

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Edward A. Lynch, Referee

PARTIES TO DISPUTE:

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

GEORGIA RAILROAD

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

(a) The Carrier violated the Agreement when on July 16, 1954, and continuing for ten days it required Claimant Mr. L. J. Bowers, Clerk-Caller, Augusta, Georgia Shops to work during his scheduled vacation period without giving the required notice that his vacation period must be changed, failing to set another date for Claimant Bowers' vacation and paying him at pro rata rate in lieu of vacation without making any effort to set a later vacation date and properly relieve Claimant Bowers when on vacation. The vacation date so set was assigned by the Carrier without the cooperation of the Organization.

(b) The Carrier shall compensate Claimant Bowers the difference between time and one-half and pro rata rate for ten days.

EMPLOYEES' STATEMENT OF FACT: Claimant Mr. L. J. Bowers is employed as Clerk-Caller in the Carrier's Mechanical Department with seniority date of November 17, 1918. A copy of the seniority roster of the seniority district in which Claimant Bowers is employed is attached hereto and identified as Employees' Exhibit "L".

Claimant Bowers' vacation was scheduled to be taken from July 16, 1954, to July 27, 1954, inclusive. Prior to July 16, 1954, Claimant Bowers was not in receipt of notice that he was not to take his vacation as scheduled. On that date he made inquiry and was informed that no arrangements had been made to relieve him, so that it would be necessary that he work his position during his scheduled vacation period. He was paid at pro rata rate in lieu of vacation.

Claim was duly filed for the difference between pro rata and time and one-half rate. The claim was progressed in the usual manner up to and including the highest Officer designated to receive such appeals, the claim being declined. The claim was discussed in conference on January 11, 1955, the Director of Personnel again declining the claim.

have the right to defer same provided the employe so affected is given as much advance notice as possible; not less than ten (10) days notice shall be given except when emergency conditions prevent. If it becomes necessary to advance the designated date, at least thirty (30) days' notice will be given to affected employes.

If a carrier finds that it cannot release an employe for a vacation during the calendar year because of the requirements of the service, then such employe shall be paid in lieu of the vacation the allowance hereinafter provided."

* * * * *

Carrier admits the ten-day notice was not given claimant Bowers, but Claimant thoroughly understood that the same situation prevailed that had existed, that is, that there was no qualified person available that we could get to relieve him for vacation. Certainly he had every reason to know he would be paid in lieu of vacation.

We assume claimant is basing his claim on findings in Awards 6630 and 6658. The circumstances in this claim are not similar to those outlined in the above awards. It has been the practice to assign vacation dates in line with seniority preferences, the lists submitted to Division Chairman and no complaint has been made as to this practice. As pointed out above, the general understanding, since complaint of 1953, has been for the men to work their vacation, being paid in lieu thereof.

The claim as filed is without merit and we respectfully request it be declined.

All data contained herein has been made available to claimants.

(Exhibits not reproduced.)

OPINION OF BOARD: Carrier here involved admits at several places in the record it failed to comply with Section 5 of the vacation Agreement. Its only defense is that Claimant Bowers "was entirely cognizant of the fact that we had no one to relieve him and he would be required to work the job."

Because the claim now before us turns on Section 5, it is here quoted:

"Each employe who is entitled to vacation shall take same at the time assigned, and, while it is intended that the vacation date designated will be adhered to so far as practicable, the management shall have the right to defer same provided the employe so affected is given as much advance notice as possible; not less than ten (10) days' notice shall be given except when emergency conditions prevent. If it becomes necessary to advance the designated date, at least thirty (30) days' notice will be given affected employe.

"If a carrier finds that it cannot release an employe for vacation during the calendar year because of the requirements of the service, then such employe shall be paid in lieu of the vacation the allowance hereinafter provided."

The above language is clear. A reading of it shows:

1. An employe must ("shall") take his vacation at the time assigned.
2. The Carrier alone has ("shall have") the right to "defer" the vacation period, but not less than 10 days' advance notice "shall" be given.
3. Carrier also has the right to "advance" the vacation period "if it becomes necessary", in which case at least 30 days' advance notice "will be given" the employe.

4. If a carrier finds it "cannot" release the employe for "a vacation during the calendar year" such employe shall be paid in lieu thereof.

The reading of the Vacation Agreement itself, as well as the "Interpretations Thereon" and "Award of Referee in Connection Therewith" leads one to the inescapable conclusion that the parties, in negotiating such Agreement, were intent upon framing a document that would assure to every employe otherwise eligible an annual vacation. The language of the Agreement itself makes it incumbent upon the Carrier to see that such vacations are granted, and directs them to provide (Section 6) vacation relief workers.

Organization charges in the instant case the Carrier, at July 16 (first day of claimant's scheduled vacation period) "arbitrarily cancelled Claimant Bowers' vacation."

The Vacation Agreement (Section 5) gives the Carrier the right to "defer" or "advance" the vacation. It does not give Carrier the right to arbitrarily cancel such vacation.

Certainly "if the requirements of the service" will not permit a carrier to release an employe for a vacation "during the calendar year" it shall pay him in lieu thereof, but the opening stipulation is that "if a carrier finds that it cannot", etc. It is incumbent upon the Carrier to "find" a way to effectuate the provisions of the Vacation Agreement; and "if a carrier finds it cannot release an employe * * * because of the requirements of the service" it shall pay him "in lieu".

Arbitrary cancellation of Claimant's vacation on July 16 does not meet the requirements of Section 5 so far as Carrier's obligation to find a way to effectuate the vacation provisions is concerned.

It is argued on behalf of Carrier that Award 7820 (Smith), a denial Award involving the same parties, agreement, rules, issue and arguments as here, "is fatal to the instant case." With this we cannot agree, and a sustaining Award is in order with respect to part (a) of the claim.

Respecting part (b) of the claim, "for difference between straight time paid and penalty rate for July 16, 17, 18, 19, 20, 23, 24, 25, 26, and 27th, these dates were Mr. Bowers' assigned vacation dates", it is argued on behalf of Carrier that a "vacation day is not a rest day under the provisions of the Rest Day Rule * * * or under any of the provisions of the 1941 National Wage Agreement"; and that the Vacation Agreement itself provides payment at the pro rata rate when such payment is made in lieu thereof, this Division held in Award 6658 (Wyckoff):

"Fourth. The payment in lieu of vacation is not a penalty. It is a substitute method, authorized by Article 5, of discharging the carrier's fundamental obligation to provide time off. If the time off is properly assigned, cancellation of the time off and a substitution of payment in lieu are improper unless the requirements of Article 5 are met.

"It follows from this that, during the period covered by the claim, Claimant was improperly worked on days that were in effect his properly assigned rest days and was work outside his regular assigned hours for which he was entitled to payment at the rate of time and one-half instead of the straight time paid."

Because Carrier admits it failed to comply with Section 5 of the Vacation Agreement, part (b) of the claim will also be sustained.

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 Employees involved in this dispute are respectively carrier and employees 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 Agreement was violated.

AWARD

Claims (a) and (b) sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: A. Ivan Tummon
Executive Secretary

Dated at Chicago, Illinois, this 25th day of July, 1957.

DISSENT TO AWARD NO. 8027, DOCKET NO. CL-7775

This Award is in error for the following reasons:

1. It misconstrues and repudiates Section 5 of the National Vacation Agreement which was in effect prior to the amendment dated August 21, 1954, as previously interpreted by this Division in a dispute between the same parties and disputes involving other parties.

2. It interprets Section 6 without regard for the relationship between it and Section 5 and other sections of the National Vacation Agreement; without regard for the facts of record in this case, and without regard for Referee Morse's interpretation of the National Vacation Agreement under facts such as undeniably existed herein.

As to Section 5: The majority herein sustained part (b) of the claim "Because Carrier admits it failed to comply with Section 5 of the Vacation Agreement". This case involves interpretation of a National Agreement. Any interpretation by Carrier in this case obviously could not change the National Agreement.

Carrier admitted that in most cases employees were given ten days' notice when they could not be relieved for vacation and that no notice was given in the instant case. However, it emphasized that this had no bearing on this case. It based its action in this case on the second paragraph of Section 5, and pointed out that, while the first paragraph thereof requires not less than ten days' notice to defer and at least thirty days notice to advance vacations, there is no requirement in the Rule to either defer or advance vacations. Furthermore, Section 5 does not provide for advance notice when payment is to be made in lieu of vacation.

In the instant case, Claimant was paid in lieu of vacation which was all that he was entitled to in any event under the National Vacation Agreement. We so ruled in Award 7820 involving the same parties, agreement and rules as in the instant case, and in Awards 5697 and 7404, holding:

"The sole penalty provided when employees are not permitted to take their vacation is payment in lieu thereof."

In Award 7967 and the other awards cited therein, we held:

"Unless palpably wrong this Board is never warranted in overruling, in a subsequent dispute between the same parties, a previous award construing the identical provisions of their contract."

The majority herein has not shown in what respect, if any, Award 7820 is palpably wrong. Neither has it assigned any reason for electing to follow Award 6658 in preference to Award 7820 and the other awards cited, supra.

The dissent to Award 6658 shows up the errors of that Award.

Subsequent developments confirm the correctness of Award 7820 as well as of Awards 5697 and 7404. In amending the National Vacation Agreement effective January 1, 1955, the parties thereto agreed to add the following to Section 5:

"Such employee shall be paid the time and one-half rate for work performed during his vacation period in addition to his regular vacation pay."

The subsequent addition above makes it very clear that the parties never intended and the Agreement did not previously provide that an employee required to work during his assigned vacation period should receive punitive compensation therefor prior to January 1, 1955, the effective date of the amendment. In sustaining the instant claim, the majority herein is giving the amendment a retroactive application contrary to the agreement in effect at the time and the intent of the parties thereto.

As to Section 6: The requirement on Carriers in Section 6 to provide vacation relief workers must be construed in the light of Section 5, the second paragraph of which is controlling herein. A basic rule of contract construction is that the meaning and intent of the agreement must be gathered from its four corners (Awards 6856, 3342).

In his interpretation of Section 5, Referee Morse made it clear that it was—

"* * * impossible to lay down in advance of construing a given set of facts any blanket rule which will determine for certainty the circumstances which entitled the Carrier to grant an employee extra pay in lieu of a vacation",

and added—

"There are undoubtedly some circumstances in which a given employee is the only person available and qualified to do certain work for a carrier, the performance of which cannot be interrupted by a vacation. Under such extraordinary circumstances the carrier would be justified in granting the employee pay in lieu of a vacation."

In the instant case, the facts are that the practice on this Carrier of working clerk-callers in the Mechanical and Stores Department at Augusta, Georgia, during their vacation periods and paying them in lieu thereof, was concurred in by the Division Chairman in recognition of Carrier's inability to provide relief. The seniority district consisted of but ten employees, four of whom were clerk-callers and there was insufficient extra work available to enable Carrier to secure, train and hold a competent vacation relief man.

For the above reasons we dissent.

/s/ W. H. Castle
/s/ J. F. Mullen
/s/ R. M. Butler
/s/ C. P. Dugan
/s/ J. E. Kemp