Award No. 8159
Docket No. TE-7699

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Livingston Smith, Referee

PARTIES TO DISPUTE:

THE ORDER OF RAILROAD TELEGRAPHERS

KENTUCKY & INDIANA TERMINAL RAILROAD COMPANY

STATEMENT OF CLAIM: Claim of the General Committee, the Order of Railroad Telegraphers, on the Kentucky & Indiana Terminal Railroad that:

1. The Carrier is in violation of applicable provisions of its agreement with the Employes when it fails and refuses to grant a vacation to Operator E. G. Herron during the calendar year of 1955; and,

2. (a) Operator E. G. Herron shall be granted a vacation with pay of ten consecutive working days during the calendar year 1955 at a time to be selected by mutual agreement in accordance with currently applicable agreement provisions; or,

(b) If such vacation is not granted during the calendar year 1955 Operator E. G. Herron shall be paid in lieu thereof an amount equal to ten days' pay at time and one-half the rate of his position.

EMPLOYES' STATEMENT OF FACTS: In addition to the parties' general working agreement dated June 15, 1945 as amended by Memorandum of Understanding dated July 12, 1949 in conformity with the National 40-Hour Week Agreement; and the National Vacation Agreement, its interpretations and amendments including the amendments contained in Article 1 of the National Agreement dated August 21, 1954, there is in evidence a collectively bargained Memorandum of Understanding, dated September 20, 1945, between the Carrier and most of its employes including those represented by The Order of Railroad Telegraphers which provides for the granting of vacations to employes who, after being released from the Armed Forces, return to active service with the Carrier too late in any year to perform the number of days' service normally required of employes in order to qualify for vacations during the following year. A copy of this Memorandum of Understanding, identified as Exhibit TE-1, is attached hereto and made a part hereof.

E. G. Herron is an employe of the Carrier in service covered by agreement between the parties to this dispute. He entered this service on July 20, 1948 and has maintained a continuous employe relationship with the Carrier since that date. During the calendar year of 1949 he worked 195 days, thus qualifying for a vacation in 1950. During the calendar year of 1950 he worked 195 days, thus qualifying for a vacation in 1951. However, he

Mr. Leighty, Chairman of the Committee and spokesman for the non-operating groups, having taken the position that in the May 20, 1955, settlement with the NC&StL, the L&N, etc. he obtained something in addition, that something being that the carriers also must continue their present policy toward qualification for veterans' vacations, cannot now say for the Organization he leads or for the other Organizations he represents with any consistency that Article 1 of the August 21, 1954, Agreement, which was adopted by reference into the May 20, 1955, Agreement contained such provisions. The claim of employe Herron should, therefore, be declined.

* * * * *

Carrier affirms that all data submitted in support of its position have been presented to Organization.

(Exhibits not reproduced)

OPINION OF BOARD: Claimant here, E. G. Herron, seeks reparations for vacation pay for year 1955, account of vacation, or pay in lieu thereof being improperly denied him. Reliance is placed upon a Memorandum of Understanding, bearing date of September 20, 1945 which, it is asserted prevails over the National Vacation Agreement, as amended on August 21, 1954.

The record indicates claimant entered service in 1948, and was continuously so employed until the latter portion of 1950, when he entered service with the Armed Forces. Upon discharge from the Armed Forces he reentered service with the Respondent on or about November 18, 1954 and worked the balance of that year.

The Organizaton took the position that the Claimant was entitled to a vacation during the year 1955, for the reason that, within the meaning of the aforementioned Memorandum of Understanding, he (claimant) had clearly qualified. It is asserted that the amendments of August 21, 1954 to the National Vacation Agreement reflected no change in the basic number of days service required of any employe, regardless of status, to qualify for a vacation during the ensuing calendar year and that the Emergency Board Report, upon which the August 21, 1954 amendments were predicated, specifically expressed the Board's intent that failure to make recommendation was not to be interpreted as affecting any existing rule, regulation, interpretation or practice.

The Respondent countered with the assertion that Article 1, Section 1 (c) the National Vacation Agreement as it stood amended by the Agreement of August 21, 1954, superseded and invalidated the Memorandum of Understanding of September 20, 1945 inasmuch as the Emergency Board in its Report (on which the August 21, 1954 amendments were predicated) specifically denied a proposal for more liberal treatment for returning servicemen than that otherwise accorded returning personnel. It was pointed out that the rejection had the effect of requiring an employe returning from service to thereafter qualify for vacations under various provisions of Section 1, of Article 1, of the Agreement as amended. To substantiate its position Awards 7339 and 8123 as well as Award No. 12 of Special Board No. 170 were cited.

The question here is whether or not the Vacation Agreement of August 21, 1954 invalidated the Memorandum of Understanding of September 20, 1945.

This Memorandum of Understanding in effect waived the Master Agreement's requirement that compensated service be performed on 160 (133) days in the year preceding the one in which a vacation was afforded veterans. The only requirement to be met by returning Veterans were (1) that 160 (133) days compensated service be performed in one or more years preceding his entry into service (2) Continuance in service throughout the year of

return to employment. While we agree with and hereby reaffirm our adherence to the awards cited we do not think they apply here. In Award 8123, practice existing prior to August 21, 1954 was relied upon and we held that the National Agreement, subsequently ratified by the parties, nullified prior practice. In this Award (8123) no jointly executed Memorandum of Understanding was present. In 7339 we stated in essence that a policy (later asserted as a practice or oral agreement by the Organization) instituted by a Carrier as a gratuity and with the specific stipulation that it (Carrier) was not to be bound contractually by its action was not prevailing in face of the August 21 Agreement. Award 12 of Special Board No. 170 cited Award 7339 as controlling. In neither instance was there a jointly executed Memorandum of Understanding.

If the confronting Memorandum is invalidated it must be predicated upon the Report of Emergency Board No. 106 which formed the basis of the August 21, 1954 amendments. There a proposal for amendment to the Vacation Agreement similar to the subject matter of the confronting agreement was considered. The Emergency Board recognized that more favorable vacation requirements existed on some Carriers but declined to recommend that such more favorable requirements should be uniformly required. In rejecting this and other proposed amendments to the Vacation provision however the Emergency Board made it a point to state that where no favorable recommendations were made on Vacation amendment proposals it was not the intent of the Board to affect existing rules, regulations, interpretations or practices however established.

Thus we conclude that the Memorandum of Understanding was not invalidated and that the confronting claim is meritorious.

FINDINGS: The Third Division of the Adjustment Board, upon the whole record and all the evidence, finds and holds:

That the parties waived hearing on this dispute; and

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 Carrier violated the effective agreement.

AWARD

Claims sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: A. Ivan Tummon
Executive Secretary

Dated at Chicago, Illinois this 26th day of November, 1957.