Award No. 6865
Docket No. CLX-6841

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Jay S. Parker—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 & Steamship Clerks, Freight Handlers, Express & Station Employes, effective September 1, 1949, was violated at the St. Louis, Missouri Agency during the year of 1952 when M. H. Kemper and O. C. McNeill were denied vacations for that year; and

(b) They shall now be compensated for ten (10) working days each in lieu of vacations not granted during that year.

EMPLOYES' STATEMENT OF FACTS: M. H. Kemper, with seniority date of August 19, 1919, is the regular occupant of position titled "Foreman," Group 1, Position 122, hours of assignment 7:00 A. M. to 3:30 P. M., exclusive of meal period, work week assignment Wednesday to Sunday inclusive, rest days Monday and Tuesday, salary $320.46 basic per month.

O. C. McNeill, with seniority date of September 6, 1935, is the regular occupant of position titled "Car-Loader," Group 97, Position 256, hours of assignment 7:00 A. M. to 3:30 P. M., exclusive of meal period, work week assignment Wednesday to Sunday inclusive, rest days Monday and Tuesday, salary $302.46 basic per month.

Carrier dismissed Kemper from service on January 26, 1951, and McNeill on January 29, 1951, following alleged investigations conducted on January 24, 1951. Subsequent thereto, claims were progressed to the Third Division, National Railroad Adjustment Board, and on June 30, 1952 the Board, in Awards 5835 and 5836, ordered the claimants restored to service "with seniority rights unimpaired." Kemper was permitted by Carrier to return to service on his regular assignment July 31, 1952, and McNeill was permitted to return to his regular assignment June 27, 1952. During the month of October, 1952, they requested vacation allowances in 1952 on the basis of their seniority ratings and the fact that they were "employes" as provided in Rule 91. Their requests were presented orally to their immediate supervisor who, in turn, referred the issue to Terminal Superintendent F. E. Horning, who contacted General Chairman Geo. D. Wright and denied the claims on November 14, 1952. (Exhibit "A.")

"Vacation with pay is something earned, to be enjoyed in a current year for service the year last preceding. In the instant case employe Ford was entitled to vacation with pay for services performed in 1941, to be taken at a time convenient to Carrier in 1942. Only a separation from the service could deprive him from such. Any contractual agreement is subject to legislation enacted prior or subsequent. The Draft Act was such legislation and induction under its provisions was not a separation from service. If, as in this case, induction came before employe received his vacation he would be entitled to pay in lieu of vacation."

The same language was used by Referee Douglass in Decision E-1308, substituting the name of employe Gaiser only for the name of employe Ford. That holding by Referee Douglass has been adopted in all cases referred to this Board in which pay in lieu of vacation has been demanded by employes based solely on "work" performed in the previous calendar year (see Awards 5666, 5677, 5910 and 6133). If there was any ambiguity in the Decisions of Express Board of Adjustment No. 1, the Awards of this Board clarify such ambiguity.

In each and every instance in the Decisions and Awards cited above it will be remembered that all of the employes involved had performed a full calendar year's work in the year preceding their request for vacation allowance, and had not been removed from service for cause. In the instant case neither Kemper nor McNeill performed work in 1951 sufficient to enable them to qualify for a vacation in 1952. They were removed from the service by dismissal for actions of their own making. Those dismissals were upheld by this Board as proper, including denial of any compensation which might have accrued to them during the period they were out of service. Since no "compensation" was due them in 1952 for vacation in that year based on "work" performed in 1951, the claim in the instant case falls of its own weight. This is recognized by General Chairman Wright in his letter of November 18, 1952, to Superintendent Horning in which he admits that these employes were removed from service for cause January 20, 1951, and were out of service during the remainder of that year; that he is not pressing for a vacation with pay for the year 1951, but somewhat apologetically, we think, adds that "The basis upon which these latter claims were referred to me, is that McNeill and Kemper are seeking a vacation in 1952 based on their seniority rights."

That no such construction can be placed on the vacation rule, in the light of prior urgings of the Employes in the various claims heretofore considered, and the interpretation placed on the vacation rule by Referees Frank P. Douglass, Hubert Wyckoff, Angus Monro, David R. Douglass and Paul G. Jasper, in the Decisions and Awards cited by Carrier, leads to no other conclusion than that the claim in the instant case for "vacation in 1952, based simply on the duration of their seniority" is an attempt to secure for these individuals a mitigation of the penalty they brought upon themselves by rewarding them with pay for a vacation for which they did not qualify under any circumstances. A denial of the claim in its entirety is in order.

All evidence and data set forth have been considered by the parties in correspondence and in conference.

(Exhibits not reproduced.)

OPINION OF BOARD: Following an investigation M. H. Kemper, with seniority from 1919, and O. C. McNeill, with seniority dating from 1935, were dismissed from Carrier's service in 1951, the former on January 26th and the latter on January 24th. Subsequently they progressed claims to this Division of the Board where, in Awards CLX-5835 and CLX-5836, disciplinary action of the Carrier was approved except as to the extent of the penalty. As to this matter it was found dismissal from service was unreasonably severe in view of the nature of the offenses they had committed, and, on that account, each employe was ordered returned to service, the award in each

case reading "The claim for restoration to service with seniority rights unimpaired sustained. In all other respects claim denied." Pursuant to such award each Claimant was returned to his regular assignment in the last week of July, 1952.

Following their return to service, and during the month of October 1952, Claimants requested vacation allowance for the year 1952 on the basis of their seniority rating and the fact they were employes as provided in Rule 91 of the current Agreement. This request was refused. Thereupon they progressed the instant claim on the property to the Carrier's highest reviewing officer who finally denied it on the basis they had not qualified for a vacation in 1952 because of their failure to perform enough work to entitle them to a vacation in 1952 and because the referee in the awards returning them to service did not extend the coverage of such awards to include rights to a vacation for the period they were out of service.

The sole question presented for decision is whether, under the foregoing facts, and others disclosed by the record, Claimants were entitled to a vacation in 1952.

When analyzed the gist of all contentions advanced by Claimants in support of the claim is that Rule 91 of the Agreement, effective September 1, 1949, supported by Award 5666 of this Division, requires a sustaining Award.

Pertinent provisions of Rule 91, on which Claimants rely, read:

> "Vacations will be granted to all employes upon the following bases and conditions:
>
> "(a) Employes having more than one (1) year's service but less than five (5) years' service—five (5) working days with pay.
>
> "(b) Employes having five (5) years' service or more—ten (10) working days with pay.
>
> "(c) Furloughed employes to be allowed vacation where they have worked in excess of 508 hours during the preceding calendar year.
>
> "Employe status employes 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."

Boiled down the gist of the Claimants' position is that the Rule above quoted provides, in terms so clear and unequivocal as to be subject to no other interpretation, they were entitled to a vacation allowance in 1952 on a seniority basis because they worked during a part of that year and were employes having 5 years' of service, or more, with the Carrier.

In approaching consideration of the issue thus raised by Claimants and with direct application to the basic premise on which vacation allowances are founded and incorporated in collective bargaining Agreements, two fundamental principles, so universally accepted they may be said to have become traditional, must be kept in mind. The first of these is that vacation with pay is not a gratuity, but, by contract, is earned compensation for service rendered (See Award 6133). The second, for reasons so obvious they need not be labored but nevertheless just as traditional, springs from the first. It is that an employe earns his vacation and is entitled to it as a result of performance of work and/or service during the year preceding such vacation (See Award 5910).

Viewed in the light of principles to which reference has just been made it would be difficult to give Rule 91 the construction Claimants seek to place upon it. But that is not all. No rule of contractual construction is better

established than the one that a contract, or for that matter a rule, under construction must be construed from its four corners. Turning to the Rule in question it is to be noted two paragraphs of subsection (c), which is as much a part of such Rule as any of the other subsections, contains language definitely indicating that vacation allowances are to be granted to the employes therein mentioned on the basis of the preceding calendar year. Inasmuch as the first paragraph of the rule applies to all employes and since it would be discriminating, if not unfair, to require one type of employes to base vacations on the preceding year and others on the current year it would seem Claimants' contention the provisions of Rule 91 are so clear and unambiguous as to permit no interpretation cannot be upheld. In that situation the rule is that resort to the intention of the parties and other existing conditions is proper. When that is done, it becomes even more difficult to construe the rule in line with Claimant's contentions. In fact when everything mentioned in preceding paragraphs of this opinion is taken into account it seems clear the parties intended such rule should be construed as contemplating that vacations earned the preceding year would be granted to all employes upon the bases and conditions set forth in subsections (a), (b) and (c) of Rule 91.

In an obvious effort to forestall the foregoing conclusions Claimants assume that subsection (c) of Rule 91 is to be regarded as creating an exception to such Rule. We do not agree. The better view is that the provisions of such subsection, relating to the preceding calendar year, are to be regarded as a clear recognition of the principles heretofore mentioned and highly indicative that the parties had them in mind in drafting the entire Rule.

In a further attempt to avoid the consequence flowing from the foregoing conclusion Claimants direct attention to Award No. 5666 of this Division, involving a similar rule, and insist it sustains their contention. When this Award is critically examined it can be said Claimants misconstrue the force and effect to be given what is there said and held. In fact when such Award is reviewed in that manner it will be seen it deals with a 1948 vacation and that what the Referee did in that case was to allow a 1948 vacation on the basis of what the Claimant in that case had earned by working the full calendar year of 1947. So construed such Award refutes Claimants' position instead of sustaining it.

Another decision supporting the construction heretofore given Rule 91 is Award No. 5910 of this Division, involving like parties and the same identical Rule. Upon examination of the record and opinion in that case it will be noted that a vacation for 1950 was granted on the basis of work performed in 1949.

What has been heretofore said and held means that in view of the confronting facts and circumstances Claimants were not entitled to a vacation for 1952 under the provisions of Rule 91 of the Agreement. In reaching that conclusion the fact each Claimant worked approximately 29 days in January 1951 has been discarded as not establishing a basis for the 1952 vacation, not overlooked. Without laboring the question of how much time they would have been required to work in 1951 to earn a vacation in 1952 it suffices to say we are unwilling to hold one month's service in 1951 was sufficient to establish vacation rights for 1952.

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

The Agreement was not violated.

AWARD

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: (Sgd.) A. Ivan Tummon
Secretary

Dated at Chicago, Illinois, this 31st day of January, 1955.