Award No. 8484

Docket No. CL-8134

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Horace C. Vokoun, Referee

PARTIES TO DISPUTE:

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

SPOKANE, PORTLAND AND SEATTLE RAILWAY COMPANY

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

(a) That Carrier violated provisions of the National Vacation Agreement of December 17, 1941, and supplements thereto including the National Agreement of August 21, 1954, also Memorandum Agreement between Carrier and Brotherhood dated May 15, 1945, when it refuses to credit certain military service of employes as qualifying service in determining vacation allowances to employes.

(b) That recognition in line with the foregoing be given to E. E. Kinnumen, clerical employe in the Purchasing and Stores Department of the Carrier at Vancouver, entitling him to ten (10) days' vacation with pay (or pay in lieu thereof pursuant to terms of the Vacation Agreements) for year 1955.

EMPLOYES' STATEMENT OF FACTS: Mr. Kinnunen entered Carrier's service April 3, 1948. He was granted leave of absence December 22, 1950, to enter military service. Following his release therefrom on November 30, 1954, he returned to Carrier's service at the Vancouver Store on December 20, 1954.

Mr. Kinnunen was not listed on Carrier's vacation assignment list for vacation for the year 1955 and upon inquiry Carrier stated that he was not entitled to a vacation with pay for that year account the National Agreement of August 21, 1954, superseding Memorandum Agreement of May 15, 1945, and that paragraph (g), Article 1, Section 1, of the August 21, 1954 Agreement precludes the allowance of a 1955 vacation with pay to Mr. Kinnunen.

Memorandum Agreement dated May 15, 1945, is attached hereto as Employes' Exhibit No. 1.

General Manager Showalter's letter of March 21, 1955, denying the claim is attached as Employes' Exhibit No. 2.

Carrier in the negotiations leading up to the August 21, 1954 Agreement. In fact, the granting of vacations to a veteran in the year following his return from military service was included in the Organizations' proposals. The August 21, 1954 Agreement, as it was finally adopted, conceded to the employe returning from military service the right to use his time in military service, under certain conditions, in determining the length of vacation to which he was entitled. The August 21, 1954 Agreement did not waive for such employes the requirement to perform at least 133 days' compensated service in the preceding year to qualify for a vacation in the current year as had been requested by the Employes.

Claimant Kinnunen was not entitled to a paid vacation for the calendar year 1955, under Article I, of the August 21, 1954 Agreement, because he did not qualify for such a vacation upon his return to service of the employing carrier in 1954.

The claim is completely lacking in merit and should be denied.

All data in support of the Carrier's position has been submitted to the Organization and made a part of the particular question here in dispute.

(Exhibits not reproduced.)

OPINION OF BOARD: The organization and the carrier were parties to the National Vacation Agreement of December 17, 1941, as amended by the supplemental agreement of February 23, 1945 and the Chicago agreement of August 21, 1954. On May 15, 1945, they entered into a memorandum of understanding which reads as follows:

MEMORANDUM OF UNDERSTANDING

between the

SPOKANE, PORTLAND AND SEATTLE RAILWAY COMPANY
OREGON TRUNK RAILWAY
OREGON ELECTRIC RAILWAY COMPANY

and

All that class of clerical, office, station and storehouse employes thereon represented by the Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employes.

On the matter of according returning veterans sufficient credit for service in the armed forces to enable them to qualify for vacations under the Vacation agreement now in effect.

It is understood that a veteran who returns to active service of the carrier prior to the close of any year in accordance with the provisions of the Selective Training and Service Act of 1940, as amended (Revised Agreement dated March 28, 1945) and who at the time of his or her entering the armed forces had worked one or more years of 160 days each, as defined in the Vacation Agreement, and remains in active service of these companies until the end of such year of his or her return, be granted a vacation in the following year as if he or she had performed the amount of service in year of his or her return required to qualify for a vacation the following year, such vacation

to be granted in accordance with the terms of the Vacation agreement.

This Understanding shall continue in effect until it is changed under the provisions of the Amended Railway Labor Act.

For the Railway Companies

/s/ T. F. Dixon
Vice President & General Manager

For the Brotherhood

*/s/ C. L. McKinney
General Chairman

Portland, Oregon
May 15, 1945

The claimant entered the carrier service in April, 1948, and was granted a leave of absence on December 22, 1950 to enter military service. Following his release from the armed forces the claimant returned to the carrier service in Vancouver, Washington, on December 20, 1954, within the time limit prescribed by the then applicable Federal Act. He was not listed on the carrier's assignment for a vacation in the year 1955, the reason being, according to the carrier, that he was not entitled to a vacation with pay for that year because the terms of the national agreement of August 21, 1954, provided for an entirely new vacation agreement.

It is the position of the organization that the claimant is entitled to a vacation under the specific Memorandum of Understanding set forth above as that memorandum was not changed in accordance to its term, namely "under the provisions of the Amended Railway Labor Act".

The position on behalf of the carrier is twofold: (1) That the provisions of this memorandum were actually changed in the agreement of August 21, 1954 because there was a thirty day notice by the general chairman of the organization served upon the carrier under section 6 of the Railway Labor Act as provided in the national vacation agreement and the carrier also served formal notice on the general chairman containing a counter proposal for certain changes in the rules of the agreement. (2) That the language of the memorandum quoted above cannot apply to this claimant because that language provides that it shall only apply to veterans who return to active service in accordance to the Provisions of the Selective Training and Service Act of 1940 as amended, when in fact, this veteran left the service of the company to enter the armed forces and returned under the terms and conditions of the Universal Military and Training Act which was enacted in 1948.

On position number 1 of the Carrier, the Board affirms its ruling in Award 8159 and concludes that the subsequent acts of the parties did not invalidate the Memorandum of Understanding.

At the time of argument the Carrier Member of the Board presented the Board ruling in Award 8364, dated June 5, 1958. It is conceded that at no time on the property or while the claim was being processed to the Board had the Carrier's position number 2 been discussed or presented. It was made for the first time in a supplemental brief filed with the referee and presented for the first time in oral argument before the Board in that manner.

The Board held in Award 8364:

"If this Memorandum is applicable to Claimant, it is clear that the claim should be sustained—Award 8159. However, Carrier argues that the Memorandum is specifically limited to veterans who returned to work under the provisions of the Selective Training and Service Act of 1940,—i.e. veterans of World War II, whereas Claimant was inducted into the military and returned to work under the provisions of the Universal Military Training and Service Act (formerly the Selective Service Act of 1948). Claimant argues that the passage of the subsequent statute could not affect the agreement between the parties; that only by proper notice and negotiations under the Railway Labor Act could the memorandum be changed or cancelled, and that the Memorandum is therefore applicable to Claimant.

"The language of the Memorandum is specific in its description of those employees to whom it applies: Veterans who return to railroad service in accordance with the provisions of the Selective Training and Service Act of 1940, and amendments thereto. It may be that there are employees of the Carrier now in military service, to whom the sections of the Selective Training and Service Act of 1940 which have been preserved or extended by later legislation, are still applicable, and who may return to the service of the Carrier in accordance with its provisions. As to such employees, if there are any, the memorandum of 1945 would also still apply. But the record shows that Claimant entered and left the military service not under the Selective Training Service Act of 1940, but under the Universal Military Training and Service Act. Consequently, by its explicit terms, he is not covered by the 1940 Memorandum and his claim must be denied."

The record of the case in 8364 shows that the defense that the claimant's rights stemmed not from a return to "active service of the Carrier prior to the close of any year in accordance with the provisions of the Selective Training and Service Act of 1940" but from a new and different Act, namely, the Universal Military Training and Service Act of 1948, was presented by the Carrier and discussed on the property by the parties before any action was instituted of appeal to the Board.

Our facts in the instant case are as near as possible identical to the facts in case 8364 but the defense was not interposed by the Carrier at any time.

Further oral arguments were requested by the referee on the question of whether or not position number 2 of the Carrier was available as a defense to the claim when presented for the first time not by the Carrier on the property but by the brief and argument of the Carrier Member in his appearance before the Referee and the Board.

In Award Number 5469 the Carrier added as a defense to a claim for four days' pay for sick leave that "Claimant's work was not kept up (on those four days) without expense to the Railway Company in accordance with the provisions of Rule 67." This defense was not made when the claim was discussed by the parties on the property and the Board held:

"* * * This question was not raised on the property, and cannot be raised before this Board for the first time. Parties to disputes before

this Board will not be permitted to mend their holds after they reach the Board on appeal, and thereby create variances in the issues from what they were on the property."

Also in Award 6140:

"In the Employees' rebuttal brief claim is made that truckers performing loading work are entitled to a higher rate of pay. That claim is not encompassed within the claim as filed and does not appear to have been handled on the property in accordance with the provisions of the Railway Labor Act as amended, so we decline to exercise jurisdiction thereon."

Also Award 8426:

"By our Rules, and numerous Awards upholding them, we cannot expand a claim before us."

In Award 6024 the Board held:

"* * * There is nothing in the record of proceedings, either on the property or before this Board, indicating Carrier's action in the present case was due to conditions resulting from such order (Service Order #843 of the Interstate Commerce Commission) or is defended on that premise. Under such conditions we cannot speculate as to the facts or supply Carrier with a defense which it did not see fit to make itself. On that account neither the Order nor the Award are entitled to weight or credence under the existing facts and for that reason have been given no consideration in reaching our decision."

In Award 8411 the Board held:

"It may be argued that the claims should be dismissed because not timely filed under Rule 56½. There is nothing in the record showing that this point was ever raised during discussions of the claim on the property or in hearing before this Board; and it may therefore be concluded that Carrier waived the point. Accordingly this Board is not now disposed to make a dismissal award on these grounds."

Also in Award 7785 the ruling of the Board was:

"The issue was not raised while the dispute was being handled on the property. We, therefore, hold the issue is not properly before us now and shall forthwith proceed to dispose of this case on its merits." (Question of notice to third party.)

From the above opinions of the Board it is apparent that the Board has diligently protected the parties, both Carrier and Organization, in the presentation of their cases on appeal to the Board in limiting claims to those discussed on the property and limiting the defenses interposed so that there can be no enlargement—or in lay language, no second look after the case is concluded on the property.

Based on a study of the prior cases on this point decided by the Board, it is the opinion of the Board that position number 2 was not presented on time and is not available to the Carrier in this case.

The Board therefore will affirm its ruling in Award 8159 and will not consider position number 2.

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 contract was violated.

AWARD

Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: A. Ivan Tummon
Executive Secretary

Dated at Chicago, Illinois, this 3rd day of October, 1958.

DISSENT TO AWARD NO. 8484, DOCKET NO. CL-8134

Award 8484 is in serious error.

Furthermore, Award 8484 is a complete reversal of an award in this docket, as at first proposed by Referee Vokoun, in which he found that the Agreement was not violated and denied the claim. The Award in this docket, as at first proposed by Referee Vokoun, is as follows:

"OPINION OF BOARD: * * *[1]

"The position of the carrier is twofold: (1) That the provisions of this memorandum were actually changed in the agreement of August 21, 1954 because there was a thirty day notice by the general chairman of the organization served upon the carrier under section 6 of the Railway Labor Act as provided in the national vacation agreement and the carrier also served formal notice on the general chairman containing a counter proposal for certain changes in the rules of the agreement. (2) That the language of the memorandum quoted above cannot apply to this claimant because that language provides that it shall only apply to veterans who return to active service in accordance to the Provisions of the Selective Training and Service Act of 1940 as amended, when in fact, this veteran left the service of the company to enter the armed forces and returned under the terms and conditions of the Universal Military and Training Act which was enacted in 1948.

[1] Omitted portion not changed in Award 8484

"The Selective Service and Training Act of 1940 (Act of September 16, 1940; 54 STAT. 886) was followed by the Selective Service Act of 1948 (Act of June 27, 1948; 62 STAT. 604; 50 U.S.C. APP. 451) which established a post war draft. Both of these acts have been amended from time to time but the latter act was an entirely new and different act from that of the 1940 Selective Training and Service Act.

"This board held on the 5th day of June, 1958 in award number 8364 which from all the facts available is on all fours with a present case, the following:

> " 'If this Memorandum is applicable to Claimant, it is clear that the claim should be sustained—Award 8159. However, Carrier argues that the Memorandum is specifically limited to veterans who returned to work under the provisions of the Selective Training and Service Act of 1940,—i.e. veterans of World War II, whereas Claimant was inducted into the military and returned to work under the provisions of the Universal Military Training and Service (formerly the Selective Service Act of 1948). Claimant argues that the passage of the subsequent statute could not affect the agreement between the parties; that only by proper notice and negotiations under the Railway Labor Act could the memorandum be changed or cancelled, and that the Memorandum is therefore applicable to Claimant.
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> 'The language of the Memorandum is specific in its description of those employees to whom it applied: Veterans who return to railroad service in accordance with the provisions of the Selective Training and Service Act of 1940, and amendments thereto. It may be that there are employees of the Carrier now in military service, to whom the sections of the Selective Training and Service Act of 1940 which have been preserved or extended by later legislation, are still applicable, and who may return to the service of the Carrier in accordance with its provisions. As to such employees, if there are any, the memorandum of 1945 would also still apply. But the record shows that the Claimant entered and left the military service not under the Selective Training and Service Act of 1940, but under the Universal Military Training and Service Act. Consequently, by its explicit terms, he is not covered by the 1945 Memorandum and his claim must de denied.'

"This board in docket number CL-7897 has just recently made an award, in which case, however, vacations had already been scheduled and part of a vacation had already been taken by the claimant. In this case, the company has resisted and denied any vacation rights and therefore there is no 'remaining previously agreed to vacation days'. So we find that the decision in that case turned in an entirely different set of facts.

"It is the opinion of this board that the award in case number 8364 is controlling.

"**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 respectivcly 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 agreement was not violated.

AWARD

"Claim denied."

The Referee's findings in Award 8484, viz.,

"That the contract was violated."

is based upon the erroneous premise—

"* * * that Position No. 2 was not presented on time and is not available to the Carrier in this case"

because—

"It was made for the first time in a supplemental brief filed with the referee and presented for the first time in oral argument before the Board in that manner."

Paragraph (a) of the Statement of Claim and the Record in this case shows that the specific issue handled by the parties from its inception and before this Board was:

"That Carrier violated provisions of the * * * Memorandum Agreement between Carrier and Brotherhood dated May 15, 1945 * * *."

The record also shows that Carrier denied violation thereof.

Under Section 3 of the Railway Labor Act, the function of this Board is limited to interpretation of agreements, as written, regardless of arguments of the parties or lack thereof. Accordingly, interpretation of the Memorandum Agreement, supra, should have been the controlling factor in our decision in this case, regardless of arguments by or on behalf of either party, as was set forth in the original Award proposed by Referee Vokoun.

Agreements between the parties are before us in their entirety for disposing of disputes presented to this Board.[1] From the inception of this Board referees have properly not only accepted and given consideration to additional argument presented by Carrier or Labor Members, but at times have based their decisions on rules of agreements as well as prior Awards of this Board, which were not, and notwithstanding that they were not, cited or argued to them by either side in submissions or otherwise.[2]

In the instant case, the Memorandum Agreement between Carrier and Brotherhood dated May 15, 1945, is limited by clear and unambiguous language to veterans who return from military service to active service of the Carrier under provisions of the Selective Training and Service Act of 1940. It was undisputed, as set forth in the original award proposed by Referee Vokoun, that the Claimant herein entered and returned from military service under the provisions of the Universal Military and Training Act which was enacted in 1948. This Division was without authority to expand the terms of the Memorandum Agreement, supra, to cover employes returning from military service under the 1948 Act, and the instant claim was properly denied in the original award proposed by Referee Vokoun, as was done in a similar case covered by our Award 8364.

To say, as the majority are attempting to say here, that the citation of an Award of this Board by a member of this Board is inadmissible; and, to say as the majority are attempting to say here, that the citation of the law of the land is inadmissible, is untenable.

For the foregoing reasons, Award 8484 is in serious error and we dissent.

J. E. Kemp

J. F. Mullen

R. M. Butler

W. H. Castle

C. P. Dugan

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[1] See Awards 2491, 2622, 4304, 4322 and others.

[2] Among the many are Awards 5404, 5432, 7139, 7145, 8301; and of particular note Award 8475 by Referee Coburn, adopted on October 8, 1958, eight days subsequent to the adoption of this Award.