Award No. 6630
Docket No. CL-6704

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Curtis G. Shake, Referee

PARTIES TO DISPUTE:

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

JACKSONVILLE TERMINAL COMPANY

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood:

(1) That the Carrier violated the effective Agreement and the Vacation Agreement of December 17, 1941, when it failed and/or refused to cooperate with the Local Committee in Seniority District No. 6, Jacksonville, Florida, in the assignments of vacation dates to employes therein in violation of Article 4(a), whereby Claimant C. J. Kane was required to suspend work on his regular assignment for ten days, from July 15 to 28, and was not compensated for ten days' vacation not granted, from November 15 through 26, 1952, and as a penalty,

(2) The Carrier shall be required to compensate Claimant for the ten days he was suspended from work between July 15 to 28, in addition to amount already received; and

(3) Carrier shall be required to compensate Claimant for an additional ten days' pay in lieu of vacation not granted from November 15 through 26, 1952.

EMPLOYES' STATEMENT OF FACTS: During the period in dispute, Claimant C. J. Kane was regularly assigned to a position of Train Clerk in Carrier's Transportation Department, District 6, Jacksonville, Florida, which position he had secured by virtue of seniority in accordance with the provisions of the collective bargaining agreement. His hours of service were from 2 P. M. to 10 P. M. Saturday through Wednesday, with Thursday and Friday as rest days.

On January 22, 1952, the employes in the Transportation Department, District 6, addressed a letter to Trainmaster J. M. Holley, advising their first, second and third choices for vacation periods during the current year, in accordance with Article 4(a) of the Vacation Agreement signed at Chicago, Illinois, December 17, 1941. Claimant requested as his first choice June 7 through June 11 and November 22 through November 26, 1952. His second choice was from November 15 through November 26, 1952 (Employes' Exhibit "A").

Vacation notices and bulletins each year have been furnished the employes and District Chairmen as required by interpretations of Article 4 dated July 20, 1942 by the Committee established under Article 14, quoted above, of the Vacation Agreement.

Letter of General Chairman L. L. Wooten to Assistant General Manager W. A. George, December 22, 1952, identified as Carrier's Exhibit No. 29, alleges failure and refusal of the Carrier to cooperate with the employes as required by Article 4 of Vacation Agreement and interpretations by the Referee.

The Claimant and the Brotherhood have endeavored to make it appear that the Carrier failed and refused to cooperate with the employes in assigning vacations for 1952. The Carrier contends that it has cooperated to the fullest extent, and the lack of cooperation has been with the Claimant and the Brotherhood instead of the Carrier. The Carrier endeavored to cooperate with all seventeen (17) employes of Group 1, Seniority District No. 6, in assigning vacations for them between July 1 and September 8, inclusive, 1952, at a time the Carrier had qualified relief available. Sixteen (16) of the employes cooperated with the Carrier, and the only employe that refused to cooperate was the Claimant, Mr. Kane. Certainly the sixteen (16) employes who cooperated at the time the Carrier had vacation relief available shows unquestionably the Carrier's endeavor to cooperate with the employes.

In Carrier's Statement of Facts No. 5, Seniority Roster, it will be noted that fifteen (15) of the Group 1 employes have seniority in Group 2, therefore, when these Group 2 employes are entirely cut off account reduction in force in Group 1, they go back to Group 2 and roll according to their seniority, which cuts off the youngest employe in Seniority District No. 6.

The Carrier cooperated with all employes in its endeavor to assign vacations and the employes with the exception of Claimant cooperated with the Carrier in assigning vacations for 1952.

The Claimant, being second oldest in seniority, could have been assigned any vacation period between July 1 and September 8, except August 26 to September 8, 1952, which was requested and assigned to Train Clerk C. H. Wright who is ahead of Mr. Kane in seniority. Therefore, in view of the fact Mr. Kane refused to cooperate with the Carrier in assigning vacations, at a time qualified relief was available, the Claimant was assigned the only available period not requested by any other Train Clerk.

The Carrier denies it required the Claimant to suspend work on his regular assignment for ten (10) days from July 15 to July 28, 1952. The period July 15 to July 28, 1952 was the Claimant's assigned vacation period for which he was correctly paid as provided under the current agreement.

Mr. Kane was assigned and paid for his vacation from July 15th to 28th, inclusive, therefore, he was not required to suspend work from his regular assignment during that period for ten (10) days, and was not entitled to another vacation with pay from November 15th through November 26th, as claimed. There was no violation of current Agreement Rules, Decisions, or Award of Referee Wayne L. Morse, as alleged by Claimant.

All data herein submitted have been presented to the duly authorized representatives of the employes, and are hereby made a part of the particular question in dispute.

(Exhibits not reproduced.)

OPINION OF BOARD: On January 22, 1952, the Claimant and sixteen other Clerks in District 6 of Carrier's Transportation Department submitted to their Trainmaster their joint written request indicating their first and second choices as to when they would like to take their annual vacations.

Claimant expressed the desire, as his first choice, to take his vacation in two parts, from June 7 to 11, and from November 22 to 26; and from November 15 to 26, as his second choice.

Nothing was done regarding these requests until April 22, when the Trainmaster posted a bulletin stating that Train Clerks would be granted their vacations during five designated periods, to-wit:

July 1 to 14,
July 15 to 28,
July 29 to August 11,
August 12 to 25, and
August 26 to September 8.

The Train Clerks were asked to bid, on the basis of their seniority for vacation leaves on the above dates.

After protesting the Carrier's action, the Claimant took his vacation from July 15 to 28. He now asks that he be compensated for ten days' additional pay for the period from November 15 to 26, when he was not permitted to take his vacation, and for ten days from July 15 to 28, when he was required to suspend from work to take his vacation.

Rule 66 of the applicable Agreement provides, in substance, that vacations with pay will be granted under and in accordance with the terms and provisions of the Chicago Vacation Agreement of December 17, 1941, and its supplement of February 23, 1945. Rule 4(a) of the Chicago Agreement of December 17, 1941, provides:

> "4(a) Vacations may be taken from January 1st to December 31st and due regard consistent with requirements of service shall be given to the desires and preferences of the employes in seniority order when fixing the dates for their vacations.
>
> The local committee of each organization signatory hereto and the representatives of the Carrier will cooperate in assigning vacation dates."

It will be noted from the second paragraph of the quoted Rule that vacation dates are to be assigned through the cooperative action of the local committee and the carrier's representative; and, from the first paragraph, that such vacations may be taken at any time during the calendar year, due regard being given to the desires and preferences of the employes and to the requirements of the service.

The Carrier urges three propositions in resistance of the Claim. It is first asserted that there has been an understanding on the property since 1942, that the vacations of this particular group of employes will be taken after the discontinuance of the winter tourist train service, and that Carrier's action in designating the vacation periods in the instant case was in complete harmony with that understanding. The Organization emphatically denies that there has been any such understanding, and since that understanding, if such existed, would be in contravention of the Rule, the burden is on the Carrier to establish it. We find no preponderance of proof in the record, and this defense must, therefore, be rejected. Secondly, the Carrier says that the requirements of its service precluded it from acceding to the Claimant's request; and (third) that qualified personnel was unavailable to work the Claimant's position during the periods when he proposed to be absent. Many facts are developed to support the Carrier's second and third proposition, and we do not hesitate to say that these considerations would be highly pursuasive if properly before us.

However, the Carrier is in the position of leaning on one part of Rule 4(a) and attempting to ignore another.

There is no showing whatever that the Carrier's Trainmaster cooperated, or attempted in any manner to cooperate, with the local committee in assigning the vacation periods as set forth in his bulletin of April 22. On the contrary, the vacation periods designated by him appear to represent his unilateral action. The Carrier's obligation in that regard was as clear and positive as its right to insist that the employes take their vacations at such times as would be consistent with the requirements of the service. Had the Carrier followed the rule and sought to assign vacation dates in cooperation with the local committee, it would have had a timely opportunity to make known its operational requirements and, in all probability, this controversy would have been avoided. In any event, if these procedural requirements had been followed, and either party had taken an arbitrary or unreasonable attitude, the other would have had an adequate remedy by appealing to this Board.

Our conclusion on this aspect of the case is supported by the Interpretation of Article 4 of the Chicago Vacation Agreement by Referee Morse wherein he said that "this referee is satisfied that when the parties adopted Article 4, they did not intend that vacation dates should be fixed in an arbitrary manner by the carrier. Rather, **they intended that vacation dates should be fixed by joint action of the representatives of the employes and of the carriers."** (Emphasis supplied)

Penalties, as distinguished from compensatory redress, are frequently imposed by this Board to bring about compliance with the rules, and the Board is entitled to exercise a measure of discretion in determining what penalty is sufficient to accomplish that result. In the instant case we are of the opinion that it will suffice to award the Claimant ten days' pay at his pro rata rate, in addition to what he has already received, for the period from November 15 through 26, 1952.

On account of the Carrier's failure to conform to that part of Rule 4(a) which requires that vacations shall be assigned in cooperation between the Carrier's representative and the organization's local committee, the claim will be sustained, to the extent indicated above.

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 Carrier violated the Agreement.

AWARD

Claims (1) and (3) sustained and Claim (2) denied in accordance with the Opinion and Findings.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: (Sgd.) A. Ivan Tummon
Secretary

Dated at Chicago, Illinois, this 14th day of May, 1954.

DISSENT TO AWARD 6630, DOCKET CL-6704

This Award is in error for the reason that it disregards the following authoritative interpretation of the second paragraph of Rule 4(a):

> **"Question 1:** Meaning and intent of the second paragraph of Article 4 (a)?
>
> **"Answer:** The second paragraph of Article 4 (a) requires cooperation between local committees of each signatory organization and representatives of carriers in assigning vacation dates. To carry out this cooperative assignment of vacation dates, a list will be prepared showing the date assigned to each employe entitled to a vacation, and this list will be made available to the local committee of the signatory organizations; such portion of any list as may be necessary for the information of particular employes will be made available to them in the customary manner."

The Carrier stated, and it was not denied or refuted, that it made lists available to the employes and local committees each year as contemplated by the interpretation, supra.

Accordingly, the claim should have been denied, regardless of whether or not an understanding existed between the parties since 1942, as contended by the Carrier, inasmuch as admittedly "highly persuasive" facts were presented by the Carrier to support its contentions "that the requirements of its service precluded it from acceding to Claimant's request" and "that qualified personnel was unavailable to work the Claimant's position during the periods when he proposed to be absent."

This Award also is in error in prescribing a penalty herein when none is stipulated in the applicable agreement. In Republic Steel Corp. v. Labor Board, 311 U. S. 7, the Supreme Court said, speaking of a labor statute directed to the same general purpose as our Railway Labor Act, "We do not think that Congress intended to vest in the Board a virtually unlimited discretion to devise punitive measures, and thus to prescribe penalties or fines which the Board may think would effectuate the policies of the Act. We have said that 'this authority to order affirmative action does not go so far as to confer a punitive jurisdiction enabling the Board to inflict upon the employer any penalty it may choose because he is engaged in unfair labor practices even though the Board be of the opinion that the policies of the Act might be effectuated by such an order.'"

Limited as we are here to the adjudication of disputes growing out of the interpretation or application of Agreements, we have no discretion, at all, to "devise punitive measures, and thus to prescribe penalties or fines which the Board may think would effectuate the policies of the Act."

This Award and those few with which it apparently seeks to conform are beyond the realm of interpretation and show the need for a response to lawful jurisdiction.

For the foregoing reasons, we dissent.

/s/ W. H. Castle

/s/ R. M. Butler

/s/ C. P. Dugan

/s/ J. E. Kemp

/s/ E. T. Horsley