Award No. 7065
Docket No. TE-6839

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Edward F. Carter, Referee

PARTIES TO DISPUTE:

THE ORDER OF RAILROAD TELEGRAPHERS

KANSAS CITY TERMINAL RAILWAY COMPANY

STATEMENT OF CLAIM: Claim of the General Committee of The Order of Railroad Telegraphers on the Kansas City Terminal Railway that—

(1) The carrier has not complied with the terms of the Vacation Memorandum dated March 4, 1938, by its refusal to adjust upward the rates of pay of all positions covered by the Agreement in the amount of two cents (2¢) per hour upon cancellation of said Memorandum effective October 8, 1952.

(2) The carrier shall be required to add to the basic rate of each position under the conditions of said Vacation Memorandum of March 4, 1938, two cents (2¢) for each hour of compensated service properly adjusted for overtime, holiday and rest day service, beginning October 8, 1952.

EMPLOYES' STATEMENT OF FACTS: As of the date of this dispute there was in effect an Agreement bearing effective date of August 1, 1924, covering hours of service and working conditions of telegraphers, telephone operators handling train orders, towermen, levermen, and tower and train directors, which Agreement was supplemented by Memorandum dated July 19, 1924, also effective as of August 1, 1924, setting forth rates of pay and vacation privileges for the employes covered by said agreement. During negotiations on increases in rates of pay in 1924, the employes were given a choice of an increase of $0.0692 per hour without vacations, or an increase of $0.0492 per hour with vacations. The increase with vacations, therefore was two cents (2¢) per hour less than the increase would have been had vacation privileges not been allowed.

The understanding was that the total time granted under the vacation privileges could be converted at the prevailing rates of pay to a 2¢ per hour differential between the rates of pay with vacations, and the rates of pay without vacations. Thus the employes gave up 2¢ per hour increase in their rates of pay and accepted in lieu thereof vacations with pay evidenced by the 1938 Vacation Memorandum.

On March 4, 1938, the Supplemental Memorandum of July 19, 1924, which covered rates of pay and vacation privileges, was revised by another Memorandum of Agreement covering only vacations. The March 4, 1938 Memorandum specifically stipulated that vacation privileges were continued

The March 4, 1938 Agreement remained static after January 1, 1942, the effective date of The National Vacation Agreement. The fact that the employes cancelled the Agreement does not change the position of either party, the employes chose in July 1924 to take a vacation with pay, rather than the two (2) cents per hour and are still receiving vacations with pay.

Referee Colby, in First Division Awards 16021-38, used the following language that is applicable in the present case: "* * * **it seems clear to us that if such were the intent of the parties, there are enough words in the English language to have enabled them to manifest such intent.**" (Emphasis supplied.) "* * * In our opinion, this Carrier and the two Organizations herein involved abrogated that concept by omitting from the rules the slightest reference to it. Obviously, we cannot here apply negotiated rules contained in schedules of other railroads, **nor can we read or write into the applicable rules language which is not there.**" (Emphasis supplied.)

If it was the intention of the parties that all rates were to be increased two (2) cents per hour upon the cancellation of the March 4, 1938 Agreement, then language to that effect would have been incorporated in the Agreement. The intention of the parties was to write an Agreement granting vacations. Since 1924, these employes have been receiving vacations with pay, therefore, the cancellation of the March 4, 1938 Agreement does not change the position of either party. That the Carrier's position is correct and that the termination of the 1938 Agreement would not and does not give the employes any claim to a two cents per hour increase, is best demonstrated by the actions of the employes themselves.

If they believed that their intentions were correct and that by merely terminating the 1938 Agreement, as they could by the express terms thereof have done anytime upon thirty days notice, they would automatically be entitled to an increase, would they have waited seven years to give this notice? Would they not have given the termination notice immediately after the Arbitration Award in 1945, rather than wait until 1952?

To summarize, it is the Carrier's position that cancellation of the 1938 Agreement does not obligate the Carrier to grant an increase of two cents per hour because no such obligation is expressed therein. That Agreement clearly expressed the choice of alternatives on the part of the Employes to have vacation instead of the increase. Notwithstanding the cancellation of the 1938 Agreement, the Employes still enjoy the vacation provided theren and to an expanded extent. To now grant the two cents per hour increase would enable the Employes to acquire the other alternative and thus nullify the clear intent of choice of alternatives. The cancellation of the agreement actually eliminates any obligation on the part of the Carrier to grant either.

All of the above has been handled with Organization, either in conference or in writing.

(Exhibits not reproduced. Page reference relates to original document.)

OPINION OF BOARD: On July 19, 1924, an agreement was entered into by the Carrier and the Telegraphers' Organization by which certain designated wage increases were granted and a 10 day vacation with pay was given to those employes who had been in the service of the Carrier for more than one year. It was expressly agreed that this vacation provision should remain in force only until a wage increase was granted by the United States Railway Labor Board, or its successor, over and above the rates listed in the agreement. The foregoing increases in pay resulted from a decision of the United States Railway Labor Board granting employes on the St. Louis Terminal Railroad an increase of five cents per hour. Carrier offered its employes the increase of five cents per hour or an increase of three cents per hour and paid vacations of 10 days after one year's service. The employes accepted the latter alternative. On August 5, 1937, Carrier notified its employes that vacation privileges were discontinued because of an increase

in pay granted in mediation. A dispute arose which resulted in a Memorandum Agreement dated March 4, 1938. This Agreement reduced the amount of vacation time so that the 2¢ would cover the cost of vacations after the 1937 pay increase became effective. This Agreement also contained this provision:

> "**This agreement is based on and in lieu of** a two (2) cents per hour differential, the same as the Agreement dated July 19, 1924 and effective August 1, 1924, and supersedes the Agreement respecting vacations dated July 19, 1924 and effective August 1, 1924, and **will remain in effect until after thirty (30) days' notice has been given in writing** by either party to the other." (Emphasis supplied.)

The National Vacation Agreement became effective on this property on December 17, 1941. The relation of the National Agreement to the 1938 Agreement became a matter of dispute. We point out that Article 3 of the National Vacation Agreement, and the interpretation thereto dated June 10, 1942, clearly demonstrate that any advantages to employes existing under prior rules or agreements were not abrogated by the National Agreement. The 1938 Agreement therefore was effective after the promulgation of the National Agreement. In the case before us, claims were paid under the 1938 Agreement which were not subject to payment under the National Agreement, although the Carrier asserts they were paid for reasons other than any legal obligation to do so.

In 1945, the Organization contended that the 1938 Agreement was abrogated and requested that the 2 cents per hour equivalent of the vacation provision be restored. Carrier contended that the 1938 Agreement was still in effect. The matter was submitted to arbitration and the Arbitration Board decided that the 1938 Agreement was still in effect and denied the restoration of the 2 cents per hour. The Arbitration Board was clearly correct in view of the fact that the only way the 1938 Agreement could be terminated was by the service of a 30-day written notice which had not been done. Nor did the National Agreement purport to terminate or invalidate rules or agreements more favorable to employes than the provisions of the National Agreement.

In 1952, the Organization served the required 30-day notice and abrogated the 1938 Agreement. It thereupon demanded the restoration of the 2 cents per hour in lieu of the vacation provisions of the 1938 Agreement. We point out at this time that the 1938 Agreement on this property, or its invalidation, was not a consideration for or in any way related to the promulgation of the National Vacation Agreement. So far as this record shows, the National Vacation Agreement was based upon other considerations wholly independent of those contained in the 1938 Agreement. Consequently the present dispute must be determined upon the meaning of the 1938 Agreement on the same basis as if the National Vacation Agreement had never come into existence.

It seems clear to us that the 1937 pay increase of 5 cents per hour was accepted on the basis of a 3 cents per hour pay increase and paid vacations of 10 days after one year's service representing the other two cents. The 1938 Agreement expressly says that the **agreement**, not vacations, is in lieu of a two cents per hour differential. The Agreement provided for its termination on 30 days written notice, but it did not provide for any decrease in the granted five cents per hour pay increase. The Agreement clearly provides that it is in lieu of a two cent differential and, when the Agreement was terminated in accordance with its terms, it evidences a clear intent that the five cent pay increase would continue as if the 1938 Agreement and its predecessor agreements had not been made. This being true, the five cent pay raise of 1937 should take the form of a money increase instead of the method of payment prescribed in the 1938 Agreement after the latter was terminated in accordance with its terms. The position of the Organization is, therefore, the correct one.

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.

AWARD

Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: (Sgd.) A. Ivan Tummon
Secretary

Dated at Chicago, Illinois, this 22nd day of July, 1955.