NATIONAL RAILROAD ADJUSTMENT BOARD

Award Number 25075

THIRD DIVISION

Docket Number CL-25246

George S. Roukis, Referee

PARTIES TO DISPUTE: (Brotherhood of Railway, Airline and Steamship Clerks, Freight Handlers, Express and Station Employes
(Elgin, Joliet and Eastern Railway Company

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood IGL-9824) that:

1. Carrier violated the effective Clerks' Agreement when it required and/or permitted Mr. H. L. Fox to work his vacation without compensating him for such work;

2. Carrier shall now compensate Mr. Fox twelve (12) hours' pay at the rate of GM-31 for each of dates November 29, 30, December 1, 2, 3, 6, 7, 8, 9, 10, 13, 14, 15, 16, 17, 20, 21, 22, 23, 27, 28, 29, 30 and 31, 1982.

OPINION OF BOARD: The pivotal issue in this case is whether Claimant is entitled to vacation pay at the amount provided by Section 4, Article I of the August 24, 1954 National Agreement. This Section in part reads:

> "Effective January 1, 1955, Article 5 of the Vacation Agreement of December 17, 1941 is hereby amended by adding the following: 'Such employee shall be paid the time and one-half rate for work performed during his vacation period in addition to his regular vacation pay.'"

Article 5 of the 1941 Vacation Agreement provides:

> "If a carrier finds that it cannot release an employe for a vacation during the calendar year because of the requirements of the service, then such employee shall be paid in lieu of the vacation the allowance hereinafter provided."

In this dispute, there is no ancillary threshhold issue regarding the amount of vacation time earned by Claimant for calendar year 1982 since he worked the requisite qualifying time in 1981 and the only question posed is his entitlement. He had worked calendar year 1982 without taking any vacation and indicated his interest to retire from Carrier's service. By letter dated, December 28, 1982, he apprised Carrier that:

> "I hereby resign and relinquish my seniority and employment rights to become eligible (sic) for annuity under the Railroad Retirment Act effective December 31, 1982 last day worked December 31, 1982. I waive vacation due."

Claimant was also covered by a supplemental pension plan that was provided to employes of the U.S. Steel Corporation and received a "special payment" for the first three (3) months following the month of retirement.

It is Claimant's position that the aforesaid payment was not a separation allowance and importantly when he apprised Carrier of his decision to retire, effective on December 31, 1982, his correlative notice of waiver for vacation benefits due was apropos the retirement benefits earned in 1982. He argues that since he had worked the entire calendar year 1982 without taking any of the vacation earned in calendar year 1981, he was entitled to the compensatory amount provided by the January 1, 1955 amendment to Article 5 of the December 17, 1941 Vacation Agreement. He avers in effect, that since Carrier did not schedule a vacation for him in 1982, the provisions of this Article apply. He contends that Carrier cannot shift its primary vacation scheduling obligation to employes and asserts that the Division's case law on this point and the related enforcement of the time and one-half payment provision is dispositive. He cited Third Division Award Nos. 17697, 17575, 17697, 18029, 18310 and 18406 as controlling authority.

Carrier contends that when Claimant's employment status terminated on December 31, 1982, he was granted full vacation pay earned up to the time he effectively retired consistent with the applicable provisions of the December 17, 1941 National Vacation Agreement. as amended. In addition, it avers that he received eight (8) hours pay at the pro rate rate for the time claimed in his petition. It maintains that since he did not indicate a desire to take a vacation in 1982, it would be most inappropriate for him to acquire extra compensation. It argues that he waived his right for vacation benefits due when he submitted his December 28, 1982 letter and notes that he avoided his shared responsibility to schedule a vacation in 1982. Carrier asserts that since it did not preclude him from vacation because of service requirements, the time and one-half payment requirements of Section 4, Article I are inapplicable. It argues that he voluntarily chose not to schedule a vacation in calendar year 1982.

In our review of this case, we concur with Claimant's position. While Carrier is correct that it did not purposely prevent him from taking a vacation in 1982 because of definable service requirements, its obligation to schedule vacations was not totally voided by Claimant's inaction. The situation herein is somewhat distinguishable from the type of contingency addressed in Article 5 of the National Agreement, namely, that a vacation was scheduled and then subsequently rescinded by Carrier. To be sure, Claimant had a shared obligation to schedule a vacation, but this obligation was not absolute. It was a shared requirement that did not absolve Carrier from its primary shared obligation. Claimant's inaction did not transfer the responsibility for vacation scheduling solely to him and to this extent the intended effect of Section 5, as amended, would apply. This construction is conceptually consistent with our holding in Third Division Award No. 17697. Moreover, contrary to Carrier's position that Claimant waived his right to earned vacation benefits implicitly in accordance with the May 16, 1963 Memorandum of Agreement, this waiver would only apply to any vacations or vacation payment for the year of retirement. This Agreement provides:

"The vacation agreement between the parties is amended effective May 16, 1963 to include the following: If, as of the last day worked prior to retirement, an employee is entitled to any vacation or vacation payment of the year of retirement or thereafter, he may waive all or part of such payment. Any such waiver shall extinguish any and all obligation of the company with respect to the payment waiver."

In this instance, the vacation benefits waived were those benefits earned in calendar year 1982, but enjoyable in calendar year 1983. The vacation benefits contested in this dispute were earned in calendar year 1981 and enjoyable in calendar year 1982. Upon this record and for the foregoing reasons. we will sustain #is 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.

A W A R D

Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Attest: Nancy J. Dever - Executive Secretary

Dated at Chicago, Illinois, this 4th day of October 1984.

Serial No. 323

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

INTERPRETATION NO. 1 TO AWARD NO. 25075

DOCKET NO. CL-25246

NAME OFORGANIZATION: Brotherhood of Railway, Airline and Steamship Clerks, Freight Handlers, Express and Station Employes

NAME OF CARRIER: Elgin, Joliet and Eastern Railway Company

Based upon the Award. Carrier was directed to pay the Claimant one and one-half tines the rate of his position for the period, November 29, 1982, through December 31, 1982. Carrier took the position that it had already paid Claimant straight time for the period prior to the Award and, in compliance with the Award, paid Claimant the additional four hours pay for each day during the period. Carrier asserted that it paid straight time for the period actually worked, straight time for the vacation not taken in 1982 in accordance with the option selected by Claimant under Section 3.2(a) of the Pension Agreement and an additional one-half rate pay pursuant to Award No. 25075. The Organization argued that payment made to Claimant under the Pension Agreement did not constitute payment for the 1982 vacation, and thus, observed that what Carrier was seeking was a Board interpretation of Section 3 of the Pension Agreement.

On April 15, 1985, the Board considered the questions raised by Carrier, but finds that an interpretation necessitates a judicial analysis of the Pension Agreement. Since this Agreement is beyond the arbitral jurisdiction of the Board, we must conclude that our decision in Award No. 25075 is dispositive.

Referee George S. Roukis, who sat with the Division, as a neutral member, when the aforesaid Award was adopted, also participated with the Division in making this interpretation.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Attest: Nancy J. Dever - Executive Secretary

Dated at Chicago, Illinois, this 26th day of July 1985.