Award No. 4156
Docket No. CL-4067

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Francis J. Robertson, Referee

PARTIES TO DISPUTE:

BROTHERHOOD OF RAILWAY AND STEAMSHIP CLERKS, FREIGHT HANDLERS, EXPRESS AND STATION EMPLOYES

CHICAGO, ROCK ISLAND AND PACIFIC RAILROAD COMPANY

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

(1) Refrigerator Inspectors should continue to receive fourteen (14) days' vacation with pay each year and

(2) They should be paid the difference between vacation allowed in 1946 and 1947 and fourteen (14) days' pay at the rate of the position occupied at the time vacation was granted.

EMPLOYES' STATEMENT OF FACTS: There is in evidence an agreement between this Carrier and the Brotherhood, bearing an effective date of August 2, 1945, Rule 77 of which specifically makes that certain agreement signed at Chicago, Illinois on December 17, 1941 and Suppemental Agreement dated February 23, 1945, commonly referred to as the National Vacation Agreement, a part thereof and applicable to employes covered thereby to the extent and in the manner set forth in said "National Vacation Agreement".

Prior to 1946, Refrigerator Inspectors employed by the Carrier were granted fourteen (14) days and, in some instances, fifteen (15) days' vacations with pay. Beginning with the year 1946, vacations for these employes were reduced to twelve (12) days with pay. Protest was made against the reduction and referred to the Committee established under Article 14 of the Vacation Agreement in the following language:

> "Claim of the System Committee of the Brotherhood that Refrigerator Inspectors continue to receive fourteen (14) days' vacation each year and that they be allowed fourteen (14) days' vacation in 1946 under the provisions of Article 3 of the Vacation Agreement of December 17, 1941, and Interpretation agreed to June 10, 1942."

The claim was considered by the Committee in a meeting held at Chicago, January 23 to February 2, 1947. The Committee was unable to reach an agreement, making it necessary to submit the dispute to this Honorable Board. During the year 1941, Refrigerator Inspectors were granted fourteen (14) and, in some cases, fifteen (15) days vacation with pay. The National Vacation Agreement became effective January 1, 1942 and these employes were allowed fourteen (14) days vacation with pay in the years 1942, 1943, 1944 and 1945 respectively.

pensated for a full day. Those days are his vacation days. Consecutive, of course, means unbroken. Thus the employe gets those six days consecutively, except when **non work days** intervene. He starts his vacation and does not end the same until he has had a total of six work days. He is paid for his **work days but not for his non work days.**" (Emphasis added.)

From page 68—

"Mr. Jewell: It is a fact that when we, the employes' committee, used the words "Work Days", we used them in line with the generally accepted understanding of these words as indicated by our agreements, and as used in the industry. This vacation agreement was written after these agreements were written, many of them."

Petitioner is here seeking to have the carrier obligated to release the Refrigerator Inspectors for a period of sixteen consecutive days, fourteen of which would be paid as annual vacation and two additional rest days without compensation. We urge that Article 2 of the December 17, 1941 agreement does not obligate the carrier to grant Refrigerator Inspectors involved in this docket fourteen (14) consecutive work days' vacation.

Presumably petitioner may argue that Article 3 of the December 17, 1941 agreement requires the carrier to continue a more favorable vacation practice which was in existence on the effective date of that agreement. We assert that petitioner, by its own determination and request, changed the pay basis and the number of days comprehended by the pay rate and that therefore Article 3 is no longer applicable and does not require the carrier to continue to grant fourteen consecutive work days' vacation to these Refrigerator Inspectors. The pay rate and hours of assignment of these Refrigerator Inspectors were not changed at the request of the carrier, but at the request of the organization. We assert that the organization should not now be heard to request a continuation of fourteen consecutive work days annual vacation when they previously requested of the carrier that the assignment be changed from seven to six days per week and the number of hours comprehended by the pay rate changed accordingly.

The carrier respectfully petitions the Board to deny the claim.

(Exhibits not reproduced.)

OPINION OF BOARD: So far as is indicated by the record, during the year 1941 refrigerator inspectors employed by the Carrier were granted 14 and, in some instances, 15 days' vacation with pay. The practice was continued during 1942, 1943, 1944, and 1945, except that vacation periods were made uniform at 14 days for each inspector. During the years above mentioned, the refrigerator inspectors were employed on a seven-day week, twelve-hour day basis, except at Kansas City where they are employed on an eight-hour day basis. On June 6, 1945, among other things, the Carrier and Employes agreed in writing that refrigerator inspectors' positions were to be assigned eight hours per day and paid in accordance with Rule 54. By the same agreement, their monthly rate of pay was adjusted downward to accord with the changed working conditions. In 1946 the Carrier granted the refrigerator inspectors two weeks' vacation and paid them for 12 work days. The employes claim that they should have received **14 work days' vacation** and hence claim pay for two extra days.

The Employes rely on Article 3 of the National Vacation Agreement of December 17, 1941 and interpretation thereof, dated June 10, 1942, which read as follows:

"3. 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 existing rule, understanding or custom, which additional vacation days shall be accorded under and in accordance with the terms of such existing rule, understanding or custom."

"Article 3 (Interpretation)

This article is a saving clause; it provides that an employe entitled, under existing rule, understanding, or custom, to a certain number of days vacation each year, in addition to those specified in Articles 1 and 2 of the Vacation Agreement, shall not be deprived thereof, but such additional vacation days are to be accorded under the existing rule, understanding, or custom in effect on the particular carrier, and not under this Vacation Agreement.

If an employe is entitled to a certain number of days vacation under an existing rule, understanding, or custom on a particular carrier, and to no vacation under this Vacation Agreement, such vacation as the employe is entitled to under such rule, understanding, or custom shall be accorded under the terms thereof."

The final disposition of this claim hinges on the answer to two questions: (1) Did a custom exist on this particular Carrier, prior to the consummation of the National Vacation Agreement, under which the claimants were entitled to a certain number of days' vacation each year in addition to those specified in Articles 1 and 2 of the National Vacation Agreement? (2) If such custom did exist, did the fact of entering into the June 6, 1945 Agreement relieve the Carrier from continuing to allow vacations or vacation pay in accordance with such custom?

With respect to question (1) above, the Carrier representative argues that no such custom has been shown to exist on the basis of the record in this case, pointing out that in that connection we have only the Employes' statements and exhibits dealing with the particular year 1941 and that no evidence is presented for the years prior to 1941 and, further, that such showing as the Employes made with respect to the year 1941 embraces the granting of vacations to about one-half of the entire force of refrigerator inspectors, and that a custom cannot be considered to exist merely on the basis of what was done in one year. He further argues that the granting of vacations for the years 1942, 1943, 1944 and 1945, after the making of the Vacation Agreement, cannot be taken as proof of a custom existing during December 1941, when the Vacation Agreement was promulgated. We cannot agree with these contentions. We believe that the payment of vacation allowances to refrigerator inspectors during 1942, 1943, 1944, and 1945 on a more favorable basis than is required by Article 2 of the National Vacation Agreement is an indication that the Carrier recognized a responsibility to continue in effect a vacation plan for refrigerator inspectors which was more favorable than that required by said Article 2 of the National Vacation Agreement. The Carrier in its submission states: "We do not contend that the Refrigerator Inspectors are not now entitled to twelve consecutive work days' vacation after one year's service. To that extent Article 3 of the Vacation Agreement continues the former practice in effect inasmuch as it was and is more favorable than the provisions of Article 2 of the Vacation Agreement." Here is an admission by the Carrier of the existence of the practice. On the whole, we believe that there is substantial proof in the record to establish that prior to the National Vacation Agreement there was a custom in existence on this Carrier under which the claimants were entitled to a certain number of days' vacation each year in addition to those specified in Articles 1 and 2 of the National Vacation Agreement and that number was at least two additional days.

With respect to question (2), Carrier submits that Petitioner, by its own determination and request, changed the pay basis and the number of days comprehended by the pay rate and that therefore Article 3 is no longer applicable and does not require the Carrier to continue 14 days' paid vacation to these refrigerator inspectors. In this we believe the Carrier has presented the heart of the issue. In other words, the Carrier asserts that by a change in the pay basis the foundation of the custom was destroyed and hence the custom falls with it. In this respect it is interesting to note that at another point in its submission, as a matter of fact in the language quoted in the preceding paragraph of this opinion, the Carrier admits that

part of the custom is still in existence, to wit, the granting of 12 days' vacation to refrigerator inspectors after one year of service instead of the 6 days required by Article 1 of the National Vacation Agreement. This would indicate that the custom did not fall entirely with the 1945 Agreement. In connection with the determination of this question, it is interesting to note that Article 2 of the National Vacation Agreement specifically provides for vacations on the basis of **consecutive work days** and that Article 3 provides that the terms of the Agreement shall not be construed to deprive any employe of such additional vacation days as he may be entitled to receive under any existing rule, understanding or custom. Reading the two articles together, it appears logical to assume that the additional **vacation days** referred to in Article 3 mean days which would normally be work days and not just calendar days. Hence, before the June 5, 1945 Agreement, refrigerator inspectors were entitled to additional work days on vacation and those days were reserved to them under Article 3 and its interpretation. Can we now say that by reason of the change in hours in the work day and days in the work week they should not be allowed those additional **work days** as paid vacation. If the reservation in Article 3 were on a weekly basis, we have no doubt that there would be no basis upon which to sustain the claim of the employes, but it is based on days. And herein lies the fallacy of the Carrier's argument that they received the same number of days' vacation in 1946 as in 1945 and prior thereto. True, they received the same number of calendar days but they did not receive the same number of **work days.** While from an organization and work scheduling standpoint we can see difficulty in a holding that these employes were entitled to 14 consecutive work days of vacation in 1946, we feel that in holding otherwise we would be depriving them of a substantial right which could only be given up by negotiation and should not be taken away by interpretation. We feel that it was a proper subject for negotiation when the June 6, 1945 Agreement was entered into but the matter not having been negotiated out at that time, the custom still stands and the claim must be sustained.

FINDINGS: The Third Division of the Adjustment Board, after giving the parties to this dispute due notice of hearing thereon, and upon the whole record and all the evidence, finds and holds:

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.

AWARD

Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: A. I. Tummon
Acting Secretary

Dated at Chicago, Illinois, this 8th day of November, 1948.