Award No. 9754
Docket No. TE-8558

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Raymond E. LaDriere, Referee

PARTIES TO DISPUTE:

THE ORDER OF RAILROAD TELEGRAPHERS

THE NEW YORK, CHICAGO AND ST. LOUIS RAILROAD COMPANY
(Wheeling and Lake Erie District)

STATEMENT OF CLAIM: Claim of the General Committee of The Order of Railroad Telegraphers on The New York, Chicago and St. Louis Railroad (Wheeling and Lake Erie District) that:

1. Carrier violated the agreement between the parties when it failed and refused to properly compensate V. N. Terry, regularly assigned rest day relief telegrapher at Spencer and Hartland, Ohio in lieu of vacation not granted during the last payroll period in 1954.

2. Carrier shall compensate V. N. Terry, in addition to compensation already paid him, an amount equivalent to eight hours ($15.52) at the straight time rate applicable to the Spencer, Ohio position repre-, senting pay in lieu of vacation for Christmas Day, December 25, 1954.

EMPLOYES' STATEMENT OF FACTS: There is in full force and effect a collective bargaining agreement between The New York, Chicago & St. Louis Railroad Company, hereinafter referred to as Carrier or Management, and The Order of Railroad Telegraphers, hereinafter referred to as Employes or Telegraphers. The agreement as amended is on file with this Board and is, by reference, included in this submission as though set out herein word for word.

The dispute involved herein was handled on the property in the usual manner through the highest officer designated to handle such disputes, and failed of adjustment.

The dispute involves interpretation of the collective bargaining agreement and is, under the provisions of the Railway Labor Act, as amended, submitted to this Board for award. The Board has jurisdiction of the parties and the subject matter.

This dispute involves interpretation of the August 21, 1954 Agreement relative payment for vacation.

V. N. Terry is an employe of Carrier, holding seniority as an employe covered by the Telegraphers' Agreement. He was, at the times involved herein, the owner of a regular rest day relief position, designatd as No. 7-A. This relief position relieves at Spencer and Hartland, Ohio.

In the vacation schedule agreed to by and between management and representative of employes for the calendar year 1954, V. N. Terry was assigned

In making payment to claimant for the period December 18, 1954, through December 29, 1954, the Carrier gave effect to the wage scale and all provisions of the current agreement governing service for work actually performed, which resulted in payment of $157.20. Carrier also gave effect to Rule 35 governing vacations, which in turn adopts the Vacation Agreement of December 17, 1941 (including Supplements and Interpretations), by allowing the claimant for each vacation day the daily compensation paid by the Carrier for such assignment, which likewise amounted to $157.20. In both instances the daily compensation included nine assigned days at the straight time rate and one day (Christmas) at the time and one-half rate. In addition to the above payments, Carrier allowed claimant eight hours at the pro rata hourly rate of the position to which assigned ($15.52) under the provisions of Article II, Section 1 and 3, of the August 21, 1954 Agreement.

The Employes concede that payments as detailed have been computed correctly but insist that the payment of $15.52 be made twice, once under the provisions of Article II, Sections 1 and 3, of the August 21, 1954 Agreement for having qualified by working, and again under Section 7(a) of the Vacation Agreement by being paid in lieu of vacation. The construction that the Employes urge be placed on the various agreements and rules involved and heretofore cited would do violence not only to the clearly expressed conclusions, findings, and recommendations of the Emergency Board, but to the precise language and qualification tests written into Article II of the August 21, 1954 Agreement by the parties themselves.

The claim is clearly without merit, lacks any rule support, and should be denied.

All that is contained herein is either known or available to the Employes and their representatives.

OPINION OF BOARD: On December 25, 1954, V. N. Terry, the regularly assigned rest day relief telegrapher at Spencer and Hartland, Ohio worked as usual for which he was paid time and a half of $23.28 and pro rata rate for the Holiday of $15.52, a total of $38.80.

His ten day vacation had been set for December 18, 1954, after postponement, but as the time approached it was cancelled by Carrier who then paid compensation in lieu of vacation. The only question here is whether he received adequate vacation compensation for Christmas Day, December 25th, for which the Carrier paid him $23.28 only and this claim is for $15.52 claimed to be due.

Article II, Section 1, provides for the pro rata pay for Holidays and Article I, Section 3 of the August 21, 1954 Agreement provides that when, during an employe's vacation period, any of seven Holidays falls "on what would be a work day of an employe's regularly assigned work week, such day shall be considered as a work day of the period for which the employee is entitled to vacation." Article I, Section 1 (b) provides for an annual vacation of ten days "with pay" for each employee with certain qualifications.

The Employes offered some questions with answers by the Association of Western Railways (the bargaining agent for Carrier), dated December 21, 1954, among which (assuming an employe such as we have here) is the following:

> "He is absent on vacation in a week in which a holiday falls on one of the workdays of his workweek. Should this employee receive in addition to a day's pay at straight time for the holiday, payment at the rate of time and one-half?

Answer—Under these circumstances, the holiday would be considered a vacation day and paid for as such. In addition, the employe would be paid what he would have earned had he been required to work the holiday."

We have no concern here with the payment of $23.28 referred to as "what he would have earned had he been required to work the holiday" in the preceding paragraph.

Provision for payment of the $15.52 claimed was evidently intended, as appears from Article I, Section 3 which provides the employee may use his holiday for vacation, and from Article I, Section 1 (b) which calls for a vacation "with pay," and from the interpretation quoted to the effect that the "holiday would be considered a vacation day and paid for as such."

Moreover, it cannot be seriously contended that Employes would give up a holiday, even an unpaid holiday, to be counted as "vacation" without getting the prevailing vacation pay, and, on the other hand, the Carrier could well agree that such holiday came within vacation pay, because such a course did not cast any additional burden on the Carrier. In other words if a holiday is not in a vacation period, and thus paid for, some other day will be there to make up the ten days or two weeks or three weeks vacation. And that "other" day will be paid for exactly the same as if it were a holiday—simply because it is a vacation day. The Carrier did not lose; it merely transferred eight hours pay from one day to another. See Awards 7422-Cluster! 9581-Johnson; Award 2800-Smith, Second Division, and awards cited therein for difference in facts and conclusions.

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 Employee 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.

A W A R D

Claim sustained for $15.52.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois this 16th day of December, 1960.

DISSENT TO AWARD NO. 9754, DOCKET NO. TE-8558

An award of this Board is no better than the soundness of the reasoning upon which it is based.

Award 9754 is correct in the instant case in that Claimant's vacation, which was scheduled to commence December 18, 1954 after having been postponed earlier in the year, was cancelled by Carrier and that Carrier paid him in lieu of vacation.

There was no dispute between the parties but that the sole issue before this Board in the instant case was the allowance due an employe in lieu of vacation, and Petitioner admitted that the intent of Article 5 and 7 (a) of the August 21, 1954 National Agreement was all that required consideration by this Board. Award 9581 makes an exhaustive analysis of these particular rules and is a sound precedent directly in point on the issue involved herein. However, Award 9754 ignores Articles 5 and 7 (a) and is based upon a misunderstanding of the fact and function of this Board, and upon an unexplained contempt for Award 9581 and other sound precedent awards.

In the first place, the Association of Western Railways is not the bargaining agent for this Eastern or any other Carrier. Furthermore, the Association's Questions and Answers are not a part of any agreement; they created no rights which Claimant could have enforced, and a departure therefrom is not comparable to a violation of agreement rules (Awards 6168 and 7770). It also is significant that the Association's interpretation, supra, is limited in its application to employes actually granted vacations and has no bearing on rules applicable to employes who cannot be relieved therefor but are paid in lieu of vacation, as in the instant case.

In lieu of applying Articles 5 and 7 (a) of the National Vacation Agreement, which Rules Petitioner itself admitted govern the sole issue involved in the instant case, Award 9754 is based upon speculation and conjecture as to whether or not an employe "would give up a holiday, even an unpaid holiday, to be counted as 'vacation' without getting the prevailing vacation pay," and upon the superficial assumption and application of irrelevant equity that "the Carrier could well agree that such holiday came within vacation pay, because such a course did not cast any additional burden on the Carrier" as compared with vacations taken in weeks in which no holiday occurs. The function of this Board is not to indulge in conjecture (Award 6647), speculation (Award 6673), assumption (Award 8135) or equity (Award 4250) in deciding cases, but to interpret the Agreement as written by the parties (Award 5079).

In the instant case, Claimant was paid the "prevailing vacation pay" under the National Vacation Agreement, and even disregarding Articles 5 and 7 (a), as Award 9754 does, there is no requirement under any rule to pyramid holiday and vacation pay, or to allow double compensation under the Holiday Rule for any holiday. Award 7422 quotes from and follows Award 7331 in these latter respects, specifically recognizing in part as follows:

> "Both (the vacation and holiday rules) having to do with payment for time not worked, the opposition to pyramiding payments was both real and apparent on the part of railroad management during negotiations."
>
> (parenthetical interpolation added)

Second Division Award 2800 followed Second Division Awards 2246 and 2342 without citation thereof, which latter two Awards were made with Judge Wenke participating as Referee, whose recommendations as Chairman of Presidential Emergency Board No. 106 were responsible for the August 21, 1954 National Agreement. None of these Awards has been shown to be palpably wrong and all of them, as well as others, irrefragably bar double payments for any holiday

under the Vacation and Holiday Rules regardless of the basis upon which claims therefor were made.

No Awards were or could be cited in conflict with Award 9581 and the other Awards cited to the Referee herein, and these precedents should have been followed in Award 9754 instead of its setting up false and speculative premises in order to sustain the claim.

For the foregoing reasons, among others, Award 9754 is in error and we dissent. An award such as this is inimical to the purpose for which this Board was established and is devoid of any value as a precedent.

/s/ W. H. Castle

/s/ R. A. Carroll

/s/ P. C. Carter

/s/ D. S. Dugan

/s/ J. F. Mullen

REPLY TO DISSENT TO AWARD 9754, DOCKET TE-8558

A dissent which merely expresses the chagrin of the dissenters is of little value to the deliberations of this Board. The dissent to Award 9754 is such a one.

Award 9754 clearly did not disregard Articles 5 and 7 (a), but on the contrary applied their intent to the facts of this case not only in the one logical way possible but precisely in accordance with the meaning ascribed to them by the negotiators of the August 21, 1954 Agreement.

The dissenters' expression of displeasure detracts in no way from the soundness of the award.

J. W. WHITEHOUSE
Labor Member