

Award No. 10958

Docket No. CL-10791

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

David Dolnick, Referee

PARTIES TO DISPUTE:

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

SACRAMENTO NORTHERN RAILWAY

STATEMENT OF CLAIM: This is a claim of the System Committee of the Brotherhood that:

(a) The Carrier violated the provisions of the National Vacation Agreement when it failed to relieve Mr. Newell Payne to take his vacation as scheduled during the period September 23 through 27, 1957, and

(b) Mr. Payne is entitled to and shall be compensated at the overtime rate, in lieu of the straight time rate allowed, for having worked his scheduled vacation period, September 23 through 27, 1957.

(c) Mr. Payne is entitled to and shall be additionally compensated at the straight time rate for the five days vacation denied him in 1957.

EMPLOYEES' STATEMENT OF FACTS: Mr. Newell Payne, with a clerical seniority date of August 17, 1941, was entitled to 15 days' vacation during the year 1957, and was assigned vacation dates of June 24 through July 25 (10 days), and September 23 through 27 (5 days). He was allowed to take the first ten days of his vacation as scheduled, but before taking the second period he received a communication from Agent C. E. Brown, dated September 11, 1957, Yuba City, reading as follows:

"Account no relief we will be unable to relieve you on your vacation at this time."

As a result thereof, Mr. Payne was not permitted to take his vacation as scheduled, although he had made plans for a vacation for that period for nearly a year, and since the vacation involved plans with friends, rescheduling it to another time would have served little purpose. Therefore, on October 10, 1957, Mr. Payne addressed the following letter to Superintendent H. J. Mulford:

"My vacation was due Sept. 23 to 27 incl. 1957, ten days prior to my vacation I was notified by Agent C E Brown that 'account

Apparently, Mr. Leighty's concern for the need for vacations has not filtered down to the local level where the emphasis, judging from the instant claim, is on obtaining the penalty instead.

In conclusion, Carrier restates its position in the instant claim as follows:

(1) the Organization's theory that the August 21, 1954 amendment to Article 5 of the Vacation Agreement entitled an employee whose vacation has been deferred to immediate payment of the time and one-half penalty has been held by your Board to be wholly untenable (Award No. 8282);

(2) the Organization's insistence that claimant need not reschedule his vacation after it has been deferred but rather can refuse to do so and collect payment under Article 5 is

(a) completely contrary to the binding interpretation of Article 5 rendered by Senator Morse and

(b) wholly at odds with the testimony of various Brotherhood leaders to the effect that the purpose of the Vacation Agreement is to insure that employees receive their vacations rather than pay in lieu thereof (see testimony of G. E. Leighty, quoted on pages 20-21 of this submission).

For the reasons stated, Carrier strongly urges that the instant claim be denied.

All of the above has, in substance, been discussed with the representative of the Organization.

OPINION OF BOARD: Claimant was entitled to 15 days of vacation during the year 1957. He took 10 days of his assigned vacation in the summer of 1957, and he was scheduled the additional 5 vacation days September 23 through September 27, 1957. On September 11, 1957 the Carrier notified the Claimant as follows:

"Account no relief we will be unable to relieve you on your vacation at this time."

Pursuant to this notice the Claimant was not permitted to take his 5 days of vacation which was scheduled to start on September 23. The Claimant soon thereafter made claim for \$133.28 which represents additional pay at time and one-half for the days worked from September 23 through September 27.

The Carrier's Superintendent wrote to Claimant under date of October 13, 1957 rejecting the claim and in that letter said, in part:

". . . Therefore, I believe it would be proper for you to reschedule your vacation for a later date."

On November 8, 1957 the Carrier's Superintendent again wrote the Claimant as follows:

"Refers to my letter of October 13 regarding re-scheduling your vacation.

"Will you please schedule your vacation to be taken before the end of the year, advising when done."

Claimant replied under date of December 17, 1957 as follows:

"In reply to your letter dated October 13, 1957 regarding re-scheduling my vacation.

"I have not re-scheduled my vacation because the understanding I have is that when an employe is assigned a date for vacation and the vacation is cancelled he is entitled to be paid for the vacation at time and half over straight time.

"I had been planning on this vacation since last January with friends from Nevada."

The Claimant did not have his five days of vacation in 1957. There is no question but that the Carrier had the right to defer Claimant's vacation. It was not done capriciously or arbitrarily. The record shows that there were no employes available to relieve the Claimant from September 23 through September 27.

Article 5 of the Vacation Agreement of December 17, 1941 gives the Carrier the right to defer a scheduled vacation, "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." More than ten (10) days advance notice was given to the Claimant.

The sole question is whether the Claimant had the right to refuse to reschedule his vacation and whether by his position waived the five days vacation in 1957. It is a fundamental principle that the purpose of the Vacation Agreement is to provide time off, not pay. The Carrier, in good faith, offered to reschedule Claimant's vacation. The offer to reschedule, however, is not sufficient. If an employe is unwilling to co-operate and agree on a vacation date, it is the duty of the Carrier to set the vacation period within the year when it is earned. This the Carrier failed to do. Under date of July 20, 1942 Article 5 of the Vacation Agreement has been interpreted as follows:

"Question 1: May an employe at his option forgo the taking of a vacation, remain at work and accept pay in lieu thereof?

"Answer: No."

The Claimant was under misapprehension when he wrote his letter of December 17, 1957. He was not entitled to be paid at time and one-half because the Carrier deferred his vacation. He would have been entitled to such penalty time only if the Carrier was unable to release him for his five (5) days vacation during the calendar year of 1957. This did not occur. The Carrier notified the Claimant that he could be released before December 31. Just as an employe may not forgo the taking of a vacation,

the Carrier may not accept the waiver by the employee. Each has a duty to comply with the terms of the Vacation Agreement.

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

That the parties waived oral hearing;

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 insofar as the Claimant did not receive the five days additional vacation, but because the Claimant refused to co-operate with the Carrier in setting a vacation period within the calendar year, he is entitled to only straight time pay for such five (5) days.

AWARD

Claimant should be paid for five (5) days vacation for the year 1957 at the straight time hourly rate then prevailing.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 7th day of December 1962.