Award. No. 7339
Docket No. CL-7471

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

H. Raymond Cluster, Referee

PARTIES TO DISPUTE:

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

MISSOURI PACIFIC RAILROAD COMPANY

STATEMENT OF CLAIM: Claim of the General Committee of the Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employes on the Missouri Pacific Railroad, that the Carrier violated the Clerks' Agreement:

1. When in December 1953, Clerk W. W. Love, with a clerk's seniority date on the Class "A" seniority district and roster, Station and Yards of the Little Rock—Louisiana Division, of March 16, 1945, returned from military service after having completed the tour of service for which he entered, and reported for and entered upon his duty as a Yard Clerk at Eldorado, Arkansas, on Thursday, December 31, 1953; and

When the vacation schedule was compiled for 1954, Clerk Love was not listed on the schedule, the Carrier refused and continued to refuse to assign him a 1954 vacation date, pursuant to and in accordance with the Carrier's established policy and practice in effect since May 22, 1945 (see Exhibits "9" and "10") of granting vacation to employes (veterans) returning from military service who return and resume service with the Carrier, too late in the year of their return to perform the requisite number of days (now 133) or more days of compensated service in that year in order to qualify for a vacation in the following year;

2. Clerk W. W. Love shall be allowed pay for ten days at $14.24 per day, amount $142.40 for the vacation in 1954, to which he was justly entitled, but was arbitrarily denied by the Carrier in violation of its established policy and practice, adopted May 22, 1945, following negotiation of the parties which resulted in this working condition, which is not subject to change or abrogation by the Carrier, except through the due process of collective bargaining.

EMPLOYES' STATEMENT OF FACTS: W. W. Love is listed on the Little Rock—Louisiana Division Station and Yards Class "A" and "B" seniority roster with an "A" date of March 16, 1945, position 1, and a "B" date of August 5, 1944.

In numerous awards some of which are 422, 757, 1389, 1492, 1518, 1551, 1806, 2281, 2700, 2812, 3518, 3603, 3890, 4070, and 4277 the principle is stated that when the meaning of a rule is clear as written, acquiescence in a contrary practice over a long period of time does not change the rule or estop requirement of present or future compliance. The rule in the agreement here involved is clear to the effect that an employe must have 133 days of compensated service in one year to qualify for vacation the next year. It is therefore clear that even if the Carrier's policy here in question had actually been an established practice, which we deny, it could have been discontinued because of the clear rule setting up the 133 compensated service days qualification requirement.

The Carrier holds:

(a) that the Carrier's continued application of a policy not required by agreement did not set up an established practice,

(b) that even if such practice had been established the Carrier had the prerogative to discontinue it at will in view of a clear rule specifying the agreement of the parties on the same subject, and

(c) that the Agreement of August 21, 1954, having entered the field of treatment of military service with respect to vacation qualification, specified the complete contract of the parties with respect to such treatment.

(Exhibits not reproduced.)

OPINION OF BOARD: Although the record is not clear, it appears that Claimant, prior to entering the armed forces, had worked one or more years of 160 days each for the Carrier. He apparently left the service of the Carrier at some time prior to 1953 and was in the military service during the entire year of 1953 until December 31st, on which date he returned to the service of the Carrier. He was not assigned a vacation in 1954 and filed a claim for pay in lieu of vacation. The date of his claim is not established by the record, but it was declined by the Carrier under date of October 29, 1954 on the ground that he had not worked the required number of days in 1953 to qualify for a vacation in 1954.

The Vacation Agreement of August 21, 1954, which governed all vacations in 1954, requires that an employe have worked 133 days in 1953 in order to qualify for a vacation in 1954. Obviously, Claimant did not meet this requirement. His claim is based upon what is variously described in the submission as a "policy", "practice" and/or "agreement" put into effect by the Carrier on May 22, 1945, by which an employe who returns from military service prior to the close of any year, works until the end of that year and continues to work thereafter, is granted a vacation in the year following his return "as if he or she had performed the amount of service in the year of his or her return required to qualify for a vacation in the following year . . ."

The history of this policy is set forth at length in the record. In brief, the Executive Committees of the three territorial bureaus of the carriers recommended that each railroad adopt the policy. The General Chairman of the Clerks on the property here involved came into possession of a circular letter dated March 27, 1945, from the Eastern Bureau to its members containing the recommendation. On April 20, he sent this copy to the Carrier with a request to docket the matter for conference in order to arrive at a Memorandum of Agreement covering the matter. A discussion was had on May 8, at which the Carrier indicated its desire to put the matter off so that it could be disposed of simultaneously and uniformly as to all organizations on the property. On May 16, the General Chairman wrote again indicating

that other organizations had raised the question and that a Memorandum of Agreement such as he was seeking had been executed on another Carrier; expeditious handling was therefore requested.

On May 22, the Carrier issued, over the signature of its Chief Personnel Officer, a letter to all of its employing officers stating the policy of the Carrier with regard to vacation rights of returning veterans to be as recommended by the executive committees in the circular letter described above. No reference to the request of any organization for an agreement was made in this letter. Copies of the letter were sent by the Carrier to all General Chairmen on the property on May 29, for their information. On June 4, the Carrier wrote to the General Chairman to the effect that the matters raised in his letters on the subject of returning veterans had been dealt with in the letter of May 22.

On June 14 and apparently again on August 2, the General Chairman wrote raising certain questions about the right of returning veterans to take leave of absence to study under the so-called G. I. Bill of Rights. No answer to these letters is disclosed by the record. On August 28, the General Chairman wrote raising the point that under the Carrier's policy as set forth in its letter of May 22, a returning veteran who worked until the end of the year in which he returned and then went on leave to study, would not get a vacation because of the requirement that he continue in service after the end of the year in which he returns. The letter then proposed that "an agreement should be entered into simply providing that he remain in the service of the Carrier and not specify that he must be actively employed after the end of the year of return in order to obtain a vacation . . ." A memorandum of agreement to this effect was enclosed and Carrier was requested to sign and return a copy.

On August 30, Mr. Roll, the Chief Personnel Officer of the Carrier replied that it had not approached the subject matter of qualifying veterans for vacations "from the standpoint of any legal or contract obligations." He went on to say that the declaration of policy "was in the nature of a gratuity on the part of Management to the returning veterans, and for that reason we do not feel as if it is the subject matter of negotiations or an agreement". In conclusion, he stated ". . . we are not agreeable to the memorandum agreements proposed . . ."

Apparently this was the last word on the subject until October 18, 1954, on which date the Carrier put out a letter to all its employing officers specifically cancelling the letter of May 22, 1945, and stating that returning veterans covered by the August 21, 1954 Agreement must perform compensated service on the number of days required by the vacation agreement just as other employes, in order to qualify for vacation in the following year. It appears that for the nine years between the enunciation of the policy in 1945 and its cancellation in 1954, it was applied uniformly to all returning veterans.

Two theories are advanced to support the claim. One is that there was an actual oral agreement between the Organization and the Carrier despite the fact that the Carrier refused to commit it to writing. This is supported by reference to the fact that it was the General Chairman who originally requested the Carrier to put the recommendation of the Executive Committees into effect on the property; the May 22, 1945 letter was in response to this request and thus was a negotiated agreement.

The other theory is that the policy, through nine years of uniform application, achieved the status of a "practice", which in turn is as binding upon the Carrier as an Agreement rule and may not unilaterally be cancelled by the Carrier.

We do not think that the claim can be supported on either ground. There was no agreement between the Organization and the Carrier either as to the

substance of the policy or as to its binding effect. The General Chairman did not agree with the policy as announced and put into effect by the Carrier. His last communication on August 28, 1945 proposed a change in the policy and enclosed a memorandum incorporating that change. The Carrier not only refused to sign the memorandum; it never agreed with the policy suggested by the General Chairman and never adopted it. It adhered to the policy which it had announced and with which the General Chairman was not satisfied. In addition to this substantive disagreement, there was a basic disagreement as to whether Carrier was to be bound to any agreement. Carrier took the position in the letter of August 30, 1945 that it would not enter into a contractual relationship; that the policy was unilateral and gratuitous. It is difficult to see how a binding agreement can arise when one of the parties to the purported agreement states at the outset that it will not be bound.

The same difficulty exists with regard to the argument that the policy ripened into a practice. It is true that there are awards on this Division which hold that a course of conduct, long-continued over the years, may become a practice and as such attain the same force as a rule. These awards have held that this may be so even though the practice is at variance with an agreement rule and originated as a gratuity on the part of the Carrier. Of the awards cited, two seem most similar factually to the instant case. In Award No. 5082, the Agreement provided for 7 specific holidays not including Lincoln's Birthday or Columbus Day. The claim was that certain employes under the Agreement were entitled to release from service with pay on the latter two holidays and that employes who had been required to work on these days were entitled to time-and-one-half, the holiday rate in the Agreement. The claim was sustained on the ground that there had been continuous recognition of Columbus Day and Lincoln's Birthday as holidays on the property for 25 years, and that by this long-continued practice the Carrier in effect extended the holiday rule by special grant to include days other than those specifically named. In Award No. 4349, Carrier for fifty years had made sick leave payments to employes at certain locations, although no Agreement rule so required. In 1947, it notified the Organization that it was discontinuing such payments. The Board found that there was a practice and an understanding that the practice would be continued, and sustained claims of employes who had not been granted sick leave payments. Similar findings to the effect that Carrier could not discontinue long-standing practices were made in Award No. 2436 and others cited by the Claimant.

In our view, these Awards are distinguishable from the present case. The key question in each case is whether the course of conduct involved established a "practice". There is little guidance as to what a "practice" is; however, Award 2436, which is generally cited as the leading award on the subject, contains this statement:

> "It is first necessary to determine if the matters sought to be avoided are in fact practices . . . A continuous recognition of them for 25 to 40 years, whether or not they had their beginnings as favors or gratuities, or as the result of oral understandings leads us to the conclusion that they are at the present time practices in the sense in which that term is used in the railroad industry."

There are two ways in which the present case differs from Award No. 2436 and those following it. First, the period of time involved—nine years—is much shorter than the periods involved in those cases; and this quantitative element appears to be basic to those decisions, as evidenced by the quotation above from Award No. 2436.

Second, and more important, in none of the cited cases does it appear that the Carrier, at the outset of the establishment of the policy later claimed to be a "practice", took the firm position that it was established as a gratuity and that it had no intention to be bound contractually by its action. Such action by the Carrier in this case negates the foundations of "oral agreement"

or "special grant" or "estoppel" on which the cases cited by the Organization rest. Where the Carrier, as here, states at the outset that it is establishing a policy as a gratuity and that it will not be contractually bound, and then refuses to enter into a Memorandum of Agreement on the policy when requested to do so by the Organization, it cannot be said that a binding oral agreement was reached, or that the continuation of the policy for nine years as in this case established a practice which the Carrier may not cancel.

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 not violated.

AWARD

Claim denied.

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.