Award No. 11026
Docket No. TE-9491

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Levi M. Hall, Referee

PARTIES TO DISPUTE:

THE ORDER OF RAILROAD TELEGRAPHERS

UNION PACIFIC RAILROAD COMPANY (NORTHWESTERN DISTRICT)

STATEMENT OF CLAIM: Claim of the General Committee of The Order of Railroad Telegraphers on the Union Pacific Railroad (South Central and Northwestern Districts), that:

1) Carrier violated the Agreement when it failed and refused to compensate L. C. Ross in accordance with the Vacation Agreement for 18 days' vacation earned during the year 1956;

2) Carrier will be required to compensate L. C. Ross for the equivalent of 18 days' vacation at the rate of the position of agent, Blackfoot, Idaho, as of June 8, 1956.

EMPLOYES' STATEMENT OF FACTS: There is in full force and effect a collective bargaining Agreement entered into by and between Union Pacific Railroad Company (South Central and Northwestern Districts) 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 Division, and is by reference made a part of 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 by Carrier to handle such disputes in accordance with the provisions of the Railway Labor Act, as amended. Under said Act this Division has jurisdiction of the parties and the subject matter.

The sole question involved in this dispute is whether Carrier should be required to compensate the Claimant L. C. Ross for 18 days in lieu of vacation for the year 1956.

Prior to June 7, 1956, L. C. Ross was at all times involved herein, and had been for many years, Agent at Blackfoot, Idaho. Effective June 8, 1956, he retired under the provisions of the Railroad Retirement Act.

All information and data contained in this Response to Notice of Ex Parte Submission are a matter of record or are known to the Organization.

(Exhibits not reproduced.)

OPINION OF BOARD: The undisputed facts are, as follows: Until he retired on June 8, 1956, under the provisions of the Railroad Retirement Act, the Claimant, L. C. Ross, occupied the position of Agent at Blackfoot, Idaho. This position is paid at a monthly rate under Article 2, Rule 2(a) of the Agreement, effective January 1, 1952, and the assignment and rate includes service on six days a week with Sunday as assigned rest day.

Upon his retirement Claimant was paid in lieu of 18 days of vacation which was due him in the year 1956 for which he had qualified in 1955 having rendered more than 160 days of compensated service in that year (1955).

Between January 2 and 7, 1956, the Claimant had rendered 136 days of compensated service toward qualifying for a vacation in 1957.

It is the position of Petitioner that Article I(c) of the August 21, 1954, Vacation Agreement states that the qualifying requirement for a vacation is 133 days of compensated service rendered without regard to the character of the position held and that any previous requirement of a different number of days has been abrogated and superseded by this Agreement.

Conversely, the Carrier maintains that in order to qualify for a vacation in 1957, the Claimant had not rendered 160 days of compensated service in 1956; that neither the qualifying period of 160 days for a vacation for employes occupying position listed in Rule 2, as provided for in the 1941 Vacation Agreement, nor the last paragraph of Rule 68 of the effective Agreement of January 1, 1952, has been annulled or superseded by the August 21, 1954 Vacation Agreement.

The issue then, clearly, is as follows:

Did the Vacation Agreement of August 21, 1954, modify, alter or change Rule 68 of the Telegraphers' Agreement effective January 1, 1952?

We must, therefore, consider this issue in conjunction with the National Vacation Agreements, the 40 Hour Week Agreement, negotiated rules in compliance with National Vacation Agreements, interpretations as contained in the Award of Referee Morse and the rules of the effective Agreement of January 1, 1952.

The National Vacation Agreement dated December 17, 1941, and effective with the calendar year 1942, provided in Article I that:

> "1. Effective with the calendar year 1942, an annual vacation of six (6) consecutive work days with pay will be granted to each employe covered by this agreement who renders compensated service on not less than one hundred sixty (160) days during the preceding calendar year."

Article II(b) of the same Agreement provides:

"2. Subject to the provisions of Section 1 as to qualifications for each year, effective with the calendar year 1942 annual vacations with pay of nine and twelve consecutive work days will be granted to the following employes, after two and three years of continuous service respectively:

* * * * *

"(b) Employes represented by the Order of Railroad Telegraphers, except custodians, caretakers, and small non-telegraph agents."

The December 17, 1941, Vacation Agreement, also set forth, the following:

"13. The parties hereto having in mind conditions which exist or may arise on individual carriers in making provisions for vacations with pay agree that the duly authorized representatives of the employes, who are parties to one agreement, and the proper officer of the carrier may make changes in the working rules or enter into additional written understandings to implement the purposes of this agreement, provided that such changes or understandings shall not be inconsistent with this agreement."

Disagreements arose over the interpretation and application of various Articles of this Vacation Agreement and in compliance with Articles 13 and 14 of the Agreement. The controversy was ultimately referred to Wayne L. Morse, as referee, who made an Award on November 12, 1942, which stated, in part:

"Thus it is seen that it was not the intention of the Emergency Board that the vacation plan should be administered independently of existing working rules, but rather, that in those instances in which existing working rules, if strictly applied, would produce unjust results, they shall be modified through the process of collective bargaining negotiations conducted between the parties.

"At the Mediation Sessions which led to the so-called 'Washington Settlement of December 1, 1941,' this referee held many conversations with representatives of the employes and of the carriers, and as a result of these conversations, he knows it to be a fact that the parties reached the Washington settlement with the understanding that the vacation plan was to be subject to the rules agreement but that the parties would negotiate adjustments of any working rules in any existing agreements which in their application would produce results contrary to the purpose of the vacation plan.

"However, the referee has no power to force the parties to make such adjustments in their rules, no matter how fair and reasonable such adjustments should be.

"The referee has presented the foregoing review of the discussions and understandings as to the applicability of existing working rules agreements to the vacation contracts, because he considers those understandings of basic importance when it comes to interpreting the vacation agreement. . . ."

With the adoption of the March 19, 1949, 40 Hour Week Agreement, and the establishment of 5-day positions, changes had to be made in the number of days of compensated services required for an employe to qualify for a vacation. In Section 3(k) of that Agreement it is provided:

"(k) — **Vacations**

The number of vacation days for which an employe is eligible under any vacation rule shall be reduced by one-sixth.

If the qualifying period is expressed in days, the days shall be reduced by one-sixth; for example, 160 qualifying day requirements in the year 1949 for a vacation in 1950 shall be reduced to 151 days; thereafter such qualifying periods shall be 133 days. Qualifying years accumulated prior to the year 1949 for extended vacations shall not be changed."

Disputes arose over the interpretation of this Agreement and Article VI of this Agreement had set up the machinery for adjusting differences that might arise. Section 3(k) was one of the sections under discussion and, pursuant to Article VI, in Decision 10 agreed to on February 15, 1950, we find the following:

"Section 3(k) — Vacations — of the March 19, 1949 Agreement is applicable to employes covered by Section 2(c)(2) of that Agreement, but it is not applicable to employes covered by Section 2(c)(3). In the latter circumstance, the last paragraph of Section 2(c)(3) should be incorporated in local agreements and former vacation periods should be continued but the sixth day of the work week shall be considered a work day for vacation and qualifying purposes."

Section 2(c)2 refers to five-day positions whereas Section 2(c)3 refers to six-day positions. This decision clearly indicates what was contemplated in the 40 Hour Week Agreement.

In conformance with the 1941 Vacation Agreement, the 40 Hour Week Agreement including Decision 10, Rule 68 of the Agreement effective January 1, 1952, was adopted, the last paragraph of which is, as follows:

"This reduction in the number of vacation days and in the qualifying period shall not be applicable to monthly rated employes occupying positions listed in Article 2, Rules 2 (a) and 5 (a), but the sixth day of the work week for such employes shall be considered a work day for vacation and qualifying purposes."

This, then, was the situation when the Vacation Agreement dated August 21, 1954 was adopted.

Section 6 of the August 21, 1954 Vacation Agreement provides as follows:

"**Section 6.** Except to the extent that articles of the Vacation Agreement of December 17, 1941 are changed by this Agreement, the said agreement and the interpretations thereof and of the Supplemental Agreement of February 23, 1945, as made by the parties, dated June 10, 1942, July 20, 1942 and July 18, 1945 and by Referee Morse in his award of November 12, 1942, shall remain in full force and effect."

Under Section 6 of this Agreement, regardless of what might have been intended by the negotiators of the August 21, 1954 Agreement, it is clear from the record before us that the parties here involved did not intend to change the 160 day qualifying period for employes occupying positions of the kind identified in the last paragraph of Rule 68.

In the Award of Referee Morse we find the following observation:

"In fact, it might be said that one of the implied conditions of this vacation agreement is that it was the intention of the parties that the vacation agreement should be broadly interpreted so as to avoid unfair results in individual cases. Obviously, the vacation agreement would be of doubtful value to the industry if it were interpreted and applied in a manner which was productive of disputes and industrial discord."

Rule 68 of the Agreement, effective January 1, 1952 is controlling and the Claimant not having rendered 160 days of compensated service in 1956, as required, is not entitled to a vacation for 1956.

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 has not been violated.

AWARD

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 23rd day of January 1963.

DISSENT TO AWARD 11026, DOCKET TE-9491

The error of this award is so obvious as to make us wonder how a learned and experienced man of the Referee's stature could possibly

have made such a mistake. He must have been led astray by his misconception of the type of position involved.

Before saying more I want to observe that I have the highest regard for the Referee, and intend no reflection on his integrity. He simply made a mistake, and a grievous one.

All that needed to be done to resolve the issue in this case was to compare the language of Article I, Section 1, of the August 21, 1954, Agreement with Article 1 of the National Vacation Agreement of December 17, 1941, and apply the clear intent as expressed by the language used.

Article I, Section 1, of the 1954 Agreement plainly and unmistakably provides that:

> "Article 1 of the Vacation Agreement of December 17, 1941 is hereby amended to read as follows:"

This obviously means that the article identified is changed to the language which follows the colon. And nowhere in any of that language is there even a hint that some employes would have to render more than 133 days of compensated service in order to qualify for a vacation. In fact, Section 1(d) clearly reveals the intent to apply the 133-day requirement to weekly and monthly rated employes.

The parties plainly replaced the 160-day requirement of the 1941 Agreement with the 133-day requirement of the 1954 Agreement — for all employes.

But the majority here has nullified that intent by writing an exception into the rule which was never agreed to, nor contemplated by the negotiators for either side.

It should be observed that the qualifying requirements have been further amended by the Agreement of August 19, 1960, thus minimizing the effect of this palpably erroneous award.

But the fact still remains that this rich and powerful railroad has been permitted, as its last act toward a faithful employe, to deprive that employe of a few hundred dollars which belonged to him by virtue of the agreement and his years of service. Such an act in this ostensibly enlightened age is positively obscene, and I dissent.

J. W. Whitehouse
Labor Member