NATIONAL RAILROAD ADJUSTMENT BOARD

Award Number 21336
THIRD DIVISION Docket Number CL-21089

Frederick R. Blackwell, Referee

PARTIES TO DISPUTE: (Brotherhood of Railway, Airline and Steamship Clerks, Freight Handlers, Express and Station Employes
(Portland Terminal Railroad Company

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood, GL-7878, that:

1. Carrier violated the provisions of the Rational Vacation Agreement when it failed to schedule a vacation period and grant vacation to Mr. K. Mack, Extra Mail and Baggageman, Portland, Oregon, for the year 1973, for services performed in 1972.

2. Carrier shall now compensate K. Mack for fifteen (15) days ungranted vacation for the year 1973 at the rate of time and one-half.

OPINION OF BOARD: After the Claimant's request for an assigned vacation period in 1973 was declined, claim was filed alleging that he met the requirements of the Vacation Agreement of 100 days of compensated service in 1972 and that he was therefore entitled to 15 days vacation pay in 1973 at the time and one-half rate. There is no dispute that the Claimant, a protected employe under the Rational Stabilization Agreement of February 7, 1965, received compensation in 1972 as follows: 79 days worked; 102 days not worked but paid pursuant to the February 7 Agreement; 15 days vacation pay; and five days sick leave pay. The Carrier's primary defense is that this claim cannot be decided without interpreting the Rational Agreement of February 7, 1965, which provides that disputes involving the interpretation of such Agreement "may be referred by either party" to the Rational Disputes Committee (SBA No. 605) set up by such Agreement. The Carrier asserts that the February 7 Agreement thus makes the Disputes Committee the exclusive forum to consider a claim of this kind and that this Board &es not have jurisdiction of the claim. The Employes contend that the application of the February 7 Agreement, while a part of this dispute, is not really the issue in this case; and that the issue here to be resolved does not require an interpretation of the February 7 Agreement, but rather, an interpretation of the National Vacation Agreement of December 17, 1941, as amended. Apart from this jurisdictional issue, the parties join issue about the significance under the Vacation Agreement of the days paid for but not worked by the Claimant in 1972. The specific issue is whether the 102 days paid for but not worked in 1972 can be counted toward the number of days of compensated service (100 days) required to qualify for a vacation under the Vacation Agreement. If it is proper to count the 102 days, such days added to the 79 days worked amount to 181 days or more than enough to meet the qualifying criterion in the Vacation Agreement. If the 102 days

are not counted, the Claimant obviously did not qualify for a vacation in 1973.

The time and one-half part of the claim Is based on the theory that, because the Claimant was required to be on standby during the entire year, which in effect amounted to the performance of service for the entire year, he is entitled to overtime under Article 5 of the Vacation Agreement. The pertinent provision of such Article provides that:

> "Such employe shall be paid the time and one-half rate for work performed during his vacation period in addition to his regular vacation pay."

The Carrier asserts that this provision is inapplicable because the Claimant did not have a vacation period and thus did not perform work during his vacation period.

Except for the herein claim of overtime, which will be discussed separately, essentially the same facts and issues presented by the instant record have been definitively adjudicated in prior Third Division Awards 16844, 18316, and 18385. These authorities expressly considered the jurisdictional and merit argument made by the herein Carrier, and each of them issued a ruling which clearly supports the instant claim. The contra Awards cited by the Carrier, Awards Nos. 7 and 15, Public Law Board No. 114, presented facts and issues which are not parallel to this case or to the aforementioned Third Division Awards and thus the Carrier's authorities do not negate the claim. Similarly, there is no support for the Carrier's contention that, in the absence of a clear showing to the contrary, it should be assumed that the parties in the cited Third Division Awards expressly or impliedly waived their rights to have their disputes resolved by the national Disputes Committee. Examination of the Awards in question show beyond any doubt that the Carrier in each of the Awards expressly and clearly plead the defense of exclusive jurisdiction of the National Disputes Committee to resolve the involved disputes, and that in each instance the Third Division Board ruled that it had jurisdiction of the dispute.

In Award No. 18316, in rejecting the argument that this Board lacked jurisdiction because the dispute required the interpretation of the February 7 Agreement, this Board stated:

> "... 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."

The same follows here because, although the confronting dispute calls for a determination of whether compensation under the February 7 Agreement for days paid but not worked has the status of rendering "compensated service" under the Vacation Agreement, and although that determination requires consideration

of a provision of the February 7 Agreement, the making of that determination &es not constitute an "interpretation" as such term is used in Article VII, Section 1, of the February 7 Agreement. Such determination amounts solely toa preliminary finding of fact, which, standing alone, is meaningless; and even if the February 7 Agreement were applied to such fact, the factors essential to the resolution of the herein dispute would still be absent. However, when the Vacation Agreement is applied to such fact in the circumstances of this dispute, an ultimate, meaningful conclusion in resolution of the herein dispute can be reached. And since it is the Vacation Agreement which is under consideration in this dispute, on an allegation that its terms have been violated; the Board has jurisdiction of the herein dispute.

As previously indicated; both the jurisdictional and merit issues of this case have been the subject of rulings which clearly support the claim. Awards 18316, 16844, and 18385. In view of these authorities, and under the doctrine of stare decisis, the claim will. be sustained.

However, as regards the herein overtime claim, none of the three prior Awards evidences that the issue of overtime was expressly considered. The Statement of Claim in two of these Awards, Nos. 16844 and 18385, does not make any claim for overtime. The Statement of Claim in Award No. 18316 made an express claim for overtime and the claim as presented therein appears to have bean sustained without modification; however, the issue of overtime was not discussed in that Award and thus the Award does not serve as a soundprecedent ontheovertimeissue in this case. Here, the overtime is claimed on the basis of an agreement provision which requires that an employe shall be paid overtime for "work performed during his vacation period," in addition to his regular vacation pay. The term "work performed" in this passage is clear and unambiguous and the status of being on standby cannot be said to come within the term as the Employes contend. The Claimant did not perform work during a vacation period and consequently, the overtime part of the claim cannot be sustained.

In view of the foregoing, and on the whole record, the claim will be sustained at the straight time rate.

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 Employesinvolved 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.

A W A R D

Claim sustained at the straight time rate.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: A. W. Paulus
Executive Secretary

Dated at Chicago, Illinois, this 16th day of December 1976.