Award No. 8123
Docket No. SG-8931

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Norris C. Bakke, Referee

PARTIES TO DISPUTE:

BROTHERHOOD OF RAILROAD SIGNALMEN OF AMERICA

ILLINOIS CENTRAL RAILROAD COMPANY

STATEMENT OF CLAIM: Claim of the General Committee of the Brotherhood of Railroad Signalmen of America on the Illinois Central Railroad that:

(a) Signalman M. L. Braswell be allowed a paid vacation in 1955.

(b) Since Claimant Braswell was not allowed a paid vacation in 1955 and was required by the Carrier to work during his vacation period, he now be allowed, in addition to compensation paid by the Carrier, 8 hours pay per day for each day required to work during his vacation period, at time and one-half his pro rata rate of pay.

EMPLOYES' STATEMENT OF FACTS: On June 29, 1942, a circular letter was sent to all departments of the Illinois Central Railroad advising that returning veterans would be granted a vacation in the year following their return from military service, under certain conditions. This was accepted by the Brotherhood of Railroad Signalmen of America and no protests were rendered, nor was the matter negotiated futher.

On July 26, 1945, Assistant to Vice President & General Manager G. J. Willingham issued a circular letter to all departments, stating that vacations would be allowed returning veterans, as follows:

"Vacations may be allowed returning veterans pursuant with the following:

'A veteran who returns to active railroad service prior to the close of any year in accordance with the provisions of the Selective Training and Service Act of 1940, as amended, and who at the time of his or her entering the armed forces had worked one or more years of 160 days each as defined in the applicable Vacation Agreement and remains in active railroad service until the end of such year of his or her return, shall be granted a vacation in the following year 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 the following year, such vacation to be

Article I, Section 1, paragraphs (a), (b), and (c) of the August 21, 1954, Agreement read as follows:

"(a) Effective with the calendar year 1954, 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 one hundred thirty-three (133) days during the preceding calendar year.

"(b) Effective with the calendar year 1954, an annual vacation of ten (10) 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 five 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 five (5) of such years not necessarily consecutive.

"(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."

The Vacation Agreement is specific on vacation qualifications required in the preceding year to qualify for vacations in the following year, and nowhere contains any rule or provision for an exception. The policy of making an exception to the returning veterans was nullified by the provisions of the August 21, 1954, Agreement which then provided for granting time spent in military service for the determination of length of vacations. (See Carrier's Exhibit 3.)

It is the position of this Carrier that an employe in the status of Signalman M. L. Braswell, who returned to our service after the effective date of the August 21, 1954, Agreement to which the Carrier and the Organization were parties, to have qualified for a vacation in 1955 must have rendered the required number of compensated days of service with the Carrier in 1954. Since he failed to acquire 133 days of compensated railroad service in 1954, he failed to meet these requirements; consequently, he was not entitled to a vacation in the year 1955.

In support of Carrier's position refer to Third Division Award 7339 and Second Division Award 2178.

In conclusion, this claim should be denied or dismissed because (1) the Organization is estopped by the time limit rule, (2) there is nothing in the Agreement to support the Employes' request, (3) claimant did not qualify for a vacation under the provisions of the August 21, 1954 Agreement. The Carrier requests that the Organization's claim be denied without qualification.

All data used in support of this claim by the Carrier have been presented to the Employes and made a part of the particular question in dispute.

Oral hearing is not desired unless requested by the Organization.

(Exhibits not reproduced.)

OPINION OF BOARD: Both sides here seem to agree that the claim in this case must stand or fall by our Award 7339, concerning which the Carrier

Member notes on the copy of that award submitted "Identical Claims Denied," and in his brief the representative of the employes states, "at first blush the Award (7339) does appear to lend support to the position of respondent in the instant case, however, there was an element in 7339 which most certainly is not in evidence here. The distinction is reflected in the last paragraph of Opinion of Board as follows:

> '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 found 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.'

"In the instant case there is no evidence that Carrier ever put anyone on notice in 1942, or any other time, that its policy was a gratuity and that carrier would not be bound by it."

Award 7339 was made June 7, 1956. On July 16, 1956 award 2178 was made on the Second Division of this Board which says inter alia "Since carrier was not under obligation to give claimant a vacation for 1954 whatever it did in this regard was a gratuity."

We think the Carrier was not under obligation to pay the claimant under the very rule of this division relied upon by the representative of the employes in the instant case as quoted from Award 6011 "Previous awards of this Board have held that where a contract is negotiated and existing practices are not abrogated or changed by its terms, such practices are enforceable to the same extent as the provisions of the contract itself."

Certainly it cannot be seriously contended that the practice based upon the Carrier's circulated letter of July 26, 1945, which gave returned veterans a vacation regardless of the days of compensated service in the preceding year, was not "abrogated or changed" by the August 21, 1954 National Agreement, which required 133 days of compensated service in the preceding year.

It may be noted in passing that the President's Emergency Board on vacations (Report 106, May 15, 1954) says in connection with veterans' vacations "On the basis of the record, however, the Board is not convinced that such more favorable practices (like in the instant case) should be uniformly required."

Consequently these claims will have to be denied.

Your referee has not overlooked the question raised by the carrier concerning failure of employes to get their case in on time but in view of Carrier's not objecting to extension of time of 90 days requested by the employes we treat the objection as having been waived, and for the additional reason we believe it desirable that the claim should be disposed of on its merits.

FINDINGS: The Third Division of the Adjustment Board, upon the whole record and all the evidence, finds and holds:

That the parties waived hearing on this dispute; and

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 Carrier did not violate the agreement.

AWARD

Claims (a) and (b) denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: A. Ivan Tummon
Executive Secretary

Dated at Chicago, Illinois this 4th day of November, 1957.