NATIONAL RAILROAD ADJUSTMENT BOARD

Award Number 21594
THIRD DIVISION Docket Number CL-21407

David C. Randles, Referee

PARTIES TO DISPUTE: (Brotherhood of Railway, Airline and Steamship Clerks, Freight Handlers, Express and Station Employes
(Robert W. Blanchette, Richard C. Bond and John H. McArthur, Trustees of the Property of Penn Central Transportation Company, Debtor

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood, GL-7971, that :

(a) The Company violated the rules agreement effective February 1, 1968. The Company also violated our Vacation Agreement of December 17, 1941, particularly Article 3.

(b) Violation occurred when the Company refused to allow claimant vacation on August 9 and August 10, 1973.

(c) Claim filed for and on behalf of John Berlingis for 8 hours pay at the time and one-half rate for the dates of August 9 and 10, 1973.

(d) Claim filed in accordance with Rule 7-B-l of the Clerks' Rules Agreement.

OPINION OF BOARD: Claimant John Berlingis entered service on May 29, 1973, as a clerk in the Car Accounting Department, Carrier's System General Offices, Philadelphia, Pennyslvania. The claimant states that prior to his entry into service, he was advised of various conditions of employment including information concerning vacation privileges. The information given him at that tine was Article 3 of the National Vacation Agreement effective December 17, 1941 which assured him of paid vacation of six (6) hours forty (40) minutes for each calendar month of service for his first two years of service. He further states that he was not advised of a4 contemplated or otherwise construed change in the aforesaid commitment. Following May 29, 1973, the claimant alleges that he notified his supervisor that, if agreeable, he would like August 9th end 10th, 1973, as "paid vacation" days. The request was granted, and he was so notified.

The granting of said vacation days was also confirmed by the next higher level supervisor. On August 8, 1973, just prior to the scheduled vacation, the claimant was notified that a new policy had been inaugurated on April 1, 1973, which was that: "Employees connected with the System General Offices, whereby the old practice of being granted 6 hours and 40 minutes for each month of service until a service date of two (2) years was attained shall now be discontinued." Pursuant to this new policy, the claimant was not allowed to take the two vacation days; however, due to commitments that he had made, he took the days off without compensation.

The Carrier alleges that the claimant was informed, prior to his entry into service, that he would be granted vacations in accordance with the National Vacation Agreement, i.e., he would be entitled to five days' vacation in the year 1974 provided he rendered compensated service on 120 days in 1973. In August of 1973, claimant requested that he be granted August 9th and 10th, 1973, as vacation days. His request was denied; however, he then requested leave without pay which was granted.

The Organization poses this question for the Board es to "whether or not the Carrier has any contractual right or otherwise to unilaterally and solely terminate a custom or practice which existed and was in force for a period of over thirty (30) years;" whereas the Carrier poses the question of "whether or not the Carrier was proper in advising new employes covered by the Clerical Agreement hired after April 2, 1973, that they would be granted vacation under the terms of the National Vacation Agreement and not under the more favorable past practice applied to employes currently in Carrier's service."

Prior to the Rational Vacation Agreement of December 17, 1941, there existed in the former Pennsylvania Railroad a vacation practice which granted Group I Monthly-rated Clerks in the System General Offices a vacation of six (6) hours forty (40) minutes for each calendar month of service during the first two years of employment. This practice was more favorable to employes than the National Vacation Agreement and was continued under the provisions of Article 3 of that Agreement.

Effective February 1, 1968, the Pennsylvania Railroad end the New York Central Railroad merged. During negotiations between the Organization and the Carrier relative thereto, an Agreement was entered into between the merged Carrier and the Organization which was also effective February 1, 1968. That Agreement continued the National Vacation Agreement of 1941, including Article 3 of said Agreement.

Article 3: (From Article 3 of December 17, 1941 Vacation Agreement.) "The terms of this agreement shall not be construed to deprive any employe of such additional vacation days as he may be entitled to receive under any exisiting rule, understanding or custom, which additional vacation days shall be accorded under and in accordance with the term of such existing rule, understanding or custom."

During the negotiations which led to said Agreement, the Carrier alleges that the Vice-President and chief spokesman for the Union stated that the more favorable past practice regarding vacations for new hires would not apply to the merged company end supported said allegation by letters of said Carrier to the Organization reiterating this alleged understanding.

This Board does not have any mitten evidence to support this verbal agreement. Not until April 1, 1973, some five years after said alleged verbal understanding, did the Carrier effect that understanding. An alleged oral understanding cannot be used as a replacement for contract language.

Agreements in the railroad industry by practice have been, and are, very clear and precise relative to any dimunition or expansion of rights; thus this Board may not conclude that it was the intent of the parties to diminish the more favorable practice.

The Agreement itself speaks-to the question of a desire by either the Organization or the Carrier to change this Agreement. Article 15(From Article II - Vacations - Section 3 of December 28, 1967 National Agreement.) "Except as otherwise provided herein this agreement shall be effective as of January 1, 1968 and shall be incorporated in existing agreements es a supplement thereto and shall be in full force end effect for a period of two (2) years from January 1, 1968, end continue in effect thereafter, subject to not less than seven (7) months' notice in writing (which notice may be served in 1969 or in any subsequent year) by any carrier or organization party hereto, of desire to change this agreement as of the year in which the notice is served. Such notice shall specify the changes desired and the recipient of such notice shell then have a period of thirty (30) days from the date of the receipt of such notice within which to serve notice specifying changes which it or they desire to make. Thereupon such proposals of the respective parties shall thereafter be negotiated and progressed concurrently to a conclusion."

Rule 9-A-3 of the Agreement would apply to this instant matter if Article 3 of the Vacation Agreement were absent and/or the practice of granting the more favorable vacation benefit was terminated at the time of the effective date of the Agreement relative to the merged companies, that is, February 1, 1968.

The Board in its consideration of the instant matter looks to both Article 3 and Article 15 of the Agreement for its determination. Notwithstanding any written or contractual language relative to .a practice that continued for some five years following the merger of the aforesaid railroads, the claim shall be sustained; however, the claimant shall be paid straight time for eight (8) hours' pay for the dates of August 9th and 10th, 1973, and not the punitive rate of time end one-half.

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 sustained as indicated in the opinion.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: A.W. Paulos
Executive Secretary

Dated at Chicago, Illinois, this 30th day of June 1977.