Award No. 7422
Docket No. CL-7469

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, on Monday, July 5, 1954, a holiday, Clerk D. F. Shelley was away on his scheduled vacation, and this holiday was excluded as one of his ten assigned vacation days, and when the Chicago Agreement of August 21, 1954 became effective Mr. Shelly was entitled to pay for Monday, July 5, 1954 under Article II, Section 1 of the Chicago Agreement, but the Carrier refused to allow pay for this day on the grounds that the holiday should be applied as a vacation day since he must be paid for same.

2. Since the vacation schedule was prepared late in 1953 or early in 1954, before the August 21, 1954 Chicago Agreement was in existence, and the Claimant took the vacation dates assigned to him as scheduled and in good faith, therefore, the Carrier shall be required to pay Mr. Shelley for one holiday, July 5, 1954, at the rate of a Junior Rate Clerk, $14.66 per day, which it declined to do, in violation of the Agreement of August 21, 1954.

EMPLOYES' STATEMENT OF FACTS: Clerk D. F. Shelley has been in continuous service in the Auditor Freight Receipts Office since May 20, 1948, and he is listed on the Auditor Freight Receipts Class "A" and "B" Seniority Roster with an "A" date of 4-17-51 and a "B" date of 5-20-48, therefore he had six years or more continuous service when he went on his vacation in 1954.

Clerk Shelley's original scheduled vacation dates on the vacation schedule for 1954 was August 16, 1954 to August 27, 1954, ten days inclusive except Saturday, August 21st and Sunday, August 22, 1954.

Upon request of Mr. Shelley and in agreement with the Carrier and the Division Chairman on February 18, 1954, the vacation dates were changed to June 28 to July 12, 1954 inclusive except Saturday, July 3, 1954, Sunday,

The rule says:	The situation was:
When, during an employe's vacation period,	There can be no doubt that July 5 was during this claimant's vacation period.
any of the seven recognized holidays	July 5 was the Fourth of July holiday specified in the rule.
falls on what would be a work day of an employe's regularly assigned work week,	This claimant had Monday through Friday as his regular work days; July 5 fell on Monday.
such day shall be considered as a work day of the period for which the employe is entitled to vacation.	The rule is clear to the effect the holiday, paid for under Section 1, of Article II, shall be counted as a vacation day.

How can the Employes be heard to say this holiday must **not** be counted when the rule says it **shall** be counted? Such an interpretation would be as much as to say the rule means exactly the opposite of what it says. The Carrier vigorously disagrees with the General Chairman's comment in his letter of November 23, 1954, quoted in Item 7 of our Statement of Facts to the effect that employes who were on vacation on Decoration Day and/or July 4, or the days observed by the nation as holidays, are entitled to payment for same just as if they had not been on vacation. This Agreement is very specific as to different treatment to be given holidays falling within vacation periods from that applicable to holidays occurring at other times with respect to an individual employe. This claimant **was** on vacation when July 5 arrived; the terms of the Agreement with respect to that day apply—not the different treatment that would have been given it if he had **not** been on vacation. Agreement provisions must be applied to factual situations—not to assumed or hypothetical ones.

There is no Agreement requirement or authority for the payment of this claim.

(Exhibits not reproduced.)

OPINION OF BOARD: Claimant requested and was granted the following vacation period for 1954: June 28, 29, 30, July 1, 2, 6, 7, 8, 9 and 12. This comprised ten consecutive work days, since July 3, 4, 10 and 11 were rest days and July 5 was a holiday. He went on vacation as planned from June 28 through July 12 and was paid for ten days. Under the rules at the time of his vacation, he received no pay for the holiday, nor was it counted as a "workday" of his vacation.

On August 21, 1954, the Chicago National Agreement was signed, amending the 1941 National Vacation Agreement, under which Claimant's 1954 vacation had been taken, and also including new provisions for holiday pay. The sections of the 1954 Agreement pertinent to this claim are as follows:

> Article I. Section 3. "When, during an employe's vacation period, any of the seven recognized holidays . . . falls on what would be a work day of an employe's regularly assigned work week, such day shall be considered as a work day of the period for which the employe is entitled to vacation."
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> Article I. Section 7. "This agreement shall be effective as of January 1, 1954 . . ."
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> Article II. Section 1. "Effective May 1, 1954, each regularly assigned hourly and daily rated employe shall receive eight hours' pay at the pro rata hourly rate of the position to which assigned for

each of the following enumerated holidays when such holiday falls on a workday of the workweek of the individual employe: . . . Fourth of July . . ."

Carrier, in carrying out the retroactive effect of Article II, Section 1, mailed checks to its employes covering holidays which had been worked after May 1, 1954 without pay. Claimant's check did not include payment for July 5, 1954, which fell during his vacation. Upon discovering this, he filed a claim for a day's pay. The basis of the claim is asserted to be that since the vacation was agreed to and taken before August 21, 1954, the holiday should not be counted as a work day of the vacation; to do so amounts to changing the vacation period which was agreed upon between the Carrier and the Claimant.

Carrier agrees that Claimant was entitled to be paid under the retroactive provision of Article II, Section 1 for the Fourth of July holiday. However, Carrier also contends that the holiday must be counted as a work day of the vacation period under the retroactive provision of Article I, Section 7 as applied to Article I, Section 3. Therefore, Claimant actually had one more day of vacation than he is entitled to under the 1954 Agreement, and has already been paid the amount he is entitled to under that Agreement, although the payment was credited to July 12 rather than to July 5 at the time it was paid. The net effect is that Claimant was paid for the holiday and also received an extra day of vacation without pay.

It would appear that in order to sustain the claim, Article II, Section 1 must be given retroactive effect and Article I, Section 3 must not. However, no basis is put forward by Claimant for this interpretation other than that it was so understood by the labor members of the Conference Committee which negotiated the Agreement. The Carrier denies that its members of the Conference Committee so interpreted the Agreement, and the language of the sections above quoted clearly provides for retroactivity in both cases. In fact, Section 3 of Article I is subject to the general effective date of January 1, 1954, whereas Section 1 of Article II is specifically made retroactive only to May 1, 1954.

This problem has been considered in a prior award of this Division, which has been cited by both parties. In that Award, No. 7331, the Board found that Article I, Section 3 was intended to be applied just as Carrier applied it here, in the following language:

> "No basis exists for dispute over the effective date of the Agreement. That point is resolved by Section 7, Article I, which expressly provides an effective date of January 1, 1954. No other date sets Section 3 apart from Section 1(c) and, therefore, it must have been intended that the Carrier should take credit during 1954, when credit is due, for holidays enumerated in Section 3 . . .
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> "Contrary to the expressed views of the Employes in this docket, as to their understanding of the intent and purpose of the Agreement in question, it does not appear that, in all instances, persons 'who were on vacation on Decoration Day, May 31, or on July 5, 1954 are entitled to payment for those holidays just as though they had not been on vacation'. Rather, it seems to have been within contemplation of the contracting parties that if the employe receives holiday pay for a work-day of his workweek, that same day is not again to be compensated for as a day of the employe's paid vacation. Both having to do with payment for time not worked, the opposition to pyramiding payments was both real and apparent on the part of the railroad managements during negotiations."

The claim in Award 7331 was sustained on the ground that the vacation period in that case was not continuous but was in installments, and the holiday in question was not included in the vacation period. Here, however, July 5 was clearly included in the vacation period agreed upon and taken by Claim-

ant. In the language of Award 7331, credit is therefore due the Carrier for this holiday under Article I, Section 3, and it was no violation of the Agreement for such credit to be taken as it was in this case.

Both Article I, Section 3 and Article II, Section 1 were clearly intended to be retroactively applied. In this case, the practical effect of such application was that the additional pay granted by one section was nullified by the other; but that is no reason to deviate from the clear language of both sections. The Agreement must be applied as written, and there is nothing in the Agreement to support Claimant's interpretation that Article II, Section 1 should be applied retroactively, but Article I, Section 3 should not.

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 1st day of October, 1956.