims might have been defeated by vacation

payments made later in December or in January during selected periods of the Claimants' unavailability. Our business is with what was done, not with suppositions. And it is sufficient to support these claims that they fall within the period when the vacation obligations and benefits matured and were sought to be discharged.

The conclusion accordingly is that the Carrier violated Article 6.

Fourth. We are unable to conclude that Article 12 (b) has any application to these claims. It reads:

> "(b) As employes exercising their vacation privileges will be compensated under this agreement during their absence on vacation, retaining their other rights as if they had remained at work, such absences from duty will not constitute 'vacancies' in their positions under any agreement. When the position of a vacationing employe is to be filled and regular relief employe is not utilized, effort will be made to observe the principle of seniority."

The structure of the first sentence indicates that vacations will not constitute "vacancies" insofar as the seniority rights of employes exercising the vacation privileges are concerned. And the second sentence adds nothing to disturb this thought.

Any inference drawn from Article 12 (b) that there is no contractual obligation to provide vacation relief workers (see Award 5192) is destroyed by the categorical requirements of Article 6, qualified though they may be.

(Page references relate to original document.)

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 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

The Carrier violated Articles 4 (a), 5 and 6 of the Vacation Agreement (Article 25).

AWARD

Claims sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: (Sgd.) A. Ivan Tummon
Secretary

Dated at Chicago, Illinois, this 26th day of April, 1954.