NATIONAL RAILROAD ADJUSTMENT BOARD

Award Number 25111

THIRD DIVISION

Docket Number CL-24945

Hyman Cohen, Referee

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

(The Baltimore and Ohio Chicago Terminal Railroad Company

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood (GL-9690) that:

(1) Carrier violated the Agreement in effect between the Parties when it failed and refused to grant Mr. K. L. England a vacation of fifteen (15) days during the year 1982 which was earned in 1981, or payment in lieu thereof, in accordance with the provisions of National Vacation Agreement. and

(2) As a result of such impropriety, Carrier shall be required to compensate Claimant K. L. England 15 days' vacation-pay at $84.27 per day, the rate of position CR-22 located on Carrier's New Rock Subdivision.

OPINION OF BOARD: The instant dispute arises from the failure of the Carrier to grant the Claimant vacation allowance based on service performed in 1981.

As background to this claim, in August, 1980 the Carrier became a signatory to the March 4, 1980 agreement commonly known as the "Miami Accord" which provided protection for former employes of the Rock Island Line. The Carrier acquired a portion of the Rock Island trackage and established a separate seniority district known as the New Rock Subdivision. Nine (9) former Rock Island employes were hired to perform service on this Subdivision. Although he was a furloughed Rock Island employe, the Claimant was not among the nine (9) employes placed on permanent assignment. However, the Claimant was utilized from time to time by the Carrier to fill vacancies on established positions.

In October. 1981, the Claimant bid on a vacant position that was advertised to the employes on the New Rock Subdivision and was awarded the position. Asserting that the vacancy had not been properly advertised to all former Rock Island employes as provided in the Miami Accord, the Organization objected to the Carrier's selection of the Claimant for the assignment. The Organization further objected to the Carrier's use of the Claimant during 1981 and indicated that there was no Rule authorizing the use of the Claimant. As a result, the Carrier rescinded its award and discontinued utilizing the Claimant.

As the petitioning party, the Organization has the burden of proving its claim. Based upon the record, the Organization has failed to sustain its burden of proof. To qualify for a vacation allowance under Section 1(1) of the National Vacation Agreement, an employe is required to have been laid off and to have rendered 120 days compensated service during the preceding year. Before the Carrier discontinued the Claimant's service on an as needed basis, he had worked 157 days in 1981. Thus, the Claimant satisfied the required number of days of compensated service. under Section 1(1). However, he was not laid off; indeed, at the insistence of the Organization, his employment was discontinued by the Carrier. The considerations that motivated the Organization to cause the Carrier to discontinue the utilization of the Claimant are the same considerations that bar him from qualifying as a laid off employe under Section 1(1), Article III, Vacations, of the National Mediation Agreement of February 25, 1971.

There is nothing in the record to indicate that by utilizing the Claimant during 1981 the Carrier sought to circumvent the vacation allowance provisions of Section 1(1). In fact, the Claimant was inadvertently utilized by the Carrier's Local Officers. His sporadic employment went undetected by both the Organization and Carrier for almost 9 months. During this time, the Claimant did not acquire seniority. The fact is that he was not properly in the service of the Carrier and had no riqhts under the applicable Agreement.

It should be noted that Article 4, Section 2 of the August 19, 1980 Agreement was not raised by the Organization during the handling of the dispute on the property. It has therefore not been considered by the Board.

The Organization has failed to sustain its burden of proving that any rule is applicable to the instant dispute or that any provision of the Agreement was violated by the Carrier. Furthermore, the Claimant was fully compensated for the service that he performed during the time that he was improperly utilized.

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

Attest: Nancy J. Dever - Executive Secretary

Dated at Chicago, Illinois this 9th day of November 1984.

LABOR MEMBER'S DISSENT TO
AWARD NO.25111 ,DOCKET NO.24945

(REFEREE COHEN)

In this instance the majority opinion has done error to the National Vacation Agreement and Claimant in declining this claim.

The record before this Board reflects the fact that the Carrier's entire basis for defense was premised upon the allegation that Claimant was not a "bona fide employee" and because of such, he did not qualify for payment-in-lieu-of-vacation.

Section l(L) of the National Vacation Agreement provides that employees who are "laid off" (and who hold "no rights to accumulate seniority"), and "who render compensated service on not less than 120 days in a calendar year for the same Carrier," and "who returns to service in the following year for the same Carrier," will be granted vacation in the year of their return.

The aforementioned are the identical circumstances involving the Claimant. He was "hired by the Carrier," laid off with no rights to accumulate seniority, rendered more than 120 days compensated service (in 1981) and was again used for service in 1982 ("the following year")for the same Carrier. The Claimant unquestionably met all of the requirements of the National Vacation Agreement.

When the majority opinion reasoned, "There is nothing in the record to indicate that by utilizing the Claimant during 1981 the

Carrier sought to circumvent the vacation allowance provisions of Section -l(l).. .His sporadic employment went undetected... The fact is that he was not properly in the service of the Carrier...", as somehow excusing the Carrier for its error, we are strained to accept such logic. The Carrier is not allowed to profit from actions which violate the Agreement at the expense of an employe. Carrier acknowledged that it erred when it utilized Claimant in 1981 and 1982 and it rectified the mistake when called to their attention by the Employes. Therefore, Carrier contends it should be excused for its mistake. Whether or not the Agreement was purposely violated or not is inconsequential; the fact remains, it was violated and Claimant is entitled to the monies requested.

The majority opinion in this instance is palpably wrong.

William R. Miller. Labor Member

Date November 28. 1984