TSA

NATIONAL RAILROAD ADJUSTMENT BOARD

Award Number 21862

THIRD DIVISION Docket Number: MW-21327

Dana E. Eischen, Referee

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employes
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(The Minnesota Transfer Railway Company

STATEMENT OF CLAIM: "Claim of the System Committee of the Brotherhood that:

(1) The Carrier violated the Agreement when it paid Mr. Willard Ginkel in lieu of his 1974 and 1975 vacations on the basis of the track laborer's rate instead of his guaranteed monthly rate (System File MT-104/(SPUD) MW-38(r) Ginkel).

(2) Mr. Willard Ginkel be allowed an additional $885.00 because of the violation referred to in Part (1) hereof."

OPINION OF BOARD: Claimant was employed in 1952 and promoted to a track foreman in 1.956 by St. Paul Union Depot Company. That Company was involved in Amtrak consolidations and Claimant was displaced and transferred to the Minnesota Transfer Railway Company as a track laborer: Since July 1973 he had worked a regular assignment as track laborer and at times pertinent to this case his hourly rate was $4.5719. However on October 13, 1973 he was awarded by an arbitration board established under Amtrak Appendix C-l a guaranteed rate of track foreman, as a displacement allowance, in the amount of $1286.70. Thus each month Claimant received a total of $1286.70 -comprising two separate and distinct payments. 1) His earnings for work performed as a track laborer at the rate of $4.5719 per hour and 2) a "claim" payment, for which he had to file each month, in the amount of the difference between whatever he earned as track laborer and his "guarantee" of $1286.70. This went on until Spring 1974 when Claimant applied for a leave of absence under Article 15 of the Agreement for which he was granted approval by both Carrier and the Organization. Thereafter he went on leave May 31, 1974 and took a new job as Federal Safety Inspector effective June 1, 1974.

Upon departing for his new job Claimant requested payment from Carrier in lieu of 40 days vacation time he had earned but had not yet taken as of May 31, 1974. Since no other contract language addresses the subject of payments in lieu of vacation we must assume that Article 8, of the National Vacation Agreement governs that transaction. In any event Carrier did pay Claimant a lump sum in lieu of 40 days vacation he had earned for 1975. The dispute occurs because Carrier paid him 40 days at the track laborer rate ($1463.00) and Claimant asserts that he was entitled to 40 days at the guaranteed rate($2348.80). Thus in this claim he seeks to recover $885.80 on the grounds that Carrier violated his rights under the Vacation Agreement.

Carrier not unreasonably argues that this claim is outside our jurisdiction since it involves interpretation and application of Appendix C-l and therefore is subject to the arbitration machinery established thereunder. We are compelled to reject this assertion and exercise jurisdiction, however, because, firstly, this claim on its face involves alleged violation of the National Vacation Agreement and we are not required to turn to Appendix C-l to dispose of it; and secondly, because the machinery established by Appendix C-l is permissive and not exclusive. See Award 19859.

Turning to the merits of the case we find the crux of this dispute lies in the application of the language of Articles 7 and 8 of the Vacation Agreement to the particular facts before us. The question of the applicability of Article 8 to a leave of absence was never raised on the property so we take its application by the parties as given without specifically deciding that point. Article 8 provides for lump sum payment "in lieu of" paid vacation earned but not taken by an employe. The phrase "In lieu of" is synonymous with "instead of" or "in place of". The question in this case is reduced to "in place of what"? Is the Article 8 payment in place of the money he earned on an hourly basis for working a regular assignment as a track laborer at the contractually established rate of $4.5719 alone; or is it in place of those earnings plus the additional payment of the displacement allowance flowing from Appendix C-l which went to make up a guaranteed monthly minimum of $1286.70? (Emphasis added). With the exception of some dicta in Award No. 298 of SBA No. 605 which is of no help herein, the precedent awards have not approached this question. Nor is the axiom that vacation pay is earned day by day as part of the total compensation of an employee helpful in this particular case. Such contract language as there is on the subject is found in Article 7 and that is the basis for the claim. We are constrained to follow it. Article 7(a) speaks to calculation of vacation pay for an employe having a "regular assignment" as the basis of the daily compensation paid for such assignment. If arguendo Article 7(a) applies to Claimant, his "regular assignment': was as track laborer. The language of 7(a) speaks of assignments and not people. It is true that Claimant as an individual had a personalized guarantee which was met by a combination of earnings from his regular assignment and the displacement allowance payment. But for purpose of the express language of 7(a) the daily compensation paid for the assignment he held was the daily track laborer rate. Nor is there satisfaction on this point for Claimant in Article 7(E). His average straight time compensation "earned" was the track laborer rate even though his total monthly income was guaranteed at a higher level. As we read the language of Article 7 it makes no provision for inclusion of displacement allowances in the computation of the "in lieu of vacation" payment to an employe taking leave of absence.

The record indicates that if Claimant had not taken his leave of absence but rather actually enjoyed 20 days off in June 1974 and returned to work he would have received vacation pay at the track laborer rate, which would have been taken as an offset against his guarantee, plus a displacement allowance check for the difference. But his receipt of the guaranteed sum of $1256.70 would have been because of the totaling of his paid vacation and his displacement allowance. In lieu of or in place of his paid vacation Claimant got vacation pay at the track laborer'srate but because he was no longer in service he could not claim the displacement allowance. As we read the express language of Articles 7 and 8 he got exactly what he was entitled to thereunder. Any claimed overage flows from Appendix C-1 and not from the Vacation Agreement. We are compelled therefore to deny the claim of violation of the Vacation Agreement.

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.

A W A R D

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTES: A.W. Paulos
Executive Secretary

Dated at Chicago, Illinois, this 31st day of January 1978.