Award No. 6714
Docket No. TE-6608

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Curtis G. Shake, Referee

PARTIES TO DISPUTE:

THE ORDER OF RAILROAD TELEGRAPHERS

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY — Western Lines

STATEMENT OF CLAIM: Claim of the General Committee of The Order of Railroad Telegraphers on the Atchison, Topeka and Santa Fe Railway; that

(1) The Carrier is in violation of the terms of the Agreement between the parties when it failed to properly assign vacation dates to A. W. Goss and J. A. Chitwood and to allow these employes a vacation period of ten (10) consecutive working days during the year 1951 or to pay them in lieu of ungranted vacation days; and

(2) The Carrier shall now be required to pay each of claimants named in (1) above an amount equivalent to four (4) additional days representing vacation for those days improperly withheld.

EMPLOYES' STATEMENT OF FACTS: Agreements between the parties to this dispute bearing effective dates of June 1, 1951, and the National Vacation Agreement dated December 17, 1941 are in evidence.

During October, 1951, J. A. Chitwood and A. W. Goss were assigned to positions of telegrapher-clerk required to work seven days per week at Belen, New Mexico.

Since early in the spring of 1951 there was no assigned relief or available extra employe to perform the service required on the rest days assigned to the two positions and since that time the incumbents were required by the Carrier to work their rest days at the time and one-half rate. Their length of service for the Carrier entitled each of the above named telegrapher-clerks to an annual vacation of ten consecutive working days.

Telegrapher Goss was absent on vacation from October 28 to November 6, 1951 inclusive—a period of ten calendar days. Telegrapher Chitwood was absent on vacation from November 8 to November 17, 1951, inclusive—a period of ten calendar days; rest days assigned to the position occupied by Goss during the period he was absent were October 28, 29 and November 4 and 5. The rest days assigned to Chitwood's position during the period he was absent were November 9, 10, 16 and 17. These rest days were worked by the vacation relief employe.

In making arrangements for the vacation reliefs, Chief Dispatcher Harrison, on October 22, 1951, advised Agent Kraft at Belen, New Mexico as follows:

disproportionate to the actual damage sustained, convincing evidence is required to prove a willful or deliberate breach of an agreement."

The penalties sought and allowed in the LaOrange claim in Award 4032, the same as the penalty sought in the instant dispute, are both excessive and grossly disproportionate to the actual damage sustained. There was no convincing evidence presented in Docket CL-3965, and certainly none can be presented in the instant dispute, as proof of a willful or a deliberate breach of an Agreement rule.

Had the complainant employes in the instant dispute been granted their full vacation of ten working days, instead of the six they did receive, they would have received the same vacation compensation that they were actually allowed, i.e., ten days' pay at pro-rata rates. The same would be true if Messrs. Goss and Chitwood had received no vacation whatever in 1951 and had, instead, been paid in lieu of the ten days' vacation to which they were entitled. It will thus be apparent that the two claimant employes in the instant dispute suffered no loss in compensation and a sustaining Award of the Employes' claim for four additional days ungranted vacation in behalf of each of the two claimants would also be violative of the terms of Article 12(a) of the National Vacation Agreement and the conclusions expressed in the following excerpt from the "Opinion of Board" in Third Division Award 5443, which was, incidentally, rendered with the assistance of the same referee who participated in Award 4032.

"Turning to that Agreement we note Article 12(a) which provides that unless otherwise provided, a Carrier shall not be required to assume greater expense because of granting a vacation than would be incurred if an employe were not granted a vacation and was paid in lieu therefor under the provisions thereof. Here it is certain that if Andrus had not been granted a vacation he would have received pay for only nine days. In the interpretations (see page 58 of the Agreement and Interpretations thereon) by Referee Morse we find the following statement:

> 'The parties should never forget that the primary purpose of the vacation agreement was to provide vacations to those employes who qualified under the vacation plan set up by the agreement. Any attempt on the part of either the carriers or the labor organizations to gain collateral advantages out of the agreement is in violation of the spirit and intent of the agreement.'

"Here, in view of our announced conclusions, it is apparent Andrus is attempting to gain collateral advantages growing out of the agreement, in violation of its spirit and intent."

In conclusion, the Carrier respectfully reasserts that the claim of the Employes in the instant dispute is entirely without support under the Agreement rules in effect between the parties hereto and should, for the reasons previously set forth herein, be denied in its entirety.

All that is herein contained has been both known and available to the Employes and their representatives.

(Exhibits not reproduced).

OPINION OF BOARD: During the year 1951 the Claimants, Goss and Chitwood, each became entitled to a ten day vacation with pay at their applicable pro rata rates. Goss requested to begin his vacation of July 18 and Chitwood on May 7, but these requests were deferred by the Carrier because of the unavailability of relief telegraphers.

Subsequently, Goss was granted a vacation for ten calendar days, beginning on October 28. In the period allotted to him, however, were four of his rest days, to wit: October 28 and 29 and November 4 and 5. Chitwood was likewise granted 10 calendar days, comencing November 8, and November 9, 10, 16 and 17 were his rest days. After making some bookkeeping adjustments, the Carrier paid the Claimants for ten days each at their respective pro rata rates.

The claim is for four additional days pay for each Claimant, but on the presentation of the matter to us, it was urged that they are each really entitled to pay for six additional days.

The Carrier concedes that it was not proper to include Claimants' rest days in their vacation periods, but urges, nevertheless, that they have been fully compensated—each having received six days' pay for the vacation period actually enjoyed and four days additional pay for those parts of their vacations of which they were deprived because their rest days should not have been included therein.

Article 5 of the 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 employe shall be paid in lieu of the vacation the allowance hereinafter provided."

The Claimants say, and we think correctly, that this Rule grants to the Carrier two, and only two alternatives, to wit: to give the employe the vacation that he is entitled to or, if the requirements of the service will not so permit, to pay him for his full vacation period in accordance with the provisions of the Agreement governing that matter. There is nothing in Article 5 which authorizes the Carrier to give the employe a part of his vacation and to pay him for the remainder.

If there is any room for doubt about the above being the proper interpretation of Article 5 that doubt is entirely dispelled by Article 11:

> "While the intention of this agreement is that the vacation period will be continuous, the vacation may, at the request of an employe, be given in installments if the management consents thereto."

Thus, it is made manifest that the vacation to which an employe is entitled may not be divided into installments unless he requests it. And there was no such request here.

The Carrier points out that the Claimants have already been paid all that they would have received in vacation pay if they had been granted vacation leaves in accordance with the Agreement and, likewise, all that they would have received if the requirements of the service had precluded them from having any vacation whatever. This argument is buttressed by the following quotations from Referee Morse's Interpretation of the Vacation Agreement:

> "* * * Any attempt on the part of either the Carriers or the labor organizations to gain collateral advantages out of the agreement is in violation of the spirit and intent of the agreement."
>
> "This contemplates that an employe having a regular assignment will not be any better or worse off, while on vacation, as to daily compensation paid by the Carrier than if he had remained at work on such assignment. * * *"

Our attention is also directed to our Award 5443, which presented a situation where an employe who was only entitled to nine days vacation was

granted two weeks through the Carrier's error. The employe, well knowing of the error, took the full two weeks and then sought to recover three days' additional wages on the theory that he was required to suspend work for that period of time. What was said by the Board in denying that claim is so foreign to the issue here presented that we do not find that Award helpful to us.

We feel obliged to conclude that the Carrier did violate the Agreement in the instant case. Articles 5 and 11 are clear and unambiguous, and where there is no ambiguity there is nothing to construe.

Article XVII of the Agreement guarantees that "Regularly assigned employes will receive one (1) day's pay within each twenty-four (24) hours . . . if ready for service and not used. . ." During the six days that they were on their so-called vacations it may be assumed that Claimants would otherwise have been available and ready to serve on their regular positions. Article XVII therefore provides the measure of recovery, unless it is otherwise limited by the demand of the Claim. While the Claim asks that the Claimants be compensated for four days each, the Organization now urges that they should each be allowed six days. We think, however, that the relief granted ought not exceed the demand. Such is the rule in courts of law, and we see no good reason why the same should not apply here.

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 in accordance with the demand thereof.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: (Sgd.) A. Ivan Tummon
Secretary

Dated at Chicago, Illinois, this 16th day of July, 1954.