Award No. 7368
Docket No. CL-7441

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

LeRoy A. Rader, Referee

PARTIES TO DISPUTE:

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

MISSOURI PACIFIC RAILROAD COMPANY

STATEMENT OF CLAIM: Claim of the General Committee of the Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employes on the Missouri Pacific Railroad, that the Carrier violated the Clerks' Agreement.

1. When, on October 1, 1953, Mrs. Lillian H. Lantzer retired from the service of the Carrier under the provisions of the Railroad Retirement Act and was compensated for ten days vacation, but the Carrier failed and refused to compensate the Claimant for the additional five vacation days due her under the liberalized provisions of the Vacation Agreement effective as of January 1, 1954.

2. Since vacations are earned and paid for based on the service performed during the preceding calendar year, Clerk Lantzer did perform the number of days in the year of 1953 to entitle her to a vacation in the year of 1954, therefore the Carrier shall be required to pay Mrs. Lantzer for five vacation days for 1954 at the rate of the Timekeeper, $15.93 per day, which it declined to do, in violations of the Agreement of August 21, 1954.

EMPLOYES' STATEMENT OF FACTS: Clerk Lillian H. Lantzer has been in continuous service since April 20, 1929, and was listed on the Supply Department—System "A" Seniority Roster with a date of 4-20-29, which roster was consolidated and made Auditor Disbursements Class "A" and "B" Roster effective February 1, 1954.

The Claimant, Mrs. Lantzer, had twenty-four or more years of continuous service and was listed on the Stores Accounting Office vacation schedule for the year of 1953, for ten days on the dates of June 29 to July 10, 1953, and this vacation time was earned for service performed during the year of 1952.

Clerk Lantzer performed 133 days or more of compensated service during the calendar year of 1953, which would entitle her to a vacation in 1954, however, on October 1, 1953, Mrs. Lantzer retired under the Railroad Retirement Act.

Since the Claimant retired before she took her vacation in 1954, which she earned for service performed during the year of 1953, the Carrier paid

was entitled to the same vacation allowance as she would have been entitled to **had she remained in service of the Carrier and retired in January 1954.**

We do not agree with this Employe statement and there is no basis for it. Nothing in the Agreement of August 21, 1954, so specifies or has that effect. We think decisions as to application of Agreement provisions must be decided upon the basis of factual situation and not on a presumption of some other situation. The point is that the claimant did **not** remain in service and retire in January 1954 — that situation is not here involved.

The Agreement under which this third week of vacation is claimed was not in existence until August 21, 1954, and no part of it was retroactive beyond January 1, 1954. How can it be said a person who left the service in 1953 was in any wise subject to an agreement which was not effective until three months later? The Agreement of August 21, 1954, was made between the Carriers and their employes — the title of the Agreement says so. It could not touch this claimant in any way because she was not an employe when it was made nor during any period of its effectiveness. As a matter of fact, we do not understand how it could be said the Agreement had any effect with respect to any person whose employe relationship had been severed prior to August 21, 1954, and we do not agree that the claimant would have been entitled to the third week of vacation even if she had remained in service and retired in January 1954 because she still would have had only two weeks vacation due at time of retirement in that month. This claimant was not a party to the August 21, 1954 Agreement.

Stated another way, when a person severs employe relationship such person is no longer an employe and does not fall within the category of "the employe of such railroads represented by the Employes' National Conference Committee" specified as one of the parties to the Agreement. Not being in either party to the Agreement, such document is not applicable to her in any way. It would be strange, indeed, for a person who is not a party to an Agreement to derive benefits therefrom.

The only vacation provision of any Agreement applicable to this claimant at time of her retirement was Article 8 of the National Vacation Agreement of December 17, 1941. She has been fully compensated in accordance with that provision. There is no Agreement requirement or authority for the payment of this claim.

(Exhibits not reproduced).

OPINION OF BOARD: This claim is for five additional vacation days based on the provisions of the National Vacation Agreement of December 17, 1941, as amended, by the Subsequent Agreement of August 21, 1954, effective January 1, 1954. Claimant retired on October 1, 1953 under the Railroad Retirement Act and on that date had 24 years, or more, of continuous service with respondent Carrier, and had performed the required 133 days of compensated service during the year of 1953. She was paid, in lieu of vacation, for ten days under the 1941 Vacation Agreement and claims the additional five days under the liberalized plan of 15 days vacation for certain employes qualifying for the same by reason of years of service and days of compensated service within the year in question.

Petitioner contends that payment due, in lieu of her vacation, is provided by Article 1, Section 1, paragraph (c) of the August 21, 1954 Subsequent Agreement. And also cites Article 8 of the Agreement as follows:

> "No vacation with pay or payment in lieu thereof will be due an employe whose employment relation with a Carrier has terminated prior to the taking of his vacation, except that employes retiring under the provisions of the Railroad Retirement Act shall receive payment for vacation due."

Respondent Carrier contends that as Claimant retired prior to the effective date of the Subsequent Agreement she cannot qualify as being entitled to the additional five days vacation and payment of ten days is sufficient.

The question to be determined appears to be:

Can Claimant qualify under Article 1, Section 1(c) of the Subsequent Agreement which became effective on January 1, 1954?

In considering Article 1, Section 1(c) of the 1954 Subsequent Agreement, we are of the opinion that there are three essential qualifications which must be met.

1. Claimant must have employe status with Carrier.

2. Must have rendered compensated service of not less than 133 days during the preceding calendar year, and

3. Must meet the requirement of 15 or more years of continuous service.

We can dispose of the last two requirements in this case as no question is raised relative to compensated service in 1953 as Claimant had more than 133 such days, and likewise she has served more than 15 years of continuous service.

This leaves her employe status as of the effective date the only question to be decided as we interpret the rules in relation to facts presented.

On this record as Claimant resigned effective as of October 1, 1953 we cannot determine her to be of employe status on the effective date of the Subsequent Agreement as it did not become effective until January 1, 1954.

Can it be said that the exception in Rule 8, set out above, entitles her to the additional five days as claimed?

Payment of the 10 days was made to her in the year 1954. It is suggested in argument on this point that past practice prompted this payment of 10 days and that it is in its nature a gratuity. With this latter theory we are not in accord. We are of the opinion that if the parties place their own interpretation on Rule 8 and under the facts here if vacation pay is made for the year 1954 the amount to be paid is under the Subsequent Agreement which became effective on January 1, 1954 and the amount of pay should be for 15 days.

We are of the opinion that Claimant did not have employment status on January 1, 1954. However, when the exception in Rule 8 is construed that there is "vacation due" and Carrier apparently so construed the exception to mean that there was vacation due when it paid for the 10 days then it brings the vacation payment under the 1954 Agreement and payment should be for 15 days. The parties have contracted that vacation, or pay in lieu thereof, for 1954 will be for 15 days. On this theory the interpretation of the exception in Rule 8 makes necesary the sustaining of this claim.

Also see Award 7336.

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 under the interpretation the parties placed on the rules governing vacation due the payment should have been for 15 days.

AWARD

Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: A. Ivan Tummon
Executive Secretary

Dated at Chicago, Illinois, this 28th day of June, 1956.