Award No. 18385
Docket No. CL-18664

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Melvin L. Rosenbloom, Referee

PARTIES TO DISPUTE:

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

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY — EASTERN LINES

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood (GL-6734) that:

(a) Carrier violated the provisions of the National Vacation Agreement when it failed to schedule a vacation period for K. C. Foster for the year 1967; and,

(b) Carrier shall now compensate K. C. Foster for ten (10) days ungranted vacation for year 1967.

EMPLOYES' STATEMENT OF FACTS: Claimant K. C. Foster is an employe of the Carrier with a Group 3 seniority date of September 23, 1959, on the Chicago Terminal Division Seniority District. Claimant was regularly assigned until October 1, 1964, when he was furloughed due to a large force reduction on his seniority district. However, Claimant performed relief and extra work to the extent of 21 days in the month of October, 1964; 20 days in the month of November, 1964; and 16 days in the month of December, 1964. As result of Claimant's service with the Carrier, he met all the requirements of the February 7, 1965 Mediation Agreement and therefore, qualified as a protected employe entitled to be returned to "active service" not later than March 1, 1965, under the provisions of that Agreement.

Irrespective of the provisions of the February 7, 1965 Mediation Agreement, that required Carrier to return Claimant to "active service", Claimant remained unassigned and was paid his guaranteed compensation in accordance with the terms of the February 7, 1965 Agreement. He performed relief and extra service when he was called by the Carrier.

Under date of September 23, 1965, a Memorandum of Agreement, (see Employes' Exhibit "A"), was entered into at Topeka, Kansas, between the parties, which provided that unassigned employes covered by the Clerks'

him under the working agreement and which does not require a change in residence."

In this connection, Claimant Foster, being an unassigned employe as of the date of this claim, received compensation in the form of make-up allowance under Article IV of the February 7, 1965 Agreement in amounts equal to 129 days during the year 1966, and performed only 35 actual days of service during the same year for which he received earned compensation. Accordingly, the 35 days compensated service performed by Claimant Foster during 1966 was not sufficient service to qualify him for a ten day or any vacation in the year 1967.

As a result of Claimant Foster not being eligible for a vacation in 1967, based on that outlined above, a claim was initially presented to Carrier's Superintendent, Mr. F. A. Beauchamp, Chicago, Illinois, by Division Chairman A. E. Cole in letter dated October 20, 1967. That claim and the subsequent exchange of correspondence considered pertinent in the appeal of the claim to succeeding officers of appeal, including the Carrier's Assistant to Vice President and highest officer of appeal, Mr. O. M. Ramsey, is submitted as Carrier's Exhibits "A" through "Q".

(Exhibits not reproduced.)

OPINION OF BOARD: This is a case wherein the principal issue is identical to that presented in Awards Nos. 16844 and 17099, namely, whether the National Vacation Agreement of 1941, as amended, extends vacation benefits to employes protected by the Non-Ops job stabilization agreement of February 7, 1965.

Claimant, a protected employe under the stabilization agreement, contends that he was eligible for but did not receive a vacation in the year 1967. There is no dispute that if Claimant rendered at least 110 days of "compensated service" during the calendar year 1966, he would have met the eligibility requirements of the National Vacation Agreement and would have been entitled to a ten day vacation in 1967. Carrier maintains that Claimant actually worked only thirty-five days during 1966, and while he was paid for an additional one hundred twenty-nine days in that year pursuant to the job stabilization agreement, only the days upon which he actually worked can be considered days of "compensated service" within the meaning of the National Vacation Agreement. Thus, the Carrier asserts that the issue herein is whether days for which an employe was paid under the job stabilization agreement but performed no work can be counted as days of "compensated service" under the National Vacation Agreement.

We do not perceive that to be the issue, at all. The fact that Claimant did not work on all the days for which he was paid was occasioned solely by the Carrier's non-observance of its contractual obligations under the job stabilization agreement. If the Carrier had performed what it clearly promised to do in the job stabilization agreement Claimant would have worked each of the one hundred twenty-nine days in question.

We adopt the well-reasoned analysis of Referee Dorsey in Award No. 16844 defining the status of protected employes with respect to the National Vacation Agreement. Referee Dorsey pointed out that the job stabilization agreement, in precise and definite phraseology, required the Carrier to re-

turn protected employes to "active service" before March 1, 1965, and retain them in 'compensated service" thereafter. In noting that under the plain language of the job stabilization agreement the Carrier did not have the option of removing a protected employe from active service, Referee Dorsey held that a protected employe shall be deemed to have been "retained in compensated service" regardless of his assignment or non-assignment by the Carrier to a working position.

We believe the use of the words "compensated service" in the job stabilization agreement to describe the protection afforded to employes thereunder is of particluar signficance. Since 1941, when the National Vacation Agreement first came into existence, that agreement contained those very words. Eligibility for vacation benefits has always been determined by reference to the number of days of "compensated service" rendered in a given calendar year. The words "compensated service" became a term of art long before 1965 when they were included in the job stabilization agreement. We cannot conclude that the employment of the words "compensated service" to designate what the employes were obtaining from the job stabilization agreement after more than twenty years of usage of those identical words as the basis for determining vacation eligibility was unintentional.

In any event, Claimant needed one hundred ten days of "compensated service" in 1966 to qualify for his vacation and Carrier guaranteed him more than that in the job stabilization agreement. Accordingly, Claimant is entitled to his vacation.

We reject Carrier's argument that the resolution of this case requires an interpretation of the job stabilization agreement and therefore must be referred to the Disputes Committee created to resolve disputes arising under that agreement. We are here interpreting the National Vacation Agreement and **not** the job stabilization agreement. Our inquiry herein is whether Claimant met the eligibility requirements for vacation benefits as established by the Vacation Agreement. The narrow issue is whether Claimant rendered sufficient "compensated service" in 1966, since that is the sole criterion upon which his eligibility is to be determined. Our task is made easy because the job stabilization agreement specifically endows Claimant with the requisite "compensated service" in so many words, but, nevertheless, the process of arriving at the conclusion that Claimant has satisfied the eligibility requirements entails first the interpretation of the Vacation Agreement to define its intendment and then examining Claimant's particular situation to ascertain whether it falls within that interpretation.

To illustrate that we are not interpreting and need not interpret the job stabilization agreement to reach our decision, let us assume for the sake of argument that the job stabilization agreement was worded as Carrier maintains that it was intended to be understood. Let us assume that the job stabilization agreement provides: "All employes who were in active service on October 1, 1964, will be retained in active service for so long as there is work for them to perform, and if there is no work for them to perform Carrier shall have the right to lay-off employes in accordance with its regular practice; provided, however, that employes so laid-off shall be paid as hereinafter set forth and, provided further, that employes shall be considered to be rendering compensated service for only those days upon which they actually perform work". Let us take another illustration wherein the

language is not so explicit: "All employes who were in active service on October 1, 1964, will be retained in active service or paid in lieu thereof as hereinafter set forth". In both of the illustrations, vacation eligibility would be determined solely by reference to the standards contained in the Vacation Agreement and no interpretation of the job stabilization agreement is involved. In both cases we must be satisfied that an employe rendered sufficient "compensated service" within the meaning of the Vacation Agreement. Our only inquiry is whether the requirements contemplated by the Vacation Agreement have been satisfied. In the first illustration we can easily ascertain that a protected employe who did not actually perform work on sufficient days would not meet the requirements. We find this by merely reading the agreement as we have done herein. In the second illustration, we would have to probe deeper to come to a decision, but the same fundamental process is involved — we must determine whether the employe performed "compensated service" within the meaning of the Vacation Agreement. Only an interpretation of the Vacation Agreement can supply us with that answer.

This case also involves an issue arising out of Carrier's offer and Claimant's acceptance of an opportunity to transfer Claimant's place of employment. We believe it unnecessary to rule on this issue since Claimant's status as a protected employe would have been unchanged by the transfer.

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

Carrier violated the National 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 29th day of January 1971.

CARRIER MEMBERS' DISSENT TO AWARD 18385, DOCKET CL-18664
(Referee Melvin L. Rosenbloom)

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 involved "make-up allowances" paid claimant

(a protected employe) by Carrier under the terms of the February 7, 1965 Job Stabilization Agreement. Since it was the organization's position that the make up allowances under the February 7, 1965 Agreement should be considered as "renders compensated service" for purposes of qualifying for a vacation under the Vacation Agreement and Carrier did not agree, this is the point at which the dispute arose. The February 7, 1965 Agreement specifically provides that any dispute arising under that 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. In fact in the first paragraph of the opinion the referee stated "This is a case wherein the principal issue is identical to that presented in Awards 16844 and 17099, namely, whether the National Vacation Agreement of 1941, as amended, extends vacation benefits to employes protected by the Non-Ops Job Stabilization Agreement of February 7, 1965", and then refused to follow them, especially 17099.

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 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 Interpretation.

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 since the record clearly shows that (a) claimant was in active service during 1966 and (b) claimant by Agreement with Carrier actually withheld himself from the opportunity of actually working at Kansas City since he wished to remain in Chicago to dispose of his property therefore Award 16844 being clearly distinguishable should not have been followed.

In light of the foregoing the majority clearly erred and have exceeded the jurisdiction of this Board.

For the foregoing reasons we dissent.

W. B. Jones
R. E. Black
P. C. Carter
G. L. Naylor
H. F. M. Braidwood

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