Award Number 17579
Docket Number TE-17700

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Paul C. Dugan, Referee

PARTIES TO DISPUTE:

TRANSPORTATION-COMMUNICATION EMPLOYEES UNION THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY

STATEMENT OF CLAIM: Claim of the General Committee of the Transportation-Communication Employees Union on the New York, New Haven and Hartford Railroad Company, that:

1. Carrier violated the Agreement between the parties when during the year 1966 it did not allow J. E. Gauvin the third week of his vacation and refused to compensate him in accordance with the Agreement.

2. Carrier shall be required to compensate J. E. Gauvin at the rate of time and one-half for service performed equal to the number of days vacation denied him, less what he has been paid.

EMPLOYES' STATEMENT OF FACTS:

(a) STATEMENT OF THE CASE

The Agreement between the parties, dated September 1, 1949, as amended and supplemented, is available to your Board and by this reference is made a part hereof.

This claim was timely presented, progressed to the highest offices designated by the Carrier to receive appeals, including conference, in accordance with the terms of the Agreement and has been declined. The Employees, therefore, appeal to your Honorable Board for adjudication.

Claimant was entitled to and applied for three (3) weeks vacation during the year 1966. He was assigned only two weeks and those not consecutively, he was allowed the free time to take those two weeks, one during the week ending June 11 and the other for the week ending November 5. At the end of the year after the matter was brought to the attention of Carrier's Superintendent, he was paid for five days at the pro rata rate in lieu of vacation. Claim was made for five days (40 hours) at time and one-half for work performed. Carrier takes the position that Claimant, not having been assigned the third week vacation, did not work during any part of his assigned vacation period and is entitled only to the pro rata rate.

(b) ISSUES

Is an employee who is not permitted to take all of his vacation and is compensated in lieu of vacation at the end of the year, entitled to be compensated at the time and one-half rate equal to the number of days vacation denied him?

Copy of Agreement between the parties dated September 1, 1949, as amended, is on file with this Board and is, by reference, made a part of this submission.

(Exhibits Not Reproduced)

OPINION OF BOARD: Claimant J. E. Gauvin contends that he is entitled to time and one-half rate for working five days of his 1966 vacation period. Although there is little dispute as to the relevant facts, and the parties do not disagree as to the applicable agreement provisions, there is a complete divergence of views as to interpretation. This is a unique dispute and the Board will resolve the question on the basis of the evidence in the record.

Claimant is regularly assigned S. S. Operator, Promenade Street Tower, Providence, Rhode Island. He was employed by the Carrier on May 7, 1951. It is agreed that he was entitled to fifteen work days paid vacation in the year 1966.

At the appropriate time Claimant filed with the proper officer a request that fifteen days vacation be scheduled for 1966. Prior to December 1, 1965 this request, and others, were considered by District Chairman and a representative of the Carrier. The vacation schedule, jointly prepared, listed Claimant's 1966 vacation as one week (5 work days) to begin on June 5, 1966; and one week (5 work days) to begin on October 30, 1966. The first week was by mutual agreement later changed to begin on June 26. Claimant was granted vacation at the times shown.

On January 21, 1967, Claimant informed the Assistant District Chairman that he had not been granted his third week of vacation for 1966. On January 28, 1967 a claim was filed with Superintendent setting forth the facts and requesting allowance of 40 hours' pay at time and one-half rate. The Superintendent replied on February 8, 1967, agreeing that Claimant was entitled to fifteen days' vacation. He also agreed to payment of 40 hours' vacation allowance at pro rata rate. This payment, in the amount of $117.07, was included in wages for payroll of week ending February 18, 1967.

We are in agreement with the Organization's contention that an employe who works his vacation period is entitled to time and one-half rate. This is specifically provided for in 1954 Amendment to Article 5 of the 1941 Vacation Agreement.

Article 4 of the 1941 Agreement provides that "local Committee" and "representatives of carrier" will cooperate in assigning vacation dates. In the instant case this was done. Claimant filed a request for fifteen days vacation which, assumably, was considered in fixing dates for two one-week vacation periods. The list was posted December 1, 1965.

Absent evidence to the contrary, the District Chairman, who represented the Organization in preparing the vacation schedule, had available Claimant's request for fifteen days vacation. He therefore, had information that Claimant contended for fifteen days vacation in 1966. Absent evidence to the contrary, the Claimant, when the list was posted December 1, 1965, knew that he was scheduled for only two weeks vacation. Yet, according to the record, he made no complaint until January 12, 1967. Thus, an error which occurred on or prior to December 1, 1965 was not called to the attention of either the Carrier or the Organization until January 12, 1967, after it was impossible to correct it.

The claim requests allowance of time and one-half for work performed during vacation period, instead of straight time rate paid. In this posture it would not be difficult to make a finding that Claimant did work during the vacation period in the absence of any proof that he was off duty during relevant times. But the record would not support a finding that he was required by the Carrier to work his vacation period. He was allowed time off for vacation in the two weeks scheduled. The record is barren of any evidence that either Organization representatives or Carrier representatives were aware until January, 1967 that an error had occurred in the scheduling of Claimant's vacation. The record contains no proof that Claimant would not, or could not, have been granted a week off prior to December 31, 1966 had the error been called to the attention of either the Organization or the Carrier. Therefore, we cannot find, under the circumstances shown herein, that Claimant is entitled to additional pay. Claim will be denied.

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 Agreement was not violated.

AWARD

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 11th day of November 1969.

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