Award No. 6751
Docket No. TE-6912

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Jay S. Parker, Referee

PARTIES TO DISPUTE:

THE ORDER OF RAILROAD TELEGRAPHERS

CENTRAL OF GEORGIA RAILWAY COMPANY

STATEMENT OF CLAIM: Claim of the General Committee of The Order of Railroad Telegraphers on the Central of Georgia Railway that,

1. Carrier violated and continues to violate the agreement, when beginning with the year 1942 and continuing each year thereafter (except year 1952) it failed to grant Mrs. R. W. Cook, agent at Juniper, Georgia, vacations during these years, or to compensate her in lieu of vacations not granted, and

2. Carrier shall compensate Mrs. R. W. Cook in lieu of vacations not allowed for each year as follows:

1942—Equivalent of 6 days of 8 hours each at the applicable rate
1943—Equivalent of 6 days of 8 hours each at the applicable rate
1944—Equivalent of 6 days of 8 hours each at the applicable rate
1945—Equivalent of 12 days of 8 hours each at the applicable rate
1946—Equivalent of 12 days of 8 hours each at the applicable rate
1947—Equivalent of 12 days of 8 hours each at the applicable rate
1948—Equivalent of 12 days of 8 hours each at the applicable rate
1949—Equivalent of 12 days of 8 hours each at the applicable rate
1950—Equivalent of 10 days of 8 hours each at the applicable rate
1951—Equivalent of 10 days of 8 hours each at the applicable rate

EMPLOYES' STATEMENT OF FACTS: Mrs. R. W. Cook, the Claimant here, entered the service of the Carrier in February, 1908 and retired under the provisions of the Railroad Retirement Act on February 13, 1953. During the years involved in this claim she occupied the position of agent, regularly assigned, at Juniper, Georgia, a small non-telegraph position.

Commencing with the year 1942 and continuing through 1952, the Carrier failed to grant Claimant vacations earned each of the previous years, as

know she was entitled to a vacation. In view of the numerous letters (see Carrier's Exhibits "A" through "G") to Agents and others, this argument simply does not hold water.

The Employes would hold that the **entire** responsibility rests with the Carrier in connection with the National Vacation Agreement, and no responsibility whatever rests with the Employes or the Claimant. We think the fact that the Order of Railroad Telegraphers signed the National Vacation Agreement, along with the Carriers, conclusively proves that it is **a bipartite agreement,** and that there is a **joint or equal responsibility.** The failure of the Employes to assume that responsibility is admitted in their letter of May 6, 1953, (Carrier's Exhibit "K"), on page 2, which is quoted below for easy reference:

> **"However in Mrs. Cook's case I do not believe she had access to a vacation book, therefore it could be that our Organization has failed in not putting it before her....."**

Carrier's Exhibits "A" through "G" conclusively proves it has done its part in endeavoring to see that all employes entitled to vacations receive them. This cannot be successfully refuted by the Employes. The burden of proof is upon the petitioner.

The Employes have not as yet cited a rule in the National Vacation Agreement that would entitle Claimant to pay for vacation time other than that provided, and paid by Carrier, under Article 8 and 9.

This claim resolves itself then into an "all to gain, and nothing to lose" proposition. It should be denied.

CONCLUSION

This dispute is bottomed on the wholly unsupported contention that there has been a violation of the Agreement. No rule has been cited to provide for vacation payment as the Employes desire. On the contrary, Article 8 and 9 of the National Vacation Agreement, cited by the Carrier, specifically covers the dispute, and these rules have been fully complied with.

The Carrier has conclusively shown beyond any doubt that there is no merit to the claim; that it is purely and simply an "all to gain and nothing to lose" case, and Carrier respectfully requests that the claim be denied by the Board.

All data submitted in support of Carrier's position in this case has been presented orally or by correspondence to the Employes or duly authorized representative thereof, and made a part of the dispute.

(Exhibits not reproduced.)

OPINION OF BOARD: The Claimant Mrs. R. W. Cook was employed by Carrier on February 13, 1908, and remained in active service until February 13, 1953, when she retired at the age of 69, after having applied for and having been granted retirement benefits under the Railroad Retirement Act, commencing February 14, 1953.

During the years 1942 to 1951, and perhaps prior thereto, Mrs. Cook was regularly assigned as Agent at Juniper, Georgia, a small non-telegraph agency, and during those years, although the parties agree she was covered by the terms of the National Vacation Agreement, she neither applied for, was assigned to, or took any vacation. Nor was she paid anything in lieu of a vacation allowance on findings by the Carrier it could not release her for any calendar year as authorized by the terms of such Agreement.

Actually it was not until after her retirement that she or anyone on her behalf, raised any question regarding the Carrier's alleged liability to her for ten years' back vacation pay. However, in order to complete the factual picture it should be stated that when such a claim was filed it was denied on the basis Carrier was not liable under the Vacation Agreement for retroactive pay for vacations not taken; likewise added that the year 1952 is not included in such claim because for such year Claimant received and accepted pay for that year, under an understanding between the parties that acceptance thereof would not impair the validity of the claim for preceding years, for "Vacation due" pursuant to the terms of Article 8 of the Vacation Agreement.

At the outset it can be said (a) that the rules Agreement merely provides the Vacation Agreement will be applied to employes covered by the terms of the Vacation Agreement and contains nothing which impinges upon its terms; and (b) that the time specified in the claim is the time Claimant would have been entitled to as a vacation if she had taken her vacation annually during the years in question. There is some quibble respecting whether Mrs. Cook actually knew she was entitled to a vacation during such years. Fortunately we are not required to either labor or answer that factual issue as it is our view all parties concerned were charged with constructive notice of rights and liabilities conferred and imposed by an Agreement so important to both labor and industry as the Vacation Agreement.

From what has been heretofore related it becomes obvious Claimant obtained whatever rights she might have to an annual vacation, or pay in lieu thereof, if the Carrier found it could not release her for a vacation during any calendar year, because of the requirements of its service, under and by virtue of the Vacation Agreement, hereafter in the interest of brevity referred to as the Agreement or by Articles as occasion requires, and that her claim must stand or fall on what is to be there found. In connection with the latter part of this statement it is interesting to note the record discloses that for at least three of the involved years Carrier addressed general notices to Agents and other supervisory employes advising it was its desire, as the Agreement permits (see Article 5), that all employes should take their vacations for those calendar years; on the other hand it is only fair to say it shows that during a few of the years of such period the Carrier itself seemed to be in doubt as to whether employes, such as Claimant, were covered by the Agreement and hence entitled to vacations.

Except for Supplemental Agreements relating to increase in vacation periods which are immaterial and require no further reference, the only portion of the Agreement relied on by Claimant to sustain her position is Article 1 providing in part that ". . . an annual vacation . . . with pay will be granted to each employe covered by the Agreement." However, it does not follow, as she insists, that this Article in and of itself obligates the Carrier to pay her for accumulated vacations when they were not taken by her and the Carrier had not found, as she concedes it did not do, it could not release her by reason of requirement of service as contemplated by Article 5, in which event she would have been entitled to be paid in lieu of the particular vacation involved. Nor, as will presently be demonstrated, do we believe, as she suggests, that other Articles of the Agreement when read in connection with Article 1, as recognized by established rules of contractual construction, sustain her position.

Conceding the rule of construction to which reference has just been made Carrier relies on another rule governing the interpretation of contracts, equally well established, to the effect that if, when read together, other Articles of the Agreement preclude recovery of accumulated vacation pay as claimed that then, and in that event, the claim cannot be sustained; even though Claimant might otherwise have been entitled to have been annually granted a vacation for the number of days claimed to have been proper for each of the years specified in the Claim.

In support of its position Carrier relies, among others, on rules of the Agreement and recognized interpretations thereof, now to be noted.

Article 9, which reads:

"Vacations shall not be accumulated or carried over from one vacation year to another."

Article 4 (a), which provides:

"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."

Article 5, which has been heretofore mentioned and discussed.

Interpretation in Referee Morse's Award of November 12, 1942, (see page 50 of the Agreement and Interpretations) where it is said:

"Thus in interpreting Article 4 (a) the referee has reached the following general conclusions:

"(1) It was the intention of the parties when they agreed upon Article 4 to cooperate in administering the granting of vacations. To that end, they specifically provided in paragraph 2 of Article 4 (a) that the local committee of each organization signatory to the agreement and the representatives of the carriers would **cooperate in assigning vacation dates.** Thus, they restricted the management's control over the administering of the granting of vacations. The adoption of a procedure whereby representatives of the employes and of the carriers shared a joint responsibility in assigning vacation dates necessarily gave to the representatives of the employes the right to a voice in determining whether or not in given instances the desires and the preferences of the employes in seniority order as to vacation dates were consistent with requirements of service.*****"

For statements of similar import with respect to Article 4 (a), see the same document; subsection (3) on pages 51 and 52 inc.; also the third full paragraph on page 56.

Interpretation to Article 5, dated June 10, 1942, appearing at page 12 of such document, which reads:

"As the vacation years runs from January 1 to December 31, payment in lieu of vacation may be made prior to or on the last payroll period of the vacation year; if not so paid, shall be paid on the payroll for the first payroll period in January following, or if paid by special roll, such payment shall be made not later than during the month of January following the vacation year."

In the opinion the heretofore quoted Articles and Interpretations of the Vacation Agreement, particularly Articles 4 (a) and 9 thereof, definitely indicate it was the intention of the framers of such Agreement (1) that the Carrier and representatives of the Employes should share responsibility in assigning vacation dates, and (2) that neither vacations nor pay in lieu thereof, when the latter has not been either requested or granted within the time contemplated by its terms, should be permitted to accumulate or be carried over from one calendar vacation year to another. Therefore under the confronting facts and circumstances, as well as principles enunciated

in controlling Awards, we are constrained to hold the Claimant, after delaying assertion of her rights for the period of time involved cannot be heard to say she is now entitled to pay in lieu of vacation allowances which were never provided or granted for the years in question.

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 controlling facts and circumstances do not warrant a sustaining Award when tested by the rules and interpretations set forth in the Opinion.

AWARD

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: (Sgd.) A. Ivan Tummon
Secretary

Dated at Chicago, Illinois, this 5th day of August, 1954.