Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 33635
Docket No. CL-34103
99-3-97-3-648

The Third Division consisted of the regular members and in addition Referee Margo R. Newman when award was rendered.

PARTIES TO DISPUTE: (Transportation Communications International Union
(Terminal Railroad Association of St. Louis

STATEMENT OF CLAIM:

"Claim of the System Committee of the Organization (G-11836) that:

1. The Carrier violated Article IV, Direct Train Control, Section 2, (hereafter referred to as DTC) of the 1986 National Agreement when it reduced by $606.98 the monthly protection for June 1996 for Mr. J. C. Wilson. The Carrier included monies in lieu of vacation for 1996 and 1997, in Claimant Wilson's earnings for June 1996.

2. The Carrier shall now be required to compensate Mr. Wilson, the difference between his regular earnings and his protected monthly rate under DTC for June 1996."

FINDINGS:

The Third Division of the Adjustment Board, upon the whole record and all the evidence, finds that:

The carrier or carriers and the employee or employees involved in this dispute are respectively carrier and employee within the meaning of the Railway Labor Act, as approved June 21, 1934.

This Division of the Adjustment Board has jurisdiction over the dispute involved herein.

Parties to said dispute were given due notice of hearing thereon.

This claim, initiated on August 28, 1996, avers that Carrier failed to pay Claimant his appropriate monthly allowance for June 1996, since it impermissibly deducted Claimant's in lieu vacation pay from his displacement allowance upon Claimant's retirement.

There is no dispute that Claimant was a protected employee under the New York Dock ("NYD") conditions by virtue of Article IV-Direct Train Control ("DTC") provisions of the parties' April 15, 1986 National Agreement, or that his monthly displacement allowance was $3,334.67 at the relevant time. The record reveals that Claimant worked seven days in June 1996 and earned 14 days paid sick leave, totaling 21 days of paid service at $129.89 per day, or $2,727.69. Claimant retired from service effective July 1, 1996, at which time he requested pay in lieu of his 1996 and 1997 accumulated vacation (ten weeks). Carrier included this additional in lieu amount in his final pay (received July 17, 1996) recording Claimant's total compensation for June 1996 as $9,222.19. Accordingly, Carrier did not pay Claimant any displacement allowance for June 1996.

The Organization contends that under the provisions of Article 8 of the National Vacation Agreement, Claimant's entitlement to pay in lieu of accumulated vacation accrued when his employment relationship terminated, or, in this case, on July 1, 1996, the effective date of his retirement. It argues that it was improper for Carrier to include this in lieu payment as part of Claimant's June earnings. The Organization further contends that under the terms of the DTC and Article I §5 of NYD, the "monthly compensation" referred to was not intended to encompass all monies paid in that month, but only compensation actually earned during the month. It notes that it is ludicrous to say that Claimant earned ten weeks of compensation during the balance of June 1996, and inequitable to permit Carrier to defeat an employees's displacement allowance by discretionarily including in lieu vacation pay in a particular calendar month and adding it to regular compensation earned for purposes of displacement allowance calculations. The Organization avers that Claimant would have received his $606.98 June 1996 displacement allowance if he had chosen to take his accrued vacation for ten weeks prior to retiring rather than a lump sum payment, and that his choice of method of receiving accrued vacation should not affect his displacement entitlement. Finally, the Organization asserts that this dispute is properly before the Board under the terms of the DTC.

Carrier argues that this Board has no jurisdiction to decide a NYD case, citing First Division Award 24804; Third Division Awards 31179, 31778; Fourth Division Award 4912. On the merits, Carrier contends that the Organization failed to sustain its burden of proving any contractual violation by its inclusion of earned vacation pay as compensation for purposes of calculating Claimant's displacement allowance. It notes that there is no dispute that Claimant's compensation for June 1996 far exceeded his monthly guarantee, thereby negating any displacement allowance entitlement.

The Board initially notes that there is no limitation to its exercise of jurisdiction under the terms of the parties' DTC, even though that Agreement encompasses certain NYD protections.

It was Carrier's decision to include this in lieu vacation payment with Claimant's June earnings which was the sole basis for Claimant's ineligibility for the June displacement allowance, not the terms of the DTC or NYD. Without determining whether Article I §5 of NYD use of the term "monthly compensation" was intended to include such in lieu amounts, an interpretation best left to another forum, we conclude that the basis for Carrier's denial of Claimant's June, 1996 displacement allowance of $606.98 under the particular facts of this case was unreasonable and not in line with the intention of either the DTC or NYD provisions in issue herein. We note that accrued vacation or other in lieu pay does not fall within the specific set off exclusion stated in Article I §5 of NYD for "time lost on account of . . . voluntary absences." Having Claimant's displacement allowance entitlement be determined solely on the basis of a unilateral decision on Carrier's part to include a lump sum in lieu vacation payment with his June rather than July earnings does not foster the spirit of the parties' Agreement and could not be considered a reasonable expectation of the parties' in negotiating such Agreement.

AWARD

Claim sustained.

ORDER

This Board, after consideration of the dispute identified above, hereby orders that an award favorable to the Claimant(s) be made. The Carrier is ordered to make the Award effective on or before 30 days following the postmark date the Award is transmitted to the parties.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Dated at Chicago, Illinois, this 16th day of November 1999.

Carrier Members' Dissent
to Third Division Award 33635 (Docket CL-34103)
Referee Newman

The matter of Claimant's New York Dock protection payment is the issue joined in Organization's claim and, as such, is beyond the jurisdiction of this Board pursuant to Section 11 (a) of the New York Dock conditions.

Beyond the lack of jurisdiction, the Majority has made an erroneous factual conclusion in this matter. At page 2 of the Award, the Majority properly notes that it was Claimant who requested the payment of his vacation time. Claimant's June 28, 1996 letter (Carrier Exhibit N) substantiates this. However, on page 3 of the Award, the Majority erroneously states that it was "Carrier's decision" to include the vacation pay. It was not!

Having done so, the Claimant did receive monies in excess of his guarantee in June, 1996. The Carrier did not renege on any entitlement. Carrier was complying with Claimant's specific request. Yet the Carrier is held liable.

We Dissent.

P. V. Varga

M. W. Fingerhut

M. C. Lesnik