Award No. 6658

Docket No. CL-6541

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Hubert Wyckoff, Referee

PARTIES TO DISPUTE:

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

NORTHERN PACIFIC RAILWAY COMPANY

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

(1) The Carrier violated the National Vacation Agreement, Article 5, when it cancelled the vacation of O. F. Sackett without giving him the ten days' notice provided therein.

(2) That O. F. Sackett now be paid at time and one-half rate instead of straight time already allowed for the days scheduled for the taking of vacation in the year 1951.

EMPLOYES' STATEMENT OF FACTS: (1) There is in evidence an agreement bearing effective date June 1, 1946 and Vacation Agreement dated December 17, 1941, including Interpretation thereto, between the Northern Pacific Railway Company, hereinafter referred to as the Carrier, and its employes represented by the Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employes. A copy of the agreement and the Vacation Agreement are on file with the Board and by reference thereto are hereby made a part of this dispute.

(2) During May 1951 Mr. O. F. Sackett, hereinafter referred to as Claimant, was regularly assigned to relief clerk position scheduled to perform service as follows:

DAY	TITLE	ASSIGNED HOURS	RATE OF PAY
Sunday	Train Desk Clerk	4:00 P.M. - 12:00 Mid.	$12.308
Monday	" " "	4:00 P.M. - 12:00 Mid.	$12.308
Tuesday	Rest Day		
Wednesday	" "		
Thursday	Train Desk Clerk	12:00 Mid. - 8:00 A.M.	$12.308
Friday	" " "	12:00 Mid. - 8:00 A.M.	$12.308
Saturday	Ice Foreman	8:00 A.M. - 5:00 P.M. (with one hour for lunch)	$11.960

This Division has consistently adhered to the proposition that its authority as conferred by the Railway Labor Act as amended, is limited to the interpretation and application of agreements and that it has no authority to enter into the realm of rule-writing for the parties.

The Vacation Agreement of December 17, 1941 fixes the penalty in cases where it is not possible to release an employe for a vacation and that penalty is payment in lieu of a vacation. To award an employe whom it is not possible to release for a vacation payment in lieu of a vacation and in addition thereto, payment at time and one-half rate for work performed during the fixed vacation period would constitute the writing of a new rule which is outside the scope of the authority of this Board.

The Carrier has shown that:

1. In good faith it fixed a vacation period in the year 1951 for Mr. Sackett; that it attempted to secure a vacation relief worker but was unable to do so, and that in consequence thereof, Mr. Sackett was not released for a vacation but was paid in lieu thereof.

2. The penalty fixed by the National Vacation Agreement of December 17, 1941 in cases where it is not possible to release an employe for a vacation is payment in lieu of a vacation.

3. This Division has consistently refrained from imposing a penalty in addition to that fixed by agreement between the parties.

4. What the Employes are now endeavoring to secure through the medium of an award of this Division is a penalty payment in excess of that provided for by agreement between the parties themselves.

5. This Division, by its vested authority is not empowered to render an award that would impose a penalty in addition to that specified in the agreement between the parties which would in effect constitute the writing of a new rule.

This claim should be denied.

All data in support of the Carrier's position in connection with this claim has been presented to the duly authorized representatives of the Employes, and is made a part of the particular question in dispute.

(Exhibits not reproduced.)

OPINION OF BOARD: This claim presents the question whether Claimant was properly given pay in lieu of a regularly assigned vacation. The claim is for payment at time and one-half instead of the straight time rate.

The dispute turns on Article 5 of the Vacation Agreement which reads:

"5. Each employe who is entitled to vacation shall take same at the time assigned, and, while it is intended that the vacation date designated will be adhered to so far as practicable, the management shall have the right to defer same provided the employe so affected is given as much advance notice as possible; not less than ten (10) days' notice shall be given except when emergency conditions prevent. If it becomes necessary to advance the designated date, at least thirty (30) days' notice will be given affected employe.

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 employe shall be paid in lieu of the vacation the allowance hereinafter provided."

Claimant's vacation for the calendar year 1951 was scheduled May 31 through June 13. On May 29, which was his last work-day prior to the vacation, he was advised that he could not be released for vacation because there was no relief for him. His vacation was not deferred or rescheduled; it was simply cancelled and, in lieu of the vacation, he was paid at the straight time rate.

There is conflict in the record upon the question whether relief for Claimant was available; but in view of our ultimate conclusion on the claim, we find it unnecessary to resolve this conflict. It is therefore assumed, for the purpose of this decision, that the requirements of service prevented release of Claimant for a vacation during the assigned period from May 31 through June 13.

First. The main purpose of the Vacation Agreement is to provide time off, not pay. The Agreement accordingly does not give carriers the unrestricted right or option to keep an employe at work and grant him extra pay in lieu of a vacation; nor does it give the employe any such option. The essential question therefore is whether this case presents one of "those extraordinary instances in which the granting of a vacation to a given employe would seriously interfere with the requirements of service" (Referee's Answers to Question No. 1 raised under Article 5 of the National Vacation Agreement).

Second. Article 4 of the Agreement prescribes the manner in which vacation dates shall be assigned during the calendar year. But this does not mean that, once a vacation date is assigned, it is frozen and, if the requirements of service prevent release of the employe for vacation on that particular date, payment in lieu of vacation is then and there in order without further ado. That no such result was intended is made clear in the first paragraph of Article 5 which requires adherence to the assigned vacation date only "so far as practicable" and also authorizes the carrier to defer or advance the assigned vacation date.

In view of the underlying purpose of the Vacation Agreement, the carrier's right to defer or advance an assigned vacation date carries with it the obligation to do so in proper circumstances.

Such circumstances would exist, for example, when the requirements of service would permit release of the employe during the tenth or eleventh month but would not permit his release during the second or third month within which his vacation date was originally assigned. In Award 5697 the Carrier pursued just such a course. These when it appeared that the requirements of service prevented release of an employe for an assigned October vacation date, the Carrier deferred the vacation to December and, when the requirements of service again prevented release in December, payment in lieu of vacation was in order.

Third. When the Carrier made the finding that the requirements of service prevented the release of Claimant for his assigned vacation in June, nothing was done about deferral of the vacation to some other time during the remaining six months of the year.

It does not appear that Claimant was personally indispensable as the only one available and qualified to do the particular work of his position. Nor does it appear that, although no relief was available in June, relief was likewise unavailable during each of the six remaining months of the year.

Under the second paragraph of Article 5 the authority to make a payment in lieu of the vacation is conditioned upon a finding by the Carrier that it cannot release an employe for a vacation "during the calendar year." The Carrier made no such finding and did not satisfy this condition by making the finding that it could not release Claimant during the month of June.

Fourth. The payment in lieu of vacation is not a penalty. It is a substitute method, authorized by Article 5, of discharging the carrier's fundamental obligation to provide time off. If the time off is properly assigned, cancellation of the time off and a substitution of payment in lieu are improper unless the requirements of Article 5 are met.

It follows from this that, during the period covered by the claim, Claimant was improperly worked on days that were in effect his properly assigned rest days and was work outside his regular assigned hours for which he was entitled to payment at the rate of time and one-half instead of the straight time paid.

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 Agreement was violated as above found.

AWARD

Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: (Sgd.) A. Ivan Tummon
Secretary

Dated at Chicago, Illinois, this 3rd day of June, 1954.

DISSENT TO AWARD NO. 6658, DOCKET NO. CL-6541

The facts are that the claimant here could not be released for his scheduled vacation because there was no qualified employe to relieve him. It is a matter of record that the Carrier had engaged an employe for that purpose, that it had offered such employe every opportunity to qualify, that he attempted to do so, but that he had finally taken other employment, necessitating the Carrier holding the claimant in service. Because of the absence of a relief employe, the Carrier paid the claimant in lieu of vacation which it was privileged to do under the Agreement.

The Opinion states the negative finding that "It does not appear that Claimant was personally indispensable as the only one available . . .". This finding quarrels with the record fact that a person employed for the purpose of furnishing relief resigned to take other work, making it necessary for the Carrier to hold the claimant in service. Then the Opinion states the negative finding "Nor does it appear that, although no relief was available in June, relief was likewise unavailable during each of the six remaining months of the year." From these negative findings the Opinion reaches the supposititious conclusion that relief was available at some other indeterminable time during the year. The record contains no evidence through the petitioner that relief

was available at any time after the person employed for that purpose resigned. The burden of establishing that fact, through evidence, was one for the petitioner, not the respondent, to carry.

The Opinion recognizes that "payment in lieu of vacation is not a penalty" but then it goes on to the violent holding that, for the very period covered by the claim, which was the claimant's scheduled vacation period, and for which he was properly paid at the pro rata rate "in lieu of vacation" because of the absence of a relief employe, the claimant shall now be paid at the rate of time and one-half instead of the pro rata rate for actually working his vacation, on the eisegetical interpretation that the vacation days which had been scheduled in anticipation of the presence of a relief worker "were in effect his properly assigned rest days" and that holding the employe on duty amounted to working him "outside his regularly assigned hours."

Therefore, this faulty interpretation of the Vacation Agreement orders the Respondent Carrier to pay the claimant for working his scheduled vacation period, which it did, and, in addition, to pay the claimant for every day of that period at the pro rata rate "in lieu of vacation," which it did, and then to pay him one-half time, in further addition, for every day that he worked in that same period.

We cannot hold that an employe is "improperly worked" when the Vacation Agreement gives the Carrier the right to hold him in service in the absence of relief and pay him in lieu of vacation. We cannot hold that vacation days which an employe is required to work in such circumstances are "rest days." We have already said that rest days are not vacation days. **Awards 4157, 4775, 4802, 4929.** And, we cannot hold that a mere negative presumption establishes an evidenciary fact for it is long and soundly settled that the proof of a negative assertion still rests upon the complainant. Finally, there are no provisions in the Vacation Agreement for paying time and one-half in lieu of vacation to an employe who cannot be released for his vacation.

The award is wrong and we dissent.

/s/ E. T. Horsley

/s/ R. M. Butler

/s/ W. H. Castle

/s/ J. E. Kemp

/s/ C. P. Dugan