Award No. 14752
Docket No. TE-11677

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

(Supplemental)

Daniel House, Referee

PARTIES TO DISPUTE:

TRANSPORTATION-COMMUNICATION EMPLOYES UNION (FORMERLY THE ORDER OF RAILROAD TELEGRAPHERS)

TERMINAL RAILROAD ASSOCIATION OF ST. LOUIS

STATEMENT OF CLAIM: Claim of the General Committee of The Order of Railroad Telegraphers on the Terminal Railroad Association of St. Louis, that:

1. Carrier violated the agreement between the parties when it failed to grant J. W. Addison a vacation starting on November 11, 1958 as assigned and refused to pay him for the time worked during his vacation period.

2. Carrier shall be required to compensate J. W. Addison in the amount of ten days' pay at the time and one-half rate for work performed during his vacation period in addition to pay already received.

EMPLOYES' STATEMENT OF FACTS: The agreements between the parties are available to your Board and by this reference are made a part hereof.

This dispute is primarily concerned with the National Vacation Agreement of December 17, 1941, as amended.

Prior to June 9, 1958, Claimant J. W. Addison held a regular assignment in "UD" office in the Telegraph Department. For the calendar year 1958, he was entitled to a vacation of ten working days with pay. He requested and was assigned to a vacation starting date of November 11, 1958, in accordance with the provisions of Article 4 (a) of the Vacation Agreement.

Effective June 9, 1958, two positions were abolished in "UD" Telegraph Office. Because of this abolishment, Claimant Addison acquired displacement rights, under the provisions of Article 7 of the regular agreement, which he exercised by displacing on the third shift at Southern Crossing Tower in the Interlocking Department. Trainmaster Canda refused to permit him to go on his new position, notifying him that he must take his vacation immediately. He was suspended from the third shift at Southern Crossing Tower for ten working days before being permitted to go to work.

abolished and on this date he notified the Supervisor of Interlocking (the position was then titled Passenger Trainmaster) that he was exercising his seniority in the Interlocking Department. On the basis of the method of assigning vacations in that department it was noted that Addison would have already had his vacation had he been in the Interlocking Department at the beginning of the year and he was, therefore, told that he would have to take his vacation before entering that department. Employes in similar circumstances have been so handled in the past, to which practice neither local nor general chairmen took exception. Accordingly, Addison took his vacation from June 9 through June 22, 1958, and went to work in the Interlocking Department on June 23, 1958.

Addison contended that he was forced to advance his vacation date without thirty days' notice as provided in Article 5 of the National Vacation Agreement and filed claim for two weeks additional vacation, maintaining that he did not have proper notice and as his vacation was set for November 11, 1958, should retain that date for starting his vacation. That claim was progressed on the property and finally declined by the Manager of Labor Relations, the highest officer designated by the Carrier to handle such disputes, in letter dated November 17, 1958. That claim is now barred under provisions of the Time Limit on Claims Rule (Article V of the August 21, 1954 National Agreement), as further proceedings were not instituted by the employe or the Organization before this division of the National Railroad Adjustment Board, within 9 months from the date of the Manager of Labor Relations' decision. This claim will hereafter be referred to as Claim I.

Under date of January 10, 1959 the General Chairman filed claim in behalf of Addison for 10 days' pay at the time and one-half rate because of work performed during his vacation period, November 11 through November 24, 1958, which is the claim before this board. This claim will hereafter be referred to as Claim II.

OPINION OF BOARD: Prior to June 9, 1958, Claimant held a regular assignment in "UD" Office in the Telegraph Department. For his 1958 ten-day vacation he was properly assigned to a vacation starting date of November 11, 1958. Effective June 9, 1958, his position in the "UD" Telegraph Office was abolished. He exercised his seniority to move into a position at Southern Crossing Tower in the Interlocking Department. He was notified by Carrier that he must take his vacation immediately and he did. He filed a timely claim protesting the advancing of his vacation time: "that he had not had the proper notice, and as his vacation was set for November 11, is claiming that date". Organization advanced that claim, which for convenience we shall call Claim I, to Carrier's Manager of Labor Relations, who, on November 17, 1958, refused to overrule prior Carrier representative decisions declining Claim I. Meanwhile, starting on November 11th, Claimant started to work the ten day period which had been originally scheduled for his vacation. Organization did not further advance Claim I, but on January 10, 1959, filed a new claim, which we shall call Claim II, saying in the letter initiating that claim: "* * * Now that Mr. Addison has not been granted a vacation and was required to work during his scheduled vacation period, he is entitled to be paid at the time and one-half rate for the work performed during that period in addition to his vacation allowance * * *". Claim II is the claim to be disposed of by us.

Carrier contends that we should not dispose of Claim II on its merits because the occurrence prompting Claim II arose on June 9, 1958, and Claimant's

right to file the claim under the Time Limit on Claims Rule expired 60 days from that date; in addition Carrier argues that consideration of Claim II on its merits is barred because the issue raised in Claim II was disposed of on the property by the disposition of Claim I.

Article 9 of the Agreement says:

> "(a) All claims or grievances must be presented in writing by or on behalf of the employe involved, to the officer of the Carrier authorized to receive same, within sixty (60) days from the date of the occurrence on which the claim or grievance is based.* * *"

We do not agree with Carrier that the occurrence on which Claim II was based took place on June 9, 1958; and our reasons for arriving at this conclusion lead us further to conclude that the issue raised by Claim II was not disposed of with the disposition of Claim I on the property. Claim I arose when, on Claimant moving into a position in a different department, Carrier, allegedly in violation of the first paragraph of Article 5 of the Vacation Agreement, advance the date designated for Claimant's vacation, wherefore Organization asked that Claimant be granted his vacation (i.e., time off with pay) beginning November 11 as originally scheduled. Carrier required Claimant to work during the time he claimed was his properly designated vacation time. This event, beginning on November 11, gave rise to Claim II which is based on an alleged violation of the last two paragraphs of Article 5 of the Vacation Agreement and claims for Claimant 10 days' pay at time and one-half. The occurrence which gave rise to Claim I took place in June when Carrier insisted that Claimant take a vacation before it would permit him to work on his new position, whereas the occurrence which gave rise to Claim II arose when Carrier did not give Claimant a vacation starting on November 11 and paid him only straight time for work on what he claimed was his scheduled vacation time. We find that the time limit for presenting Claim II under Article 9 of the Agreement was sixty days after Claimant was paid for the two weeks starting November 11, 1958. Claim II was filed within the time limit.

The remedy claimed by Organization in Claim I, a two week vacation beginning on November 11, became impossible even before Carrier finally rejected it in writing on November 17. By abandoning Claim I when, as far as the claimed remedy was concerned, proceeding became futile, and initiating a new action based on a new circumstance and claiming a remedy fitted to that new event. Organization did not either concede or establish as a fact that Carrier's action in June was proper—it merely recognized the futility for Claimant of a further progressing of Claim I. Carrier correctly insists that Claim II is the only claim to be disposed of by us. The determining issue of fact to be decided by us in disposing of Claim II is whether the period beginning November 11 was the assigned vacation time of Claimant as claimed by Organization and denied by Carrier. In order to decide this question we must decide whether Carrier's action in advancing Claimant's vacation in June was valid under the Agreement; while that was the issue involved in Claim I, for Claim II it is only one of the preliminary, though critical, questions. We find that the issue raised by Claim II was not disposed of with the disposition of Claim I on the property.

On the merits it is Carrier's position that Claimant's right to take the vacation slated to begin in November automatically terminated when he left "UD" Telegraph Office and exercised his seniority in the Interlocking Depart-

ment; that he then immediately became subject to the vacation procedures in effect in the Interlocking Department; and that the two weeks vacation allowed him from June 9 on, was in accordance with such vacation procedures and in full satisfaction of his entitlement under the Agreement. At the base of this argument is the repeated assertion by Carrier, undenied by Organization, and, therefore, accepted as fact by us, that it had been an accepted practice for some years that when employes came into the Interlocking Department from "UD" they took their vacations before starting to work in the Interlocking Department. This undenied practice would be decisive of the intent of the parties regarding the meaning of Article 5 of the Vacation Agreement if the Article were ambiguous and there were no other evidence of its intended meaning. But if the language of the Article is unambiguous, or if there is contradictory evidence proving other intended meaning, we cannot find that the practice changed the intention without exceeding our authority which is to apply the Agreement as it was intended by its framers.

In this case we are fortunate enough not only to have the relatively unambiguous language of the Article, and to have the clearly stated intention of the framer of the language who, as Referee, wrote and interpreted the language as the agent for both parties, but we have also Carrier's position on the meaning of the language taken by its representatives in proceedings before Referee Morse when he was asked to interpret the language.

The first paragraph of Article 5 of the Vacation Agreement is:

> "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 last thirty (30) days' notice will be given affected employe."**
>
> **(Emphasis by Referee House)**

Referee Morse decided:

> "* * * What the language of the paragraph does is lay down a statement of policy that when a vacation schedule is agreed to and the employes have received notice of the same and have made their vacation plans accordingly, the schedule shall be adhered to unless management, for good and sufficient reason, finds it necessary to defer some of the scheduled vacations * * * When it becomes necssary to advance the scheduled vacation date, then the employe is entitled to a thirty days' notice under the language * * * The important point * * * is that the primary and controlling meaning of the first paragraph of Article 5 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 demands."**
>
> **(Emphasis by Referee House)**

And Carrier contended before Referee Morse:

> "* * * that the carrier shall adhere to the vacations dates as

far as practical, but has the right to defer the same giving the notice provided for in the paragraph."

In this case Carrier does not deny that the thirty days' notice was not given. The reason given by Carrier on the property for the practice was that the vacations might "be charged to the department in which those vacations were earned"; this reason does not meet the requirement of the Agreement that management may advance the scheduled vacation time of an employe only for good and sufficient reason growing out of essential service requirements and demands. Further we find no support in the Agreement or in any evidence in the record for Carrier's contention that Claimant's right to take the vacation scheduled to begin in November automatically terminated when he left "UD" Telegraph Office and exercised his seniority in the Interlocking Department, and we reject that contention.

From the foregoing we have concluded that Carrier's action in advancing Claimant's vacation to June was not under the Agreement a valid advancement of his scheduled vacation time, therefore the originally assigned vacation time remained Claimant's desginated vacation dates. There is no dispute that Carreir did not release him from work during that time and paid him only straight time for the period; he was entitled to pay in accordance with the last paragraph of Article 5.

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.

A W A R D

Claim allowed.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 16th day of September, 1966.

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