Award No. 10132

Docket No. TE-8598

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION
(Supplemental)

Albert L. McDermott, Referee

PARTIES TO DISPUTE:

THE ORDER OF RAILROAD TELEGRAPHERS

NORFOLK AND WESTERN RAILWAY COMPANY

STATEMENT OF CLAIM: Claim of the General Committee of The Order of Railroad Telegraphers on the Norfolk and Western Railway, that:

1. The Carrier violated the Agreement between the parties when it failed and refused to properly compensate R. R. Smith, Agent, Tip Top, Virginia, for holiday and vacation days of September 6, 7, 8, 9 and 10, 1954; and that

2. The Carrier shall be required to pay claimant for the fifth day at pro rata in addition to four which were allowed.

3. The Carrier violated the Agreement between the parties when it failed and refused to properly compensate E. D. Maxwell, Agent, English, West Virginia, for holiday and vacation days of September 6, 7, 8, 9 and 10, 1054; and that

4. The Carrier shall be required to pay claimant for the fifth day at pro rata in addition to four which were allowed.

EMPLOYES' STATEMENT OF FACTS: The Agreements between the parties to this dispute are by reference thereto made a part of this submission.

The claim arises out of Carrier's refusal to properly compensate Claimant R. R. Smith, regularly assigned Agent, Tip Top, Virginia, for holiday and vacation days September 6th through 10th inclusive 1954; and Claimant E. D. Maxwell, Agent, English, West Virginia, for holiday and vacation days of September 6th through 10th inclusive 1954, in accordance with applicable rules of the Agreement.

Claimant Smith is the regularly assigned Agent at Tip Top, Virginia, with a work week Monday through Friday, Saturday and Sunday rest days.

Claimant E. D. Maxwell is the regularly assigned Agent at English, West Virginia, with a work week Monday through Friday, Saturday and Sunday rest days.

In the base year 1953, both Claimants rendered compensated service on not less than 133 days, and thus qualified for a paid vacation in the following

assigned a vacation period starting Monday, September 6th. It is clear, therefore, that the holiday September 6th fell during Smith's vacation period on a day (Monday) that was a workday of Smith's assigned workweek. The requirements of Article I, Section 3, as to including paid holidays as vacation days were met. It is, therefore, the position of the Carrier that paid holiday September 6th fell on a workday of Smith's assigned workweek and was properly counted as a day of Smith's vacation.

It is clear in the agreed upon Article II, Section 1, of the August 21, 1954 Agreement, the Employes get pay for seven specified holidays when they fall on a workday of the workweek of the individual employe, if he otherwise qualifies, but, as part of the bargain, the Emergency Board recommended and the parties provided in Article I, Section 3, that the Carriers have the right to count such paid holidays falling during or within the employe's vacation period, as a vacation day.

It is the Carrier's position that as Labor Day, September 6, 1954, fell on what would be a workday of Smith's workweek and as Smith's vacation was assigned to commence September 6, 1954, the holiday fell during Smith's vacation period and such holiday was properly counted as a vacation day for Smith.

CLAIM ON BEHALF OF E. D. MAXWELL:

As stated in the Carrier's Statement of Facts, the request filed by the Employes that September 6, 1954, a paid holiday for E. D. Maxwell, not be counted against him as a day of vacation, was disposed of by excluding September 6th as a day of Maxwell's vacation as it was determined by the Carrier. after the Employes filed the claim, that Maxwell's vacation period had been assigned to start September 7, 1954. (Carrier's Attachment "E".) The claim on behalf of Maxwell referred to in Attachment "F" having been disposed of (Attachment "E"), there is now no such dispute between the parties within the meaning of the Railway Labor Act.

(Exhibits not reproduced.)

OPINION OF BOARD: The question of jurisdiction raised in the Carrier's original submission is no longer an issue before the Board.

The point at issue involves a holiday, namely September 6, 1954. Prior to the Agreement of August 21, 1954 that day had been observed as a non-compensated day and not as a day of vacation. The Agreement of August 21, 1954 provided inter alia that effective May 1, 1954 eligible employes would receive eight hours' pay at the pro-rata hourly rate on seven (7) enumerated holidays (one of which was Labor day) when such holidays fell on a workday of the workweek of an individual employe. The Agreement further prvoided, however, that when any of the seven (7) designated holidays occurred during an employe's vacation period on what would be a workday of his workweek, such holiday was to be counted as a vacation day.

The question is whether or not September 6, 1954 was during the vacation periods of Claimants Smith and Maxwell.

The Maxwell case, although originally disallowed, was finally resolved in Maxwell's favor on the property. The Organization as to this part of the case seeks an order that a joint check of Carrier's record be made to assure

that the allowance to Maxwell has been paid. This we will not do. If need be, we would suggest that first an effort be made to have Mr. Wyatt and General Chairman Wilson or their designated representatives contact the other.

The Maxwell case, however, should be examined briefly. The Carrier states that his claim was allowed when subsequent to the claim being filed, it was determined that Maxwell had specifically asked the Chief Dispatcher for permission to begin his vacation on Tuesday, September 7 and this request had been granted by the Dispatcher. Thus, Monday, September 6, a holiday, was not "during his vacation period" and was not held to be a vacation day. The Carrier thus reversed its original position and held that Maxwell was due one more day of vacation with pay, which was allowed. In explaining the mix-up in the Maxwell case, the Carrier stated "all of this indicates that Maxwell was not notified that, on and after August 21, 1954, Employes either scheduled for or still due five or more days' vacation would not be permitted to be on vacation the entire workweek in which a recognized holiday occurs without being charged with five days of vacation."

The foregoing statement of the Carrier is interesting as we turn our attention to the Smith claim.

Agent R. R. Smith had a workweek Monday through Friday with Saturday-Sunday rest days. He had no vacation schedule. By request and approval of the Carrier he had been taking his vacation in installments. He had taken six days out of his ten days of entitlement when the Agreement of August 21 extended his vacation period for calendar 1954 an additional five days. Agent Smith was not at his station during Labor day week September 6-10, 1954.

The Organization contends that:

> "About September 3rd Agent R. R. Smith at Tip Top was notified that his station would be closed on Monday, September 6 as a legal holiday and upon receipt of this notice, Agent Smith asked to be allowed to take the remaining four days of that week as part of his vacation."

Carrier contends that Agent Smith requested and was granted permission to be on vacation his entire work week beginning September 6, 1954.

We must first discuss the Organization's contention that two Carrier affidavits should be stricken from the file as incompetent evidence. We have examined the arguments marshalled by the Organization and do not find them controlling. The affidavit of Howard L. Klink neither contributes to or detracts from the issue at hand. The affidavit of Chief Dispatcher F. L. Hoops purports to relate a conversation which he had with Claimant Smith eighteen months before the execution of the affidavit.

The record indicates that the affidavits were filed with the original submission of the Carrier on February 29, 1956. The Organization in its employes' statement at Hearing (second submission) dated October 26, 1956 failed to object to such affidavits and said:

> "We do not necessarily dispute Carrier's assertion, supported by Chief Dispatcher Hoops' affidavit."

Almost five years later, (October 3, 1961) Organization seeks to strike such evidence from the record. This we are not prepared to do. On the other hand, we fully recognize that ex parte affidavits are regarded as weak evi-

dence, to be received with caution. They are by no means conclusive of the facts stated and are so received.

The beginning date of Agent Smith's vacation must be resolved. If he began his vacation on Monday, September 6, 1954, the holiday would fall within his vacation period and he would not be entitled to an additional vacation day. If, however, his vacation began on September 7, 1954 he would be in the circumstances similar to Maxwell. The holiday, Monday, September 6, 1954 would not be counted as a vacation day. Claimant Smith would be due one more day of vacation with pay.

Article 11 of the Vacation Agreement is not at issue. That article permits a vacation at the request of an Employe, to be given in installments if the management consents thereto. Here Claimant requested and management consented to a vacation in installments.

There would have been no problem except for the new Agreement of August 21, 1954. Under such conditions Claimant would have received undoubtedly a non-compensated day on September 6 (Labor day) and his four remaining vacation days for the balance of the week. The Agreement gave him five additional days and created a problem. We think the language of the Carrier previously quoted in the Maxwell case significant.

> "All of this indicates that . . . was not notified that on and after August 21, 1954, employes either scheduled for or still due five or more days' vacation would not be permitted to be on vacation the entire workweek in which a recognized holiday occurs without being charged with five days of vacation."

Where, as here, it is necessary to resolve conflicting testimony, we believe the foregoing takes on added significance.

We believe the factual situation in the instant case unusual. Following as it did in the immediate wake of the Agreement of August 21, 1954, it arose in an era of miscalculation and misunderstanding.

We find that Agent Smith's vacation began on September 7, not September 6, 1954. He should be compensated accordingly.

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

The Carrier violated the Agreement to the extent indicated in the foregoing Opinion.

AWARD

Claim sustained in accordance with Opinion.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 27th day of October, 1961.