Award No. 8409
Docket No. CL-7897

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Carroll R. Daugherty, Referee

PARTIES TO DISPUTE:

BROTHERHOOD OF RAILWAY AND STEAMSHIP CLERKS, FREIGHT HANDLERS, EXPRESS AND STATION EMPLOYES

ST. LOUIS-SAN FRANCISCO RAILWAY COMPANY

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

(1) The Carrier violated the terms of the currently effective agreement between the parties and a long established practice when it failed and refused to grant in full vacations with pay to D. W. Beck and C. W. Pomeroy, Clerks in the office of the Auditor-Disbursements, St. Louis, Missouri or pay them for vacations not granted.

(2) D. W. Beck now be paid for nine days vacation not granted and C. W. Pomeroy now be paid for one and one-half days vacation not granted.

EMPLOYES' STATEMENT OF FACTS: D. W. Beck entered military service in 1951 and was granted a military leave of absence until he returned to the service of the Carrier in October, 1953.

Mr. Pomeroy entered military service in December, 1951 and was granted a military leave of absence until he returned to the service of the Carrier on October 26, 1953.

As a result of negotiations between the Carrier and the Organization, the Carrier issued notice on June 20, 1945 establishing a policy and practice of granting a vacation in the year following the year of his or her return from military service 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 in the following year. (See Employes' Exhibit 1.) Both of these employes entered service in the year of 1948 and had been in the service more than one year prior to entering military service. Having returned from military service in October, 1953, they were entitled to vacations in the year 1954 and were scheduled for vacations as indicated in Employes' Exhibit 2. Mr. Beck took one-half day of his scheduled vacation on May 7th and one-half day on August 13th with the approval of his supervisor and at his request, the remaining nine days of vacation were

All data submitted in support of Carrier's position have been presented to the employes or duly authorized representative thereof and made a part of the particular question in dispute.

(Exhibits not reproduced.)

OPINION OF BOARD: Claimants Beck and Pomeroy, employed by Carrier in 1948, entered military service in 1951 and returned to Carrier's service in October, 1953. Following said return each was scheduled for a ten-day vacation in 1954. The schedule sheet was headed, "Record of Vacations To Be Granted during 1954 in order to Give Effect to Provisions of Agreements with Operating or Non-Operating Employes", and was signed by two Carrier officials and the Local Chairman of the Railway Clerks Organization.

The Organization and the Carrier were parties to the National Vacation Agreement of December 17, 1941, as amended by the Supplemental Agreement of February 23, 1945; by Section 3(k) of Article II of the Forty Hour Work Week Agreement of March 19, 1949; and by the Chicago Agreement of August 21, 1954.

On June 20, 1945, Carrier issued notice granting to employes returning from military service vacations in the year following said return on the same basis, under existing Agreements, as they had been in Carrier's service while in the Armed Forces. Carrier's notice said that this "is adopted as the policy on the Frisco system" and mentioned nothing to the effect that the policy was either an agreement with the Organization or a revocable gratuity to affected employes. The current controlling Agreement between the Parties, dated January 1, 1946, contains no mention of said policy.

On September 10, 1954, Carrier issued notice cancelling the policy of June 20, 1945, "effective immediately". By this date Claimant Beck had taken only one day of his scheduled ten-day vacation; and Claimant Pomeroy had taken only 8½ days of his.

In approaching a determination of the instant dispute the Board affirms the principles underlying its Awards 7339 and 8257. Under these principles the Carrier's policy of June 20, 1945, may not be regarded as an agreement between the Parties. But this affirmation does not dispose of the claims here before us. The facts and issue in this case differ from those in the others. In the above-numbered cases no vacations had been scheduled or agreed to for returning Claimant service men; and the issue was whether such men were entitled by agreement to any vacations at all. In the instant case Claimants' 1954 vacations had been locally scheduled and agreed to. The issue here is whether these vacations, so scheduled and agreed to, could properly be cancelled by Carrier as to the vacation days not yet taken by Claimants. In other words, did the August 21, 1954, Agreement and the Carrier's notice of September 10, 1954, permit Carrier to cancel Claimants' remaining, previously agreed-to vacation days?

We think not. It is true that Article I, Section 1, particularly paragraphs (a) and (g), of the August 21, 1954, Agreement changed the conditions under which employes returning from service in the Armed Forces might be given vacations. And these provisions were controlling for the 1954 (and subsequent years') vacations of returning veterans in respect to whom no vacations had previously been scheduled or otherwise agreed to. But the 1954 Agreement left in effect Article 3 of the 1941 Vacation Agreement, which says that an employe shall not be deprived of additional (in this case, additional to zero) days of

vacation if he is entitled to same under any existing understanding. We hold that the form and content of the above-mentioned agreed-to vacation schedule for Claimants constituted such an understanding. It existed in late 1953 or early 1954; it did not have to exist in 1941, at the time the Vacation Agreement became effective. Existence of this understanding in late 1953 or early 1954, satisfies the meaning of "existing" in said Article 3. If the Parties had intended to confine the meaning of "existing" to the time when and before the 1941 Agreement was made effective, they could have said so by some such words as "theretofore agreed on." But they did not. True, they could have bolstered the instant interpretation by adding some such words as "or subsequent" to "existing." This also they did not do. We are left with the conclusion that the word "existing", in the context of Article 3, contains elements of ambiguity. But we also are convinced that the interpretation herein set forth is the reasonable and proper one.

Accordingly, the Board rules that the claims have merit and are to be upheld.

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 applicable agreements.

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 18th day of July, 1958.

DISSENT TO AWARD NO. 8409, DOCKET NO. CL-7897

This Award is unsound, is in serious error and cannot be considered as a valid precedent. The majority herein either completely ignored or evaded consideration of (1) provisions of the controlling agreements; (2) clear interpretations of Article 3, made by the parties themselves, and (3) precedent Board awards.

This dispute involved the simple question of whether or not employes returning from military leaves of absence in 1953, and who had not rendered 133 days compensated service in 1953, were entitled to vacations in 1954. Notwithstanding that these employes were not entitled to a vacation in 1954 under the terms of the 1941 National Vacation Agreement, they were scheduled

a vacation in 1954 by reason of a policy unilaterally adopted by the Carrier in 1945. The majority recognizes that Carrier's policy, supra, was not an agreement between the parties for its says:

> "In approaching a determination of the instant dispute the Board affirms the principles underlying its Awards 7339 and 8257. Under these principles the Carrier's policy of June 20, 1945, may not be regarded as an agreement between the Parties."

But—the majority then proceeds to render a sustaining Award by first calling the 1954 Vacation Scedule an "Understanding", and then, by coupling such "Understanding" with the provisions of Article 3 of the 1941 National Vacation Agreement, it concludes that the term "existing" in Article 3 of the 1941 Agreement covers a period twelve years subsequent to 1941 in complete disregard of the Parties' and this Board's confirming interpretation of Article 3.

The 1954 Vacation Schedule was neither an "understanding" nor an "agreement". It simply constituted compliance with the provisions of Article 4 (a) of the 1941 National Vacation Agreement under which the parties cooperated at the local level in assigning vacation dates. It bore the heading "Record of Vacations to be granted during 1954 in order to give effect to **provisions of Agreements** with operating and non-operating employes".

Employes' **rights** to vacations in 1954 emanated not from the 1954 Vacation Schedule, but from provisions of the Agreements between the parties: first, until August 21, 1954 under the provisions of the 1941 National Vacation Agreement; second, on and after that date under the provisions of the Agreement of August 21, 1954. Claimants were not entitled to a vacation in 1954 under the terms of either of these Agreements. Having been scheduled a vacation in 1954 under Carrier's announced policy of 1945 gave them no "rights" and Board Awards so hold. See Second Division Award 2178 and Third Division Award 8257 where similar carrier policies are defined as a gratuity.

Of more serious nature, however, is the majority's distortion of the provisions of Article 3 of the 1941 National Vacation Agreement. This Article reads:

> "The terms of this agreement shall not be construed to deprive any employe of such additional vacation days as he may be entitled to receive under any existing rule, understanding or custom, which additional vacation days shall be accorded under and in accordance with the terms of such existing rule, understanding or custom."

The majority then says:

> "* * * Existence of this understanding in late 1953 or early 1954, satisfies the meaning of 'existing' in said Article 3. If the Parties had intended to confine the meaning of 'existing' to the time when and before the 1941 Agreement was made effective, they could have said so by some words as 'theretofore agreed on.' But they did not. True, they could have bolstered the instant interpretation by adding some such words as 'or subsequent' to 'existing.' This also they did not do. We are left with the conclusion that the word 'existing', in the context of Article 3, contains elements of ambiguity. But we also are convinced that the interpretation herein set forth is the reasonable and proper one."

In so holding, the majority ignored and evaded the following interpretation which the Parties themselves placed on Article 3:

> "This article is a saving clause; it provides that an employe entitled, under existing rule, understanding, or custom, to a certain number of days vacation each year, in addition to those specified in Articles 1 and 2 of the Vacation Agreement, shall not be deprived thereof, but such additional vacation days are to be accorded under the existing rule, understanding, or custom in effect on the particular carrier, and not under this Vacation Agreement.
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> "If an employe is entitled to a certain number of days vacation under an existing rule, understanding, or custom on a particular carrier, and to no vacation under this Vacation Agreement, such vacation as the employe is entitled to under such rule, understanding, or custom shall be accorded under the terms thereof."

Further ignored and not discussed are cited awards of this Division interpreting Article 3.

Award 4156 involved the interpretation of Article 3. In that dispute Employes stated (Employes' position):

> "The term 'existing rule, understanding, or custom' means **existing as of the date the vacation agreement was signed,** December 17, 1941." (Emphasis added.)

In late Award 8223, Article 3 was again interpreted. There the Division, speaking of Article 3, held:

> "But we cannot find an ambiguity. The clear intent of the Vacation Agreement was not to establish vacations in addition to all vacations theretofore established under other agreements or practices but to establish a general vacation practice for the employes concerned without reducing rights already established.
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> "Thus Article 3 provided that the Vacation Agreement 'shall not be construed to deprive any employe of such **additional** vacation **days** as he may be entitled to receive under any existing rule, understanding or custom, which **additional** vacation **days** shall be accorded under and in accordance with the terms of such existing rule, understanding or custom.' (Emphasis added.)
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> "Obviously 'additional days,' means days in addition to the number provided by the Vacation Agreement. In other words, if an employe is entitled to ten days under the Vacation Agreement, but to twelve days under 'existing rule, understanding or custom,' he shall receive the two additional days 'under and in accordance with the terms of such existing rule, understanding or custom.' Certainly the express provision that he shall receive the 'additional days' negatives any intent that he shall receive a full vacation under each Agreement.
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> "The agreed interpretation of June 10, 1942, shown on page 11 of the Vacation Agreement is that Section 3 is 'a saving clause'; that it does not reduce any employe's vacation theretofore established, but preserves it in full, even though it exceeds the number of days established by the Vacation Agreement."

The parties to the 1941 National Vacation Agreement having interpreted Article 3 and this Division's having confirmed and followed that interpretation of Article 3, the majority herein was in error in concluding:

> "We are left with the conclusion that the word 'existing', in the context of Article 3, contains elements of ambiguity. But we are also convinced that the interpretation herein set forth is the reasonable and proper one."

For the reasons herein set forth, we dissent.

/s/ J. E. Kemp

/s/ J. F. Mullen

/s/ R. M. Butler

/s/ W. H. Castle

/s/ C. P. Dugan