Award No. 10965
Docket No. CL-10115

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION
(Supplemental)

John H. Dorsey, Referee

PARTIES TO DISPUTE:

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

CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employes:

That the Carrier violated the current agreement, effective June 1, 1953; the Vacation Agreement of December 17, 1941, and supplemental Agreement thereto, effective February 23, 1945; the Agreement of August 21, 1954 by and between the participating carriers and the employes of such carriers represented by the Railway Labor Organizations signatory thereto.

(a) By not giving Mr. R. C. Robinson, Yard Clerk, Brookfield, Missouri at least 10 days' advance notice deferring his scheduled vacation period September 28th to October 9th, 1956, inclusive, excluding rest days October 3rd and 4th.

(b) By not paying Mr. Robinson the time and one half rate for work performed during his scheduled vacation period, shown above in addition to his regular vacation pay.

EMPLOYES' STATEMENT OF FACTS: Vacation dates for employes in the Operating Department on the Hannibal Division were published by the Superintendent on February 9, 1956. We attach hereto as Exhibit "A" the Vacation Assignments for the Hannibal Division.

Page 5 of Exhibit "A" is conclusive that the Carrier recognized Mr. Robinson's assigned vacation date, however, it did not defer it in accordance with Article 5 of the Vacation Agreement.

On September 25, 1956 Mr. Robinson addressed a memo to Mr. J. A. Lloyd, Assistant Superintendent, at Brookfield, Missouri, reading as follows:

"Just a note to remind you that I start my vacation Friday, 9-28-56, 3rd trick yard clerk.

/s/ Robert Robinson"

payment at the time and one half rate to them. The Board denied the claim, stating:

> "While the Respondent had the right to work regular employes on the dates in question on Claimant's relief assignment, such action was not contractually mandatory. Likewise, the sole penalty provided for in the Vacation Agreement (Article 5) in cases where employes are not permitted to take their vacations, is pay in lieu thereof."

Two claims similar to the instant claim have recently been decided by Special Boards of Adjustment on other properties. Attached as Carrier's Exhibit No. 1 is copy of Award No. 13, SBA No. 186, ORT vs. D&RGW, Referee Mortimer Stone. The Board will note that the claimant in that case was originally scheduled to commence his vacation on July 2, but it was deferred on June 27 — 5 days in advance. His vacation was then scheduled for July 9 but was cancelled the date it was to begin. He was advised on July 16 that he could start his vacation on July 23 which he did. The Board denied the claim based on Article 4(a) and 5 of the Vacation Agreement because of unexpected illness of employes and unavoidable shortage of help, which they found to create an emergency condition and permitted deferring the vacation by giving less than 10 days' notice.

Attached as Carrier's Exhibit No. 2 is copy of Award No. 22 of SBA No. 166, BRC vs. MP with Referee Livingston Smith. The Board will note from the statement of the claim that a violation of Articles 4(a) and 5 was claimed because the claimant's vacation period was changed by giving notice only three days in advance. (In the instant claim three days' advance notice was given.) The Board denied the claim because of existing emergency conditions. The Missouri Pacific Railroad advises that it was necessary to defer the vacation on short notice because of illness of other employes.

In the light of the facts in this case and the precedent cited herein, there is only one possible award and that is "Claim Denied".

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The Carrier affirmatively asserts that all data herein and herewith submitted has previously been submitted to the Employes.

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(Exhibits not reproduced.)

OPINION OF BOARD: The material facts in this case are not in dispute.

The issue is the interpretation and application of Article 5 of the 1941 Vacation Agreement as amended August 21, 1954.

Article 5, as amended, reads:

> "5. Each employe who is entitled to vacation shall take same at the time assigned, and, while it is intended that the vacation date designated will be adhered to so far as practicable, the management shall have the right to defer same provided the employe

so affected is given as much advance notice as possible; not less than ten (10) days' notice shall be given except when emergency conditions prevent. If it becomes necessary to advance the designated date, at least thirty (30) days' notice will be given affected employe.

"If a Carrier finds that it cannot release an employe for a vacation during the calendar year because of the requirements of the service, then such employe shall be paid in lieu of the vacation the allowance hereinafter provided.

"Such employe shall be paid the time and one-half rate for work performed during his vacation period in addition to his regular vacation pay.

"Note: This provision does not supersede provisions of the individual collective agreements that require payment of double time under specified conditions."

Carrier posted a vacation schedule on February 9, 1956. [NOTE: All dates herein are in the year 1956 unless otherwise indicated.] Claimant, the regular assigned third trick yard clerk, Brookfield, Missouri, was scheduled to begin his 10 day vacation on September 28.

In a letter under date of September 25, Carrier was informed by its medical examiner that Frank Martin, its first trick yard clerk, "will be physically unable to return to work for a period of sixty days." On September 26, by telephone, Carrier informed Claimant, who was at home on a rest day, that his vacation would have to be deferred. When Claimant returned to work on September 28, the day on which his vacation was to have begun, he was handed the following memorandum:

"Due to sickness of Clerk F. J. Martin, the extra clerk who was to relieve you for your vacation will be unable to do so account working vacancy created by Mr. Martin."

Carrier, thereafter, reassigned Claimant's vacation to the period from November 27 to December 11. This was accepted and taken by Claimant without protest and he was paid for the vacation as provided for in the Agreement.

This issue narrows as to whether the illness of Martin created an "emergency" condition which by operation of the Agreement justified Carrier giving Claimant less than 10 days notice of deferment of his scheduled vacation.

An emergency is generally defined as an unforeseen combination of circumstances which calls for immediate action. The Organization does not dispute that Martin's illness created an emergency. The pith of its argument is that "the lack of an 'extra' clerk does not give Carrier the right to defer a vacation. The Carrier had available, in service, two qualified Rest Day Relief Clerks at Brookfield" who could have worked Claimant's job on their rest days. Organization makes no showing that these regularly assigned Relief Clerks would have accepted such an assignment; it has filed no claim that the Relief Clerks should have been assigned to Claimant's job during his originally scheduled and deferred vacation period.

The Carrier being faced with an emergency, arising from Martin's illness, was free to take such good faith action as it deemed necessary under the circumstances. That it might have done something other than it did is immaterial in the absence of proof that it was motivated by an intent to circumvent the terms of the Agreement. The record contains no such proof. We find, therefore, that, under the facts of this case, Carrier was faced with an emergency which comes within the exception to the 10 days notice of deferment of vacation as provided for in Article 5 of the Vacation Agreement.

The Claim must be denied for still another reason. Claimant did, without protest, take his vacation as reassigned and was paid in accordance with the terms of the Agreement. While Claimant may have been inconvenienced by the deferment, he suffered no loss of wages. The Agreement does not provide for compensatory damages for inconvenience. As was stated by Referee Morse in his Interpretations, dated June 10, 1942, of the December 17, 1941, Vacation Agreement: "The vacation agreement was not designed to . . . provide hidden wage increases. . . ."

Upon the basis of the foregoing findings, reasons and conclusions the Claim must be denied.

FINDINGS: The Third Division of the Adjustment Board, upon the whole record and all the evidence, finds and holds:

That the parties waived oral hearing;

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, as amended, 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 17th day of December 1962.