Award No. 10621
Docket No. TE-9150

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

D. E. LaBelle, Referee

PARTIES TO DISPUTE:

THE ORDER OF RAILROAD TELEGRAPHERS

GULF, MOBILE AND OHIO RAILROAD COMPANY

STATEMENT OF CLAIM: Claim of the General Committee of The Order of Railroad Telegraphers on the Gulf, Mobile and Ohio Railroad that

1. Carrier violated the agreement between the parties when it failed and refused to pay J. R. Watson on the basis of his regular assignment for 1956 vacation.

2. Carrier shall be required to pay J. R. Watson $24.60 representing the difference between what he was paid and the amount due.

EMPLOYES' STATEMENT OF FACTS: The agreement between the parties are available to your Board and by this reference are made a part hereof.

Claimant J. R. Watson for some time prior to November 19, 1955 had a regularly assigned position as Ticket Agent-Telegrapher at Columbus, Mississippi. At the close of business on that date, the position was abolished and claimant exercising seniority rights granted by the rules of the Agreement elected to displace a junior employe on the Agent-Telegrapher position at Brooksville, Mississippi which then became claimant's regular assignment. Due to illness he was unable to assume the duties of the position and 'layed off' pending recovery; his physical condition failing to improve as fast as expected, he elected, on January 16, 1956, to retire under the provisions of the Railroad Retirement Act as he had sufficient service and had reached the retirement age. He was entitled to a vacation in the year 1956 and the Carrier paid him $233.16 which represents 15 days' pay at the November, 1955 rate ($1.943 per hour) the Columbus Ticket-Agent-Telegrapher position. The claimant's regular assignment was the Agent-Telegrapher position at Brooksville bearing a rate of $2.148 per hour effective December 1, 1955, making a difference of $24.60 in calculating 15 days' pay. Claimant wrote the Superintendent about the shortage and the Superintendent denied any shortage contending claimant was paid properly and in full.

Claim was filed and handled in the usual manner up to and including the highest officer of the Carrier designated to handle such matters and failing of adjustment we are now before your Board.

Board, under date of May 31, 1956, a copy of which was sent to the Carrier. A copy of Mr. Watson's letter of May 31, 1956, is attached hereto as Carrier's Exhibit "B." In this letter, Mr. Watson asked the Retirement Board to correct the date of his retirement from November 20, 1955, to January 16, 1956. Evidently, the Retirement Board was of the opinion that November 20, 1955, was the correct date of Mr. Watson's retirement because the Carrier has never been informed of any reply to Mr. Watson's letter (Carrier's Exhibit "B").

In view of the facts in this case, it is the Carrier's position that the Claimant has been properly compensated for his vacation allowance and that the claim is without merit and should be denied.

Carrier reserves the right to manke an answer to any further submission of the Petitioners.

(Exhibits not reproduced.)

OPINION OF BOARD: Claimant J. R. Watson for some time prior to November 19, 1955, had a regularly assigned position as Ticket Agent-Telegrapher at Columbus, Mississippi. At the close of business on that date, the position was abolished and Claimant exercising seniority rights granted by the Rules of the Agreement elected to displace a junior employe on the Agent-Telegrapher position at Brooksville, Mississippi.

Shortly thereafter he notified the Carrier that he was sick and could not take over the position until May 1, 1956. On January 16th, 1956, Carrier advertised for bids the temporary vacancy at Brooksville. On that day Carrier received word from the Claimant that he was applying for annuity under the Railroad Retirement Act. As herein set forth, Claimant never assumed the duties of that position.

Under Article 8 of the National Vacation Agreement Claimant was entitled to a vacation allowance computed in accordance with Article 7 thereof, which reads, in part:

> "7. Allowances for each day for which an employe is entitled to a vacation with pay will be calculated on the following basis:
>
> (a) An employe having a regular assignment will be paid while on vacation the daily compensation paid by the carrier for such assignment.
>
> (e) An employe not covered by paragraphs (a), (b), (c), or (d) of this section will be paid on the basis of the average daily straight time compensation earned in the last pay period preceding the vacation during which he performed service.

Organization contends that sub-section (a) of Article 7 applies to Claimant's vacation allowance and that he should have been paid for 15 days at the December, 1955 rate of $2.148 per hour, the rate of the Brooksville Agent-Telegrapher position.

Carrier contends that the Claimant should be paid his vacation allowance under the provisions of sub-section (e) of Article 7, contending that it paid him $233.16, which represented 15 days' pay at the November, 1955 rate ($1.943 per hour) of the Columbus Ticket-Agent-Telegrapher position: that he was thus paid "on the basis of the average daily straight time compensation earned in the last pay period preceding the vacation during which he performed service."

This is a case of first impression. Awards 7772, 5390 and 5422 have been cited. They involve Article 7(a) and Referee Wayne L. Morse's interpretation and application of Section (a) of Article 7, as applied to an employe having a regular assignment, but temporarily working on another position at the time his vacation begins. However, in connection with the interpretation of said Article 7(a) (Page 80, 81 and 82 of Vacation Agreement) question No. 1, was raised under said Article 7 as to the meaning and intent of that part of said Article 7(a) reading, "an employe having a regular assignment." The Carriers in said proceedings contend relative thereto:

> " * * * interpretation of this phrase is that the words 'regular assignment' means a position which an employe has held with regularity and will continue to hold as distinguished from some position which the employe may be filling casually at the time of going on vacation."

Labor's contention at that hearing was:

> " * * * It is our position that the words 'regular assignment' as used in Article 7(a) were intended to mean any regular established job or position and, therefore, that the language 'an employe having a regular assignment' means an employe who is filling or occupying any regular established job or position. (Emphasis ours.)"

Referee Morse's interpretation of that portion of Article 7(a) as hereinbefore set forth, reads in part as follows:

> "It is the decision of the referee that the preponderance of the evidence in the record clearly supports the position taken by the carriers on this question."

We follow Referee Morse's interpretation. We are of the opinion that the words "having a regular assignment" as used in Article 7(a) of the Vacation Agreement mean more than bidding for a position and having it assigned by reason of seniority. In addition to this, we are of the opinion it means actual acceptance by physically taking over the duties of the position.

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 Agreement was not violated.

AWARD

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 24th day of May, 1962.

DISSENT TO AWARD 10621, DOCKET TE-9150

I cannot agree that the majority, consisting of the Referee and Carrier Members, has correctly decided this dispute.

The facts are accurately set forth in the first two paragraphs of the Opinion of Board. But when the majority attempted to state the problem to be solved it misplaced the emphasis necessary to accurately apply the rules to the facts. Clearly, in any case when an employe retires under the provisions of the Railroad Retirement Act, the question of his vacation allowance requires primary emphasis to be placed on Article 8 of the Vacation Agreement. Quite obviously the majority was primarily concerned with Article 7.

The intent of Article 7 as it might apply to a situation involving Article 8 and a retiring employe, was never the subject of interpretation by Referee Morse or anyone else. It thus becomes clear that the majority was completely in error when it said, "We follow Referee Morse's interpretation."

The provision, in Article 8, that a retiring employe shall receive payment for vacation due can only mean that the payment shall be on the same basis that would be applied if the employe had not retired but had remained at work and received either a vacation or allowance in lieu of vacation in the usual manner.

Claimant, if he had remained at work instead of retiring, would have had a regular assignment at the time the vacation was to be taken. That regular assignment would have been the position of Agent-Telegrapher at Brooksville, Mississippi, carrying a rate of pay a few cents per hour higher than his former assignment which had been abolished. The rules clearly required application of this higher rate.

The majority, by its failure to give the proper value to Article 8, has permitted the Carrier, in its final dealing with a faithful employe who had spent the most fruitful years of his life in service of that Carrier, to deprive him of $24.60. I hope the Carrier can find a good use for the money.

J. W. WHITEHOUSE
Labor Member