Award No. 8155
Docket No. MW-7885

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Norris C. Bakke, Referee

PARTIES TO DISPUTE:

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES

CHICAGO, BURLINGTON AND QUINCY RAILROAD COMPANY

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

(1) The Carrier violated the Agreement when it failed and refused to allow retired Section Foreman E. E. Wise payment in lieu of the five additional work-days of 1954 vacation earned by Claimant Wise in 1953 and preceding years, and due him under the vacation Agreement as amended effective with the Calendar Year 1954.

(2) Claimant Wise now be allowed five days' pay at the same rate for which he was paid ten days' pay in lieu of ten days' vacation in 1954.

EMPLOYES' STATEMENT OF FACTS: During the year 1953, Mr. E. E. Wise performed in excess of 133 days of compensated service while employed as a Section Foreman and had similarly performed the required number of days of compensated service to entitle him to ten consecutive working days' vacation during the calendar year of 1954, or pay in lieu thereof.

Also Mr. Wise had performed in excess of the required number of days of compensated service in each of fifteen years prior to 1954 (not necessarily consecutive) to entitle him to fifteen (15) consecutive working days' vacation in 1954, or pay in lieu thereof, under the provisions of the Vacation Agreement as amended, which became effective as of January 1, 1954.

Mr. Wise performed no work for the Carrier after December 15, 1953, intending to make application for an annuity under the provisions of the Railroad Retirement Act. The Carrier allowed the claimant payment in lieu of ten days of his 1954 fifteen-day vacation.

On February 18, 1954, the claimant's application for an annuity was filed with the Railroad Retirement Board. Subsequently Mr. Wise was advised that his application for an annuity under the provisions of the Railroad Retirement had been approved, retroactive to and effective as of December 16, 1953.

A claim similar to the instant dispute was handled by the Disputes Committee when the original Operating Vacation Agreement became effective in 1944. The claim is identified as Case 1-E, the dispute involving the ORC and the Boston and Maine Railroad. It is found at page 21 of the printed volume of decisions of the Vacation Disputes Committee, and reads as follows:

> "Boston and Maine Railroad will not grant Carl L. Harris one week's vacation with pay.
>
> Decision: (2-23-45)
>
> "The committee is agreed that since the employe's annuity in this case was effective on November 13, 1943, on which date he severed his employment relation with the Carrier, he is not entitled to a vacation in 1944. **He was not in the service of the Carrier on the effective date of the Vacation Agreement."** (Emphasis added).

The agreement referred to in the quotation above became effective on January 1, 1944.

In the instant dispute, the agreement became effective January 1, 1954. Claimant retired on December 31, 1953. He was not in the service of Carrier on the effective date of the agreement providing for three weeks vacation. Since he was not in Carrier's service on the effective date of that agreement, he is not subject to the provisions thereof, and is not entitled to the benefits thereof.

There is no merit to the instant claim, and it must be denied in its entirety.

OPINION OF BOARD: Parties are agreed that this docket and docket number MW-7915 cover identical disputes, and submitted the same brief on each docket. The employes rely on the following awards 7336, 7368, 7483, 7488, 7651, 8025 on this Division, and 2151 and 2231 on the Second Division, all of which involved the same dispute as in the instant dockets and in all of them the claim was sustained.

In all of the awards on this division the Carrier filed a dissent in only Award 7336, and that dissent is based primarily on Carrier's contention that the payment of the vacation pay there had been a gratuity.

In its instant brief the Carrier adopts as its second point of argument the following "A vacation with pay is a contractual right which accrues to the employe by the terms of an agreement."

We mention this to dissuade any members from the Board from concluding that this referee is committed to the proposition that the vacation pay sought in these claims is a gratuity because of what was said in the recent award 8123, and as possibly indicating sympathy with the Carrier Members' dissent in 7336. The distinction is obvious.

The fact that the Carrier is now arguing from a contractual standpoint does not change the result that was reached in the cited Awards relied upon by the employes, because those awards state unequivocally that claimant is entitled to his vacation pay under his agreement.

No good purpose would be served by elaborating on this point further. We think this issue should now be deemed settled on this division.

One matter which is new in these two dockets is a court decision handed down on August 7, 1957. This is the case of Hargrove vs. Louisville Nashville R. R. Company, reported at 33 Labor cases 70,920 from which Carrier quotes as follows "* * * But in that case the plaintiffs were still employes, and in the present case they are not, having ceased to be employes on Sep-

tember 1, 1949. Since the plaintiff's status as employes ceased on September 1, 1949, the defendant Brotherhoods ceased to be their designated representatives, and the 'continuing obligation' rule of the Mitchell case does not apply. * * *"

This quote illustrates what the Carrier said in its dissent in Award 7336 in commenting on Award 561 "There we pointed out the inherent danger of relying upon an excerpt of law taken in complete disregard of its context." We use this here because the Court said in its ruling "The conclusion that the three-year statute of limitations of the District of Columbia is applicable to this action renders unnecessary consideration of the alleged failure of the plaintiffs to exhaust intraunion remedies before resorting to the courts."

The Carrier cites the above case as authority for the proposition "that the Organization's right to represent the claimant ceased when his status as an employe of the Carrier ceased."

Even assuming this to be true, under the Railway Labor Act Sec. 3(j) the Claimant could still represent himself because we have said at least a half dozen times that he is still an employe. Awards cited supra.

Our conclusion is that the Carrier violated the agreement and that this claim should be sustained.

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 Carrier violated the agreement.

AWARD

Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: A. Ivan Tummon
Executive Secretary

Dated at Chicago, Illinois this 26th day of November, 1957.