Award No. 18316

Docket No. CL-18530

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

John B. Criswell, Referee

PARTIES TO DISPUTE:

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

MISSOURI PACIFIC RAILROAD COMPANY

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood (GL-6706) that:

1. Carrier violated the Clerks' Agreement when, on January 8, 1969, it refused and continues to refuse to allow Clerk W. M. Crouch fifteen days' vacation pay in 1968, for which he qualified in the year 1967, under the provisions of the National Vacation Agreement of December 17, 1941, as amended by National Agreements of August 21, 1954; August 19, 1960; November 20, 1964; December 15, 1966 and December 28, 1967.

2. Carrier shall be required to allow Clerk W. M. Crouch pay for fifteen days' vacation at the punitive daily rate of $36.06, amount $540.90, for the year 1968, with compound interest rate of one percent per month starting with the sixtieth day after filing of claims and continuing to the date of payment.

EMPLOYES' STATEMENT OF FACTS: On and prior to October 1, 1964, Mr. W. M. Crouch, seniority date September 1, 1952 (Class A) and June 3, 1949 (Class B) on the Kansas Division Station and Yards seniority district and roster, was assigned to a five day per week position of Bill Clerk in the Agent's Office, Topeka, Kansas, assigned hours 9 A. M. to 6 P. M., meal period 1 P. M. to 2 P. M., rest days Saturday and Sunday, rate $20.74.

On February 7, 1965, National Mediation Agreement Case No. A-7128, was negotiated, which Agreement provided among other things, in Article I, Section 1, as follows:

"All employees, other than seasonal employees, who were in active service as of October 1, 1964, or who after October 1, 1964 and prior to the date of this Agreement have been restored to active service, and who had two years or more of employment relationship as of October 1, 1964, and had fifteen or more days of compensated service during 1964, will be retained in service subject to compen-

"Please refer to your letter of March 6, 1969, file 7476, appealing claim of Clerk W. M. Crouch, Avondale, Colorado, for 15 days' 1968 vacation allowance, plus interest at the rate of 1% per month, starting March 9, 1969.

"The record shows claimant had only 32 days of compensated service in the year 1967; therefore, he did not qualify for a vacation in the year 1968.

"In view of these facts, claim is without merit and is respectfully declined. The agreement contains no provision for penalties or interest payment; therefore, that part of the claim is also without merit and is respectfully declined.

"The record also shows that the 1968 vacations were scheduled in January of that year, and at no time during the year 1968 did Mr. Crouch or the Clerk's Organization request that he be scheduled for vacation. Without waiving the position set forth above, this is to advise that claim is without merit because Carrier was not afforded opportunity to schedule the vacation here requested.

"It is also our position that the claim is barred under the time limit provisions of Rule 43 because for a period of almost four years subsequent to the effective date of the Agreement of February 7, 1965, the employes agreed with Carrier's application of that agreement to the effect that payments made under Agreement of February 7, 1965, did not constitute 'compensation for service.'"

OPINION OF BOARD: Claimant held a regularly assigned position from which he was displaced and reverted to a furloughed status. In 1967 he worked 32 days for which he was compensated. He was also paid, under the provision of the February 7 Agreement, for approximately 229 days.

It is the position of the Employes that all of the days for which he received compensation during 1967 should be taken into account when determining his eligibility for vacation in 1968.

The Carrier argues that this Board has no jurisdiction for the reason that it is called upon to interpret the February 7 Agreement. We determine, however, as the Organization contends, that it is a question of whether or not the Vacation Agreement was violated and thus the question is properly before this Board.

In interpretation of the Vacation Agreement, Referee Morse was asked: "Question No. 2: Meaning and intent of the words 'renders compensated service.'"

"Labor's contention:

The words 'renders compensated service' should be interpreted and applied as to include all and any compensation received from the employing carrier for time paid for. The application of the language is not confined to work actually performed.

"For example: compensation paid for any of the following is included:

"(a) Time paid for on account of standby or subject to call service where the employee does not actually work, but holds himself subject to call."

Had Claimant not been in a standby or call-service category, Carrier would not have been required to compensate him as a protected employe.

Carrier, in presentation of this case, says:

"During the year 1968 Claimant had 132 days of compensated service, 122 days' pay for not performing service and 8 days as time lost voluntarily during which no compensation was due. Claimant received full pay for each of the 52 weeks of the year with the exception of the eight days of voluntary absence."

It is also contended by the Carrier that the claim should fail because no mutual planning was done on a vacation for Claimant and that the Organization failed in its contractual obligation.

We find in the record, at Page 2 of Carrier's submission, this language:

"6. Carrier refused to consider the 213 days paid under Agreement of February 7, 1965, as "compensated service" for vacation purposes and did not schedule or grant Claimant a vacation as such in the year 1968."

This indicates there was a conversation and that it was not considered on the Carrier's part rather than the Organization.

We follow the reasoning of Award 16844 (Dorsey) and sustain the claim.

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 violated.

AWARD

Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 4th day of December 1970.

CARRIER MEMBERS' DISSENT TO AWARD 18316, DOCKET CL-18530

(Referee John Criswell)

The primary reason relative to why this is an erroneous award is that this Board did not have jurisdiction to adjudicate the dispute involved in this case. The instant dispute arose from and as a result of the Mediation Agreement A-7128 of February 7, 1965 which specifically provides that any dispute arising from the application of the February 7, 1965 Agreement will be submitted to a Disputes Committee set up under that Agreement to handle such disputes. The claim should have been dismissed for lack of jurisdiction of this Board just as were those claims in Third Division Awards 14979, 15696, 16522, 16924, 16869, 17099 and 17579 as well as others.

Secondly the majority completely ignored Referee Morse's Interpretation of the National Vacation Agreement of December 17, 1941 where he specifically stated at least three times that the expression "renders compensated service" means **actual** working and the performance of compensable service for Carrier and did not mean compensation for no actual work or service could be considered relative to qualifying time for purposes of an employe being entitled to a vacation. In the instant case the claimant simply did not "render service" on a sufficient number of days to qualify for a vacation according to the general acceptance of Referee Morse's Interpretations.

Thirdly, the Referee cited Third Division Award No. 16844 (Dorsey) and followed it in the instant case. This too was patently erroneous for in 16844 the Carrier withheld the claimant in that case from rendering compensated service thus depriving him of the opportunity to accumulate sufficient qualifying days to entitle him to a vacation. This facet was **not** present in the instant case therefore Award 16844 being clearly distinguishable should not have been followed.

Fourthly, the majority in sustaining this claim allowed the payment of interest when no rule in the controlling Agreement provides for such allowance. If the Petitioner wants employes to be paid interest its recourse is through collective bargaining. Again, the Agreement does not contain a provision for interest payment and this Board cannot concoct such a rule for the parties — (Awards 16552, 15533, 17616 and others) — for as Referee Whiting stated in Second Division Award 2675:

> "The claim seeks interest but there is no basis therefore in the rules and this Board is not a court of general jurisdiction, so such request must be denied."

Other pertinent awards which denied interest are 6962, 8088, 15709, 11172, 13478, 12838, 14497, 17217 among many others.

Aside from the fact that no rule in the Agreement supports a claim for interest, and the Board can only validly apply the Agreements as written, the fact remains that claims before this Board are not judgements, but are requests for interpretations of the Agreement for which money is claimed. Until those interpretations are rendered in claimants' favor there is no money due and owing and hence no interest could possibly accrue. See **Leday vs Milwaukee Road**, U. S. Court of Appeals, Seventh Circuit, decided January 29, 1970.

For the foregoing reasons we dissent.

W. B. Jones

R. E. Black

P. C. Carter

G. L. Naylor

G. C. White

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