Award No. 12312
Docket No. CL-12064

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

(Supplemental)

Benjamin H. Wolf, Referee

PARTIES TO DISPUTE:

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

PANHANDLE AND SANTA FE RAILWAY COMPANY

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

(a) Carrier violated the provisions of the current Agreement at Lubbock, Texas, when it deferred the vacation of J. D. Warner and failed and refused to pay him the punittive rate of time and one-half for work performed during his assigned vacation period; and,

(b) J. D. Warner shall now be paid an additional four (4) hours at the pro-rata rate of Assistant Cashier, Position No. 3632; for each of the ten (10) work days on which he worked during his scheduled vacation period.

EMPLOYES' STATEMENT OF FACTS: Prior to January 1, 1959, a vacation schedule was prepared in accordance with the individual requests and seniority of the clerical employes on the Slaton Division Station Department Seniority Roster. The Brotherhood's Division Chairman and the Carrier's representatives cooperated in assigning such dates.

In this manner, J. D. Warner, with a seniority date of December 1, 1949, was assigned his annual vacation of ten (10) days to commence on June 1, 1959.

On May 21, 1959, Mr. Warner was advised that his vacation was being deferred and was requested to advise the Superintendent preference as to a rescheduling of his vacation at a later date. Mr. Warner advised the Superintendent that his next preference was June 15, 1959. On June 3, 1959, Mr. Warner was again advised, by the Carrier that his vacation, as rescheduled for June 15, 1959, was again being deferred and he was again requested to advise a later date on which he wished his vacation to be rescheduled. Mr. Warner, on June 5, 1959, advised the Carrier, that as his vacation had been deferred the second time, he did not desire to set another date for rescheduling his vacation and instead, requested that he be paid his vacation allowance at that time. Carrier refused to pay the vacation allowance and deferred Mr.

out of the respondent Carrier's deferment of an employe's vacation and was denied by Award No. 23 of Special Board of Adjustment No. 174, it is appropriate to direct the Board's attention to the following which is quoted from the "Findings" in Award No. 23 and clearly supports a denial of the claim in the instant dispute:

> "Presumably employes and their families make vacation plans and the dominant purpose of Article 5 is that employes shall take their vacations as originally scheduled; but it may be a matter of indifference to an employe if his scheduled vacation period is deferred and a reassigned vacation date may be preferable to him.
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> When the Carrier served the required 10-day notice of deferment on Claimant and solicited his request for another vacation date, he was then and there confronted with a number of choices. He could have protested the deferment and challenged its propriety. If he had no objection to the deferment and had some preference for some other vacation date, he could have requested one. And if he had no objection to the deferment and was indifferent about when he took his vacation, he could have stood mute and permitted management to determine the length of the deferment as well as to make the deferment; and this he did.
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> On the facts of record, Claimant must be taken to have waived the right to challenge the propriety of the deferment by failure to protest the 10-day notice and he also must be taken to have waived the right to challenge the reassigned vacation date by his failure to request another vacation date and by taking the vacation date reassigned by the Carrier without protest."

In conclusion, the Carrier respectfully reasserts that the Employes' claim in the instant dispute is wholly without support under the governing agreement rules and should be declined for the reasons expressed herein.

OPINION OF BOARD: Claimant was scheduled to take ten days' vacation beginning June 1, 1959. On May 21, 1959 the Carrier informed the Claimant that his vacation would have to be deferred because there was no relief worker available to hold his job. The Claimant then chose to begin his vacation on June 15, but this, too, was deferred by the Carrier for the same reason. Claimant then asked that his vacation begin on December 18th, but the Carrier refused this because it had a rule that all vacations should begin on the 1st day of the work week, which would have been December 14th. This was not acceptable to the Claimant and he asked that his vacation begin on July 20th. This was agreed to by the Carrier and ultimately he took his vacation at that time.

The Petitioner asks that the Claimant be paid time and a half for the work which he did during the ten days following June 1st which was his originally scheduled vacation. This Board has held that, where extra or relief employes are not available, scheduled vacations may be properly deferred by Carrier and no overtime payment is due for the period originally scheduled as vacation. See Awards 12025 (O'Gallagher); 10965 (Dorsey); 10958 (Dolnick); see also Award No. 23, Special Board of Adjustment 174 (Wyckoff).

Carrier asserts that the Claimant is estopped to deny that the postponement of his vacation was proper because he did not object to the notice advising him of the change but requested and took a vacation at a subsequent

time. Carrier relies on Award No. 23 cited above, and Award 10965, (Dorsey). These Awards do indeed assert that the failure to protest the notice of deferment of vacation constitutes a waiver on the part of the Claimant.

Petitioner claims, however, that the Carrier acted in a capricious and arbitrary manner and not in good faith in deferring the Claimant's vacation. If, in fact, the Carrier did not act in good faith and was arbitrary and capricious, the authorities relied upon by the Carrier would not apply. They were predicated on the premise that Carrier acted in good faith.

Article V of the National Vacation Agreement provides as follows:

> "5. 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.
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> 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."

This Article was the subject of interpretation by Referee Wayne Morse who said,

> "There is no substitute for good faith. A Management would not act in good faith towards its employes if it gave notice of a vacation schedule, permitted the employes and their families to make vacation plans accordingly, and then, for no good or substantial reason, arbitrarily deferred vacations of some of the employes. Such a practice would not promote good labor relations. The important point for the parties to keep in mind is that the primary and controlling meaning of the first paragraph of Article V is that employes shall take their vacations as scheduled and that vacations shall not be deferred or advanced by management except for good and sufficient reason growing out of essential service requirements and demand."

It is clear from the foregoing that no vacation should be deferred except for good and sufficient reason and the mere assertion by the Carrier that a relief employe was not available is not conclusive proof that there was "good and sufficient reason growing out of essential service requirements and demand." The burden is, of course, upon the Petitioner to prove that the Carrier has not acted in good faith, for good and sufficient reason and was capricious or arbitrary.

The Carrier's argument that the Claimant waived his rights when he failed to protest would be valid only if the Carrier's good faith were not challenged. Surely, the Claimant cannot be held to have waived if his assumption that the Carrier was acting in good faith, was erroneous. A waiver which is induced by representations made in bad faith must be disregarded. To do otherwise would be to encourage the lapsing of legitimate claims by improper, arbitrary misrepresentations, made in bad faith.

Accordingly, the defenses which the Carrier has interposed, which normally we have held would be adequate, must fall if the Petitioner sustains its burden of proving that the Carrier has acted in bad faith.

The record indicates that the Claimant's vacation schedule was arranged through the cooperation of the local committee of the Organization and the Representative of the Carrier at the location. An arrangement was also made at the property for the relief of the employes who were going on vacation, by the substitution of other workers for those going on vacation, and that these arrangements were made by the Division Carrier and Organization Representatives. The arrangements were being followed when the Superintendent countermanded them. The reason given was that there was no qualified relief available. Later the Carrier stated the reason as, "somewhere down the line in filling the resulting temporary vacancies brought about by such a vacation relief program, penalty payment might be involved" or that the Carrier could be confronted with claims for improperly filling such vacancies.

The real reason for deferring Claimant's vacation was not that "qualified relief was not available" as stated, but that the Carrier might be subject to penalty payment if it permitted the established arrangements to continue. Thus, the Carrier deferred the vacation on the mere conjecture that it might be subject to penalty payment in the future.

We do not think the Carrier was completely candid in its reasons for deferring Claimant's vacation, nor do we think that it was a good or substantial reason to defer a vacation because of the mere possibility that penalty payment might be involved. This was not a "good and sufficient reason growing out of essential service requirements and demand" as stated by Referee Wayne Morse in his interpretation of the Vacation Rule.

Carrier sought to disavow the local arrangements as having been made by a Carrier's Representative who lacked authority and because it was an arrangement in violation of the existing Agreement and the rights of others. The record shows, however, that the local Carrier's Representative was authorized to do so by his Superintendent, that similar plans were in effect for several years past. There is no showing that this arrangement was a violation of the rights of others. In fact, there were no others involved, as witnessed by Carrier's own assertion that there was no available qualified relief.

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 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 Agreement.

AWARD

Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 6th day of March 1964.

CARRIER MEMBERS' DISSENT TO AWARD 12312, DOCKET CL-12064

We agree with the majority on the rule of the case, namely, ". . . The burden is, of course, upon the Petitioner to prove that the Carrier has not acted in good faith, for good and sufficient reason and was capricious or arbitrary."

We cannot agree, however, that in this case Petitioner has proved Carrier's conduct to be arbitrary, capricious or in bad faith.

We dissent.

G. L. Naylor
W. M. Roberts
R. E. Black
W. F. Euker
R. A. DeRossett