Award No. 12426
Docket No. MW-11473

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

John H. Dorsey, Referee

PARTIES TO DISPUTE:

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES

MISSOURI-KANSAS-TEXAS RAILROAD COMPANY
MISSOURI-KANSAS-TEXAS RAILROAD COMPANY OF TEXAS

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

(1) The Carrier violated the effective Agreement when it failed and refused to allow Mr. Jim K. Williams pay in lieu of his 1958 vacation which he earned during the calendar year of 1957.

(2) Mr. Jim K. Williams now be allowed pay in lieu of the 15-day vacation which he earned but did not receive for the calendar year of 1958.

EMPLOYES' STATEMENT OF FACTS: During the calendar year of 1957, Mr. Jim K. Williams performed more than 133 days of compensated service as a section laborer for this Carrier and had performed a sufficient number of days of compensated service in previous years so as to make him eligible for a fifteen-day paid vacation in 1958 or pay in lieu thereof.

The Claimant was laid off in force reduction on November 22, 1957 and protected and retained his seniority and employe-relationship by his compliance with Rule 25 of Article 3 when he filed and refiled his address with the appropriate Carrier and Organization officers. The Claimant initially filed his address on November 22, 1957, **the date of his lay-off.** He then refiled his address under dates of 1/10/58, 3/1/58, 4/30/58, 6/23/58, and 7/24/58, advising, with each of such filings, that he was "available for work." During the aforesaid period, he had responded to two recalls for temporary service and, as a result thereof, he performed compensated service as a section laborer during 1958, in recognition of his seniority, from June 2, 1958 through June 20, 1958 and again from July 7, through July 18, 1958.

On July 23, 1958, the Claimant filed application for a disability annuity under the provisions of the Railroad Retirement Act. (He was only 60 years of age.) This was exactly five (5) days after his last day of compensated service for and in behalf of this Carrier. His request was granted and, under date of September 22, 1958, he notified the appropriate officers of the Carrier and of the Organization of his address, further advising that he was "on sick leave." **No exception was ever taken to the last mentioned notice.**

pay that he would have received had he not been cut off account of force reduction on June 23, 1958, when he was scheduled to begin his fifteen (15) days vacation. No such claim was presented to and handled with the Carrier and is before the Board here, and that contention, which shows Petitioner is attempting to change horses in the middle of the stream, or the basis of the alleged claim, refutes and denies the alleged claim as presented to the Carrier January 12, 1959, and the alleged claim as presented to the Board in President H. C. Crotty's letter of November 16, 1959. Petitioner's contentions are nothing more than mere assertions and conclusions without adequate supporting evidence and substance.

As the facts and evidence clearly and substantially show that the Third Division, National Railroad Adjustment Board, is without jurisdiction to docket, hear and determine this alleged dispute, and that said alleged dispute is without merit and agreement support, for each and all of the reasons set forth herein, the Carrier requests that the Board dismiss or deny this alleged claim.

Except as herein expressly admitted, the Missouri-Kansas-Texas Railroad Company and Missouri-Kansas-Texas Railroad Company of Texas, and each of them, deny each and every, all and singular, the allegations of the Organization and Employes in alleged unadjusted dispute, claim or grievance.

For each and all of the foregoing reasons, the Missouri-Kansas-Texas Railroad Company and Missouri-Kansas-Texas Railroad Company of Texas, and each of them, respectfully request the Third Division, National Railroad Adjustment Board, deny said claim and grant said Railroad Companies, and each of them, such other relief to which they may be entitled.

(Exhibits not reproduced.)

OPINION OF BOARD: Claimant was laid off in a force reduction on November 22, 1957. Thereafter, he complied with Rule 25 of the Agreement to insure retention of his seniority and return to service if the opportunity arose.

On two occasions subsequent to November 22, 1957, Claimant was recalled to service. He worked from June 2 through June 20, 1958; and, July 7 through July 18, 1958.

On July 23, 1958, he made application for a disability annuity under the Railroad Retirement Act. It was granted.

Under date of December 3, 1958, Carrier wrote Claimant that since he was laid off in a force reduction on November 22, 1957, and since the forces had not been restored within twelve months after that date, he was "In accordance with Rule 25 of Article 3 of current agreement . . . considered out of service and your name is being dropped from seniority list." Thereafter, Carrier failed and refused to pay Claimant for his 1958 vacation which he had earned for services performed in 1957. This gave rise to the claim before us.

Both parties cite Section 8 of the Vacation Agreement in support of their respective positions. It reads:

"Section 8. No vacation with pay or payment in lieu thereof will be due an employe whose employment relation with the carrier has terminated prior to the taking of his vacation, except that employes retiring under the provisions of the Railroad Retirement Act shall receive payment for vacation due."

Concerning this Section, the June 10, 1942 Interpretation of the Vacation Agreement states that:

"Within the application of Article 8:

(1) An employe's employment relation is not terminated when (a) laid off or cut off on account of force reduction if he maintains rights to be recalled; or (b) on furlough or leave of absence; or (c) absent on account of sickness or disability."

This makes clear that Claimant's employment relationship was not terminated at the time he was granted a disability annuity under the Railroad Retirement Act.

Carrier contends that Claimant's employe relationship was terminated when it wrote Claimant, on December 3, 1958, that he was "considered out of service" in accordance with Rule 25, Article 3 of the Agreement, which reads in pertinent part:

". . . When force is not restored within twelve (12) months after date of reduction, employe wil be considered out of service and dropped from seniority list."

Further, there is a conflict between Section 8 of the Vacation Agreement and Rule 25, Article 3 of the Agreement; and where this condition exists this Board held, in Award No. 5048, the rules of the Agreement prevail over the Vacation Agreement. It concludes that Claimant's employe relationship was terminated in 1958 "prior to the taking of his vacation"; therefore, Section 8 of the Vacation Agreement strips Claimant of entitlement to vacation pay.

Petitioner argues that Claimant was an employe at the time he was granted a disability annuity under the Railroad Retirement Act and the employe relationship could not be terminated so long as he continued in the disability annuitant status; and, that Claimant comes within the exception expressed in the last clause of Section 8 of the Vacation Agreement.

We held in Award No. 7651 that an employe whose last service was performed on December 23, 1953, who filed for a retirement annuity on December 28, 1953, was entitled, by application of Section 8 of the Vacation Agreement, to pay for the 1954 vacation which he earned in 1953. In applying for the retirement annuity that employe "voluntarily gave up any rights which he then held to return to service." In Award No. 3897 we spelled out the difference in status of an employe receiving a retirement annuity from one receiving a disability annuity, as follows:

"There is nothing in the Railroad Retirement Act as amended July 21, 1946, which changes Neyhard's status as an employe on leave of absence because of illness by reason of the fact he receives a physical disability annuity under the act. To obtain such an

annuity he must furnish proof of his total disability and after having once done so he must furnish proof of continuing disability from time to time in order to remain under the benefits of the act. The requirements for a physical disability annuity differ from those for a retirement annuity. The latter requires an employe to forsake the service of his employer. But such is not the requirement for a physical disability annuity. In fact the act specifically states that the requirement that an annuitant must relinquish his right to return to the service of his employer shall not apply to those receiving physical disability annuities prior to attaining the age of 65.

If Neyhard recovers from his disability before reaching 65 his annuity ceases. Under Rule 4 he would be entitled to return to his regular position upon returning from his sick leave. Therefore, the position is not now permanently vacated, but only temporarily vacated. In advertising Neyhard's regular position as a permanent vacancy instead of a temporary vacancy, Carrier violated the agreement."

In Award No. 5910 we held:

"It is generally accepted that an employe earns his vacation and is entitled to it as a result of performing certain work during the year preceding the vacation."

And in Award No. 6865 we said:

"In approaching consideration of the issue thus raised by Claimants and with direct application to the basic premise on which vacation allowances are founded and incorporated in collective bargaining Agreements, two fundamental principles, so universally accepted they may be said to have become traditional, must be kept in mind. The first of these is that vacation with pay is not a gratuity, but, by contract, is earned compensation for service rendered (See Award 6133). The second, for reasons so obvious they need not be labored but nevertheless just as traditional, springs from the first. It is that an employe earns his vacation and is entitled to it as a result of performance of work and/or service during the year preceding such vacation (See Award 5910).

With the foregoing as prologue, we approach the pivotal issue in the instant case: Did Claimant retain his employe relationship while in the status of a disability annuitant? We hold that he did.

It is our understanding of the Railroad Retirement Act that the continuation of the employe relationship is the predicate upon which a disability annuity is founded. Unlike a retirement annuity which severs the relationship, the disability annuity contemplates the annuitant's return to work when the disability disappears. This contemplation would evaporate if the Carrier is free to sever the relationship during the term of the annuity. This is not to be construed as meaning that upon the termination of the disability annuity the Carrier is required to put Claimant to work. Upon the termination of the disability annuity, the annuitant stands in no better position than he would have been if absent of the disability. We will sustain the claim.

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 Carrier violated the Vacation Agreement.

AWARD

Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 23rd day of April 1964.