Award No. 7336
Docket No. TE-7415

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

H. Raymond Cluster, Referee

PARTIES TO DISPUTE:

THE ORDER OF RAILROAD TELEGRAPHERS

CLEVELAND, CINCINNATI, CHICAGO & ST. LOUIS RY.
(The New York Central R. R. Co., Lessee)

STATEMENT OF CLAIM: Claim of the General Committee of The Order of Railroad Telegraphers on the Cleveland, Cincinnati, Chicago and St. Louis Railway (New York Central Railroad Company, Lessee) that:

1. Carrier violated the Agreement between the parties hereto when it failed and refused to pay E. D. Coble, an employe retired under the provisions of the Railroad Retirement Act, the full vacation allowance, in lieu of vacation, due for the calendar year 1954.

2. That Carrier shall be required to pay E. D. Coble, the sum of $82.30, the additional amount due.

EMPLOYES' STATEMENT OF FACTS: There are in full force and effect various collective bargaining agreements entered into by and between Cleveland, Cincinnati, Chicago and St. Louis Railway (New York Central Railroad Company Lessee), hereinafter referred to as Company or Carrier and The Order of Railroad Telegraphers, hereinafter referred to as Employes or Telegraphers. All agreements are on file with this Board and are, by reference, included in this submission as though set out herein word for word.

This dispute arose when Carrier failed to compensate E. D. Coble, in accordance with the agreements, for his vacation allowance, in lieu of vacation, for the year 1954. The claim was presented and handled on the property, in the usual manner and in accordance with the Railway Labor Act, as amended, to the highest official designated by the Carrier to handle such disputes. The claim was not adjusted, in accordance with the Agreements, and constitutes an unadjusted dispute between Employes and Carrier.

This Board has jurisdiction of the parties and the subject matter under the Railway Labor Act, as amended.

E. D. Coble entered service of Carrier on the 13th day of November, 1910 and retained continued employment status during the times herein involved. Effective with the end of his tour of duty, as Operator-Clerk, Ashby Yard (Petersburg, Indiana) on the 16th day of December, 1953, Mr. Coble retired under the provisions of the Railroad Retirement Act.

That the termination of service as set forth in Article 8 of the December 17, 1941, Vacation Agreement is controlling and which both the Second and Third Divisions recognize in their prior awards.

That the claimant voluntarily retired thereby terminating his employment relation with the Carrier prior to the effective date of the January 1, 1954 amendment.

That the submission of this claim is tantamount to requesting a new rule or amending the August 21, 1954 agreement, which is beyond the power of the Board.

That there is no provision in any existing agreement for an extra weeks' pay for employes voluntarily retiring prior to January 1, 1954, and a comparison of Mr. Coble's retirement date with the vacation agreement amendment (January 1, 1954) makes a denial award by the Board clearly in order.

All evidence and data set forth in this submission have been considered by the parties in conference.

(Exhibits not reproduced.)

OPINION OF BOARD: Claimant voluntarily retired from the service of the Carrier under the provisions of the Railroad Retirement Act as of December 17, 1953. Prior to his retirement, he had been granted 10 days vacation with pay during 1953, having qualified for that amount of vacation by virtue of his service during 1952, under the provisions of the Vacation Agreement of December 17, 1941, as modified by the 40 hour week agreement of March 19, 1949.

Article 8 of the 1941 Agreement reads as follows:

> "No vacation with pay or payment in lieu thereof will be due an employe whose employment relation with a Carrier has terminated prior to the taking of his vacation, except that employes retiring under the provisions of the Railroad Retirement Act shall receive payment for vacation due."

It is clear from the record that both parties have construed this Article to mean that if an employe has performed sufficient service during the year in which he retires to qualify for a vacation in the following year, he shall receive full payment in lieu of taking such vacation, even though he performs no service during the following year and has terminated his employment by retiring prior to the start of the following year. Thus, Carrier states in its Statement of Facts at page 28 of the record:

> "When the Carrier was notified of his retirement, effective as of December 17, 1953, it determined by a check of the records that he had worked the required number of days in the year 1953 to be entitled to a 1954 vacation of ten days had he not signified his intention to terminate his employment, and in keeping with the vacation agreement of December 17, 1941, the Carrier paid Mr. Coble an allowance of ten days amounting to $164.56, representing pay in lieu of vacation earned in 1953."

On August 21, 1954, a new Vacation Agreement was signed which provided, among other things, for fifteen days vacation for employes who met certain conditions. The pertinent provision of the 1954 Agreement reads:

> "Section 1. Article 1 of the Vacation Agreement of December 17, 1941 is hereby amended to read as follows:
>
> * * * * *
>
> (c) Effective with the calendar year 1954, an annual vacation of fifteen (15) consecutive work days with pay will be granted to

each employe covered by this agreement who renders compensated service on not less than 133 days during the preceding calendar year and who has fifteen or more years of continuous service and who, during such period of continuous service renders compensated service on not less than 133 days (151 days in 1949 and 160 days in each of such years prior to 1949) in each of fifteen (15) of such years not necessarily consecutive."

It is undisputed that Claimant's service met the numerical requirements in terms of days and years worked to qualify for a vacation of fifteen days under Section 1(c) of the 1954 Agreement. Accordingly, on the assumption that the 1954 Agreement was applicable to him, he submitted a claim for an additional five days pay in lieu of vacation in 1954. Carrier declined to pay this claim on the ground that the 1954 Agreement did not apply to Claimant.

Carrier's contention is that since Claimant retired prior to the effective date of the 1954 Agreement, he was never an "employe covered by" the Agreement within the meaning of Section 1(c). In Carrier's view, Claimant would have been entitled to the additional five days vacation if he had retired on or subsequent to January 1, 1954, for he would then have been an employe after the effective date of the Agreement; however, since he had severed his employment relationship prior to January 1, 1954, he was not "covered by" and did not become entitled to the benefits of the new Agreement.

Claimant contends that Article 8 (which is continued in full force and effect after the 1954 Agreement) is the controlling rule; that the intention of that Article was to entitle a retiring employe to the same vacation pay he would have received had he continued in an employe status into the following year and actually taken the vacation or a payment in lieu thereof. Since in this case Claimant could not have taken the vacation until after January 1, 1954, if he is entitled to anything he must be entitled to what is provided in the 1954 Agreement.

Both parties agree that under the Vacation Agreement, a railroad employe qualifies for a vacation in one year but is not entitled to take the vacation until the next year; and that normally an employe must continue his employment relationship until he takes the vacation or else he loses any right to it. However, a specific exception was written into Article 8 to deal with an employe who retires; such an employe "shall receive payment for vacation due".

We have no question before us here as to the meaning of the phrase "vacation due". The parties to this dispute unequivocally have interpreted the phrase to mean vacation "earned" or vacation "qualified for". The vacation to which the retiring employe is entitled under Article 8 on this property therefore, includes the vacation for which he has qualified in the year of retirement, and which is payable in the year following retirement.

The amount to be paid can be governed only by the agreement applicable to the year in which it is payable. In this case, the only agreement between the parties which deals with the computation of vacations to be paid employes who have qualified for them by virtue of service in 1953 is the agreement of August 21, 1954. The December 17, 1941 Agreement has no application to vacations qualified for in 1953; it is the 1954 Agreement which must be applied to Claimant here in the light of the parties' construction of Article 8.

The narrow construction advanced by Carrier of the phrase "employe covered by this Agreement", which would exclude from the coverage of the 1954 Agreement an employe who has retired in 1953 after having qualified for a vacation in 1954, is inconsistent with the parties' interpretation of Article 8. Under that interpretation, such an employe is "covered by" the 1954 Agreement to the same extent as if he had continued in the Carrier's employment in 1954. The fact that Carrier chose to pay Claimant for his 1954

vacation in 1953, in advance of the time he could have demanded such payment, does not change his rights under the 1954 Agreement.

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: A. Ivan Tummon
Executive Secretary

Dated at Chicago, Illinois, this 7th day of June, 1956.

DISSENT TO AWARD NO. 7336, DOCKET NO. TE-7415

While the majority sustained the claim herein based on Carrier's statement that its allowance of ten days in lieu of vacation earned in 1953 was "in keeping with the Vacation Agreement of December 17, 1941" it erred in ignoring the meaning of the phrase "vacation due." In reaching its decision, the majority relied upon the exception which, it states, "was written into Article 8 to deal with an employe who retires" and recognized that the exception only provides that such an employe "shall receive payment for vacation due."

In relying upon the exception, supra, the majority should have considered the meaning of the phrase "vacation due." If it had, it could only have reached the conclusion that the exception was coextensive with Section 1 of the Agreement in effect at the time claimant retired. Section 1 thereof provided for a vacation, or payment in lieu thereof, only for service rendered "during the preceding calendar year" of 1952. Admittedly, claimant was granted that vacation in 1953, so that, technically, he was entitled to no payment for "vacation due" under Article 8 at the time of his retirement on December 17, 1953. Petitioner admitted that the Agreement of December 17, 1941 (as supplemented by Agreement of February 23, 1945) "was the controlling agreement at that time."

While the Carrier also granted claimant payment of ten days at the time of his retirement for service rendered in 1953, it was not required to do so under the National Vacation Agreement. That Agreement is before us at all times and was entitled to consideration. While this Carrier unilaterally adopted the policy of granting payments to employes who retire based upon their status at the time of retirement, this Division has no authority to extend a practice which is not supported by agreement. Under the Carrier's stated policy, the amount to be paid was governed by the agreement applicable to the year in which an employe retired, in which year it also was payable thereunder.

Obviously, the majority erred in extending the unilateral, gratuitous practice of this Carrier in disregard of the plain and unambiguous terms of a

written contract, and to a newly written Agreement under which the practice never had been operative.

In **Award 561,** this Division, with Referee Swacker sitting as a Member, very wisely recognized that the argument of past practice is inapposite in a situation where the rule relied upon is clear and unambiguous. There we pointed out the inherent danger of relying upon an excerpt of law taken in complete disregard of its context.

Later, in **Award 4513,** with Referee Wenke, we were again faced with this issue and we held—"The fact that the parties have placed or acquiesced in an erroneous construction of an unambiguous provision in a collective agreement will not prevent us from giving it the correct construction."

In **Award 3423** with Referee Blake, we held that past practice under a prior agreement could not be extended over into a new agreement whose terms are specific.

Even as late as **Award 7021,** with Referee Wyckoff, we held that, while past practice and acquiescence may serve to resolve ambiguities, it does not nullify a rule which is plain and clear.

In allowing the instant claim, the majority committed another grave error. By according controlling significance to Article 8 of the Vacation Agreement in derogation of Section 1, which is the basic enabling provision, it has permitted the stream to rise higher than its source. This exemplifies our reason for holding in **Award 3842,** with Referee Yeager, that the controlling significance of a provision of a correlated agreement is that significance which flows when it is considered in its co-relationship with the other parts and the whole, and not that which may flow from the provision when considered separate and apart from the rest of the Agreement. Also see **Award 5207** with Referee Wyckoff.

Being an employe is a condition precedent to the application of Section 1(c) of the August 21, 1954 Agreement. Admittedly, the claimant herein was not an employe thereunder, he having voluntarily retired, as the majority states herein, on December 17, 1953. Accordingly, the decision herein gives a retroactive effect to the new August 21, 1954 Agreement back beyond the effective date upon which the parties agreed—January 1, 1954. The majority had no authority to do this.

In **Award 2622,** with Referee Parker, we held as follows:

> "* * * To adopt the practice of broadening or extending the terms of any instrument by a tribunal such as ours will only lead to confusion and uncertainty and ultimately to injustice and hardship to both employe and carrier. Far better for all concerned is a course of procedure which adheres to the elemental rule, leaving it up to the parties by negotiation or other proper procedure to make certain that which has been uncertain."

For the above reasons, we dissent.

/s/ W. H. Castle
/s/ R. M. Butler
/s/ C. P. Dugan
/s/ J. E. Kemp
/s/ J. F. Mullen