Award No. 7483
Docket No. TE-7400

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

H. Raymond Cluster, Referee

PARTIES TO DISPUTE:

THE ORDER OF RAILROAD TELEGRAPHERS

ST. LOUIS-SAN FRANCISCO RAILWAY COMPANY

STATEMENT OF CLAIM: Claim of the General Committee of The Order of Railroad Telegraphers on the St. Louis-San Francisco Railway, that:

1. Carrier violated the agreement between the parties hereto when it failed and refused to pay C. A. Smith, a retired employe, the full vacation allowance, in lieu of vacation, due for the calendar year 1954.

2. That Carrier shall be required to pay C. A. Smith the sum of $74.10, the additional amount due.

EMPLOYES' STATEMENT OF FACTS: There are in full force and effect various collective bargaining agreements entered into by and between St. Louis-San Francisco Railway Company—St. Louis, San Francisco and Texas Railway Company, 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 C. A. Smith, in accordance with the Agreement, 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 Agreement, 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.

C. A. Smith entered service of Carrier on the 28th day of July, 1909, and retained continued employment status during the times herein involved. Effective with the end of his tour of duty, as Agent-telegrapher, Steelville, Missouri, on the 29th day of October, 1953, he retired under the provisions of the Railroad Retirement Act.

Mr. Smith, in 1953, in every respect qualified for vacation, due him in the calendar year 1954. Therefore, on the Steelville payroll for the period

"The Division finds from all of the evidence submitted in this case that the **agreement and rules relied upon by Petitioner were not in effect** at the time the position involved was filled, and the claim must be and hereby is denied." (Emphasis supplied)

Burden of Proof Rests Upon Party Asserting Claim

Part 1 of Employes' Statement of Claim is that "Carrier violated the agreement between the parties hereto when it failed and refused to pay C. A. Smith . . . the full vacation allowance . . . due for the calendar year 1954." They do not identify the agreement which they allege was violated, but since the December 17, 1941 Vacation Agreement was the only agreement in effect between the parties covering vacations at the time Smith severed his employment relationship with the Carrier, that is the only agreement which could be involved. Employes have asserted the claim and have alleged a violation of agreement rules, and the burden of proof rests upon them. In Award 6349, Third Division, it is stated—

"This Board has held in numerous awards that the burden of establishing facts sufficient to require the allowance of a claim is upon the party seeking relief."

Also see Awards 6406, 6359, 6828, 6829, 4758 and 4011.

There are innumerable Awards of all Divisions of this Board holding that the Board is without authority to write new rules, or to change or modify existing rules; that the Board must give effect to the rules as agreed to betwen the parties. See Third Division Awards 6828 and 6365. The employment relation of the claimant here cannot be extended beyond the date of his resignation from the Carrier's service. To qualify for 15 days' vacation under the provisions of the Vacation Agreement which became effective January 1, 1954, he must have been an employe of the Carrier. But the claimant admittedly cannot meet this requirement. The only provision of the Vacation Agreement which he can meet after his resignation is the exception contained in Article 8 by reason of his being granted an annuity, and Carrier has fully complied with the provisions of that Article in making payment for ten days' vacation under the rules of the Vacation Agreement applicable to claimant's service prior to his resignation. Carrier emphatically denies any violation of applicable agreement rules.

CONCLUSION

Carrier's submission shows (1) that the claimant was paid for ten days' vacation after he was granted an annuity; (2) that such payment met the requirements of the applicable Vacation Agreement in effect at the time claimant resigned from Carrier's service; (3) that claimant was not an employe of the Carrier on the effective date of the fifteen day vacation provision contained in the August 21, 1954 Agreement and could not be subject to that agreement or the amended vacation provisions contained therein; (4) that the Employes have asserted the claim but have failed to meet the burden that rests upon them to prove a violation of applicable agreement rules.

The claim submitted by the Employes is wholly unsupported by effective agreement rules and Carrier respectfully requests the claim be denied in its entirety for any and all reasons set out in its position.

Carrier affirms that all data submitted in support of its position have been presented to the Employes.

(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 October 29, 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. During the period from January 1 to October 29, 1953, he had worked more than 133 days, which was sufficient time to qualify him for a vacation in 1954 had he remained in service. Carrier allowed Claimant payment for 10 days, the vacation due him in 1954 under the terms of the 1941 Agreement, which was in effect at the time of his retirement.

The claim is for an additional 5 days vacation payment under the provisions of the Vacation Agreement of August 21, 1954, which grants employes with Claimant's length of service fifteen days instead of the former ten days, effective with the calendar year 1954.

The question presented in this case is in all respects similar to that presented in Award No. 7336 of this Division, in which the claim for an additional 5 days vacation pay was sustained. In the instant case, Carrier members strongly urge that the decision in Award No. 7336 be reconsidered, and present extensive arguments in support of their position that the claim should be denied. Essentially, in addition to the arguments already considered and rejected by the Board in Award No. 7336, the argument for reconsideration is that the phrase "vacation due" in Article 8 of the 1941 Agreement is clear and unambiguous and, in a case such as this one, can only be construed to mean that Claimant was not entitled to any vacation other than the 10 days which he had already received as the result of his service in 1952. It is contended that any payment given Claimant on the basis of work performed in 1953 was merely a gratuity; and that Claimant cannot insist on any additional gratuity. We disagree with this contention. The phrase "vacation due" is not so clear and unambiguous that it is susceptible of only the interpretation urged by Carrier. "Due" may mean "earned" as well as "presently payable" and it has been so interpreted by the parties to this dispute. Just as in Award No. 7336, the parties have interpreted it to mean that Claimant was "due" the vacation for which his service in 1953 qualified him, and payment in lieu of such vacation was made not as a gratuity, but as a requirement of the vacation agreement. This being so, Claimant is entitled to the additional five days for the reasons set forth in Award No. 7336. See also Award No. 7368 of this Division and Second Division Awards Nos. 2151 and 2231 which favorably cited Award 7336 and sustained claims under similar circumstances.

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 5th day of December, 1956.