Award No. 7848
Docket No. MW-7554

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Edward A. Lynch, Referee

PARTIES TO DISPUTE:

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES

MISSOURI-KANSAS-TEXAS RAILROAD COMPANY

MISSOURI-KANSAS-TEXAS RAILROAD COMPANY OF TEXAS

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood that:

(1) The Carrier violated the effective Agreement when it failed and refused to allow Mr. W. G. Eikel a vacation or pay in lieu thereof for the calendar year of 1952;

(2) That Mr. W. G. Eikel now be allowed five days' pay account of being deprived of a vacation in 1952 which he had earned during the calendar year of 1951.

EMPLOYES' STATEMENT OF FACTS: On May 21, 1951, W. G. Eikel entered service of the Carrier as an Extra Gang Laborer. He was cut off at different intervals during the year of 1951, but did render compensated service for the Carrier on at least 133 days in other work classifications coming within the scope of the instant Agreement.

Request was made for a vacation for claimant Eikel during the year 1952. Carrier refused to allow this vacation and likewise, has declined to allow Mr. Eikel pay in lieu thereof.

The Agreement in effect between the two parties to this dispute, dated September 1, 1949, and subsequent amendments and interpretations are by reference made a part of this Statement of Facts.

POSITION OF EMPLOYES: As pointed out in the Employes' Statement of Facts, W. G. Eikel entered the Carrier's service on May 21, 1951, as an extra gang laborer and performed one hundred and thirty-three (133) days of compensated service during that year as will be noted from the following quoted letter, signed by Superintendent O. L. Crain:

"Franklin, Sept. 25, 1952
501-E

Mr. W. G. Eikel:
Americus, Mo.

Referring to your letter September 4, vacation time. I am quoting letter from Mr. F. A. Schulz, Assistant Auditor.

which terminated July 31, 1951, as required by Rules 28 and 30 of Article III of Agreement No. DP-173.

All data submitted in suport of carrier's position have been heretofore submitted to the employes or their duly authorized representatives.

The carrier requests ample time and opportunity to reply to any and all allegations contained in the Brotherhood of Maintenance of Way Employes', System Committee's and Employes' submission and all pleadings.

Except as herein expressly admitted, the Missouri-Kansas-Texas Railroad Company expressly denies each and every, all and singular the allegations of the Brotherhood of Maintenance of Way Employes, System Committee of the Brotherhood, and Employes' alleged unadjusted dispute, claim or grievance.

For each and all of the foregoing reasons, the Railroad Company respectfully requests the Third Division, National Railroad Adjustment Board, deny said claim, and grant said Railroad Company such other relief to which it may be entitled.

(Exhibits not reproduced).

OPINION OF BOARD: At the outset, it is argued on behalf of Carrier that the claim in the instant case is barred by Article 24, Rule 2 reading as follows:

> "Claims of employes which may arise under this agreement shall not be subject to monetary recovery unless presented within sixty days from the date of events or circumstances on which the claim is based."

However, because Carrier did not raise this issue while the case was being handled on the property, it cannot raise the issue now and we shall proceed with the merits of the claim.

W. G. Eikel entered Carrier's service as an extra gang laborer on May 21, 1951. Carrier concedes Eikel worked a total of 133 days in 1951, but points out his first employment was as a laborer in an extra gang on May 21, 1951. Carrier states he was then "temporarily employed" and is not, according to its view entitled to credit for the 24 days he worked in that extra gang. When that gang was abolished on June 22, 1951, Carrier asserts Claimant's employment "was permanently and finally terminated on that date." It takes the same view with respect to 5 days Claimant worked as an extra laborer in July.

His next work period started on August 1, 1951 when, Carrier asserts, he "was again newly employed and regularly assigned as a laborer." Carrier does credit his work service from August 1 forward, a total of 104 days, which, Carrier points out, was short of the 133 days required in order to qualify for a vacation in 1952.

Carrier's position is that termination of a temporary employe's services within the first 60 days completely severs his employment relationship with the Carrier so that such employe's days of temporary service during such periods could not be preserved and added together in order to make up the number of qualifying days of compensated service necessary to entitle him to a vacation in the following year.

Argument is offered on behalf of Carrier that an employe is considered a temporary employe for the first 60 days of his service. Article 2, Rule 2 is quoted:

> "The application of employe if not rejected within sixty (60) days from date of application will be considered as excepted, and

applicant will be considered as a temporary employe for the sixty (60) day period unless application is sooner rejected. In event applicant gives false information in application, approval may be revoked at any time."

Article 3, Rule 1 on Seniority is also cited on behalf of Carrier:

"Seniority begins at time employe's pay starts in the respective branch or class of service in which employed, transferred or promoted and when regularly assigned. Employes are entitled to consideration for positions in accordance with their seniority ranking as provided in these rules."

Also cited in Rule 4 of Article 3:

"Vacancies or new positions of section laborers of twenty (20) days or less duration will be considered as 'temporary' and may be filled without regard to seniority rules. When practicable to do so in the judgment of the railroad, furloughed section laborers holding established seniority rights on the Roadmaster's district concerned will be used for 'temporary' work."

Likewise, Rule 6:

"The performance of 'temporary' service shall not operate toward establishment of original seniority date."

This is argument offered on behalf of Carrier:

"Since under this rule the Claimant's original seniority date, and hence his continuous employment relationship with the Carrier, could not extend back into the period when he performed temporary service, the 29 days' service which he performed as a temporary employe could not be considered as having been performed in one continuous term of employment as the parties agree it must be in order to qualify for a vacation. We rightly understand that it is not necessary that the 133 days' service be continuous. They may be sporadic as long as they are performed while the employes maintain a continuous employment relationship."

Other rules of the Seniority Article are quoted on behalf of Carrier, leading to the argument by Carrier member that "Claimant's bare allegation that he has complied with Rule 25 is irrelevant because that rule by its terms did not apply to him prior to his performance of service in eleven consecutive months following his regular assignment. Consequently we must conclude that the Claimant has failed to bring himself within the coverage of paragraph (1) (a) of the interpretation to Article 8 of the National Vacation Agreement because it is clearly evident that under the rules of the Agreement he had no rights to be recalled during the period of his temporary service. In accordance with that interpretation, his employment relation was terminated on June 22 and July 31, 1951. That being so, the service performed by him during those periods could not be preserved, accumulated and then added to his service under a regular assignment to satisfy the 133 day requirement prescribed by Article 1 of the National Vacation Agreement."

Organization's position is, stated simply, that the Claimant had 133 days of compensated service in the calendar year 1951 and was entitled to a vacation of five consecutive work days in the following year of 1952.

It is argued on behalf of Organization that "Carrier's contention, that an extra gang employe who is cut off from time to time does not maintain his employment relationship, is completely untenable."

Article VIII of the Vacation Agreement upon which Carrier relies reads as follows:

"No vacation with pay or payment in lieu thereof will be due an employe whose employment relation with 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."

The language "whose employment relation with a carrier has terminated" was interpreted in an agreed interpretation dated June 10, 1942, and reads as follows:

"Within the application of Article VIII:

"(1) An employe's employment relation is not terminated when (a) laid off or cut off on account of force reduction if he maintains rights to be recalled; or (b) on furlough or leave of absence; or (c) absent on account of sickness or disablity.

"(2) An employe, who loses his seniority because of moving from one seniority roster or seniority district to another established under one rules agreement made with one organization or with two or more federated organizations, or under two or more rules agreements made with one organization or federation of organizations parties to the Vacation Agreement, shall not be deemed to have terminated his 'employment relation' under this article."

Of the ten Awards cited on behalf of Carrier's position, most of them deal with (a) giving effect to the entire language of an agreement, (b) seniority or (c) "temporary employes gain no rights, etc." Only one Award relates to vacation pay, but it (5429) turns on a rule clearly not applicable or involved here.

The applicable portion of the Agreement involved here is Section 1 of the Vacation Agreement of December 17, 1941, as revised, which reads in its applicable form as follows:

"An annual vacation of five (5) 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."

So, we are confronted with two questions:

1. Did Claimant render compensated service on not less than 133 days during 1951?

Carrier concedes he rendered compensated service of 133 days.

2. What effect has the parties' interpretation "within the application of Article VIII," on this case?

None. That would apply to an employe whose employment relation "prior to the taking of his vacation" has terminated. True, the agreed interpretation spells out how such employe's employment relation is not terminated, but the interpretation must be considered in its relation to Article VIII which includes the phrase, "prior to the taking of his vacation."

A sustaining Award is in order.

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 Employe involved in this dispute are respectively carrier and employe 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 has been violated.

AWARD

Claim (1) and (2) sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: A. Ivan Tummon
Executive Secretary

Dated at Chicago, Illinois this 9th day of May, 1957.