Award No. 11144
Docket No. TE-9895

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

(Supplemental)

Preston J. Moore, Referee

PARTIES TO DISPUTE:

THE ORDER OF RAILROAD TELEGRAPHERS

THE CHESAPEAKE AND OHIO RAILWAY COMPANY (CHESAPEAKE DISTRICT)

STATEMENT OF CLAIM: Claim of the General Committee of The Order of Railroad Telegraphers on the Chesapeake and Ohio Railway that:

(1) Carrier violated the agreement between the parties when on October 19, 22, 23, 24, 25, 26, 29, 30, 31, November 1 and 2, 1956, it improperly suspended Agent-Operator E. C. White, Pomeroy, Ohio from work.

(2) Carrier shall now compensate E. C. White for 8 hours at the time and one-half rate on each of the dates listed in part 1 of this claim.

EMPLOYES' STATEMENT OF FACTS: The agreements between the parties are available to your Board and by this reference are made a part hereof. The instant claim is primarily based on violation of the provisions of the National Vacation Agreement.

Claimant E. C. White is regularly assigned to the position of Agent-Operator at Pomeroy, Ohio. This is the only position under the Telegraphers' Agreement at that station; the assigned work days of the position are Monday through Friday with Saturday and Sunday as rest days.

Claimant had qualified for fifteen days vacation during the calendar year 1956 and was assigned a vacation period starting October 15 in accordance with the provisions of the Vacation Agreement. The Carrier was unable to relieve him for a vacation starting October 15. There is a dispute as to whether or how he was notified that he would not be relieved on October 15; Employes will discuss this later in this submission. The notification, if any, was not before October 12. Claimant worked his assignment on October 15, 16 and 17. On the 17th he received the following message from the Chief Train Dispatcher:

can be given and the full vacation period must be paid for on a penalty basis.

The claim should, therefore, be denied in its entirety.

All data contained in this submission have been discussed in conference or by correspondence with the Employe Representatives.

OPINION OF BOARD: This is a dispute betwen The Order of Railroad Telegraphers and The Chesapeake and Ohio Railway Company.

Claimant's vacation was scheduled to start on October 15, 1956. October 12 the Carrier notified the Claimant that he would not be relieved. Claimant worked the 15, 16 and 17th. At 2:30 P. M. on the 17th, the Carrier notified Claimant that he would be relieved for the balance of his vacation. He was required to work the 18th and then relieved for the remaining days of his vacation. The Carrier contends that an emergency developed. This position cannot be upheld. Under the circumstances, the Carrier should have anticipated the need for relief and taken action more promptly.

Under The Vacation Agreement (Addendum 10, Section 5), the Carrier has the right to defer the vacation if proper notice is given.

> "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."

The requirements of the service were not sufficient for Carrier to invoke the above rule.

We believe Referee Wayne L. Morse in his answer to a question involving the interpretation and application of the Vacation Agreement of December 17, 1941 answered the issue involved herein.

"Referee's Decision:

> "It is the view of the referee that when the language of the second paragraph of Article 5 is read in light of the primary purpose of the vacation agreement; namely, that all employes who can qualify should receive a vacation, the conclusion is inescapable that carriers do not possess the unrestricted right or option to keep an employe at work and grant him extra pay in lieu of a vacation. Here, again, the solution of the problem rests upon

the exercise of good faith. As the spokesman for the employes points out, on page 425 of the transcript, the President's Emergency Board, in its report of November 5, 1941, rejected the notion that vacations should be denied in the railroad industry because of 'great pressure upon the railroads to maintain constant, rapid, and efficient service.' In its report the Emergency Board stated:

> 'Thus they urge that to accomplish this end it is necessary that there should be no disturbance in the continuity of railway operations. Further, they maintain that the probable dislocations and many adjustments that the adoption of a vacation plan would involve precludes its consideration under present emergency conditions. The Board has considered these arguments and although it appreciates the fact that the emergency has increased the responsibility and the strain upon the railroads of the country, it recognizes, too, that the pressure of the emergency and the more continuous operation of the railroads at near or full capacity has placed greater responsibilities and strain upon the workers in the industry. If a vacation plan is inherently sound under more normal conditions, it is equally sound under emergency conditions that increase the strain upon the physical and mental powers of the employes . . .
>
> 'It is admitted that the adoption of a vacation plan may cause dislocations and make necessary numerous adjustments which may be somewhat more difficult to overcome under the present emergency conditions. Despite this, it is the opinion of the Board that these difficulties are not insurmountable even under present conditions. . . .'

"This referee wrote the above-quoted language into the report of the Emergency Board, and he believed then, as he believes now, that all employes who qualify for a vacation should receive a vacation, except in those extraordinary instances in which the granting of a vacation to a given employe would seriously interfere with the requirements of service.

"It is impossible to lay down in advance of considering a given set of facts any blanket rule which will determine for a certainty the circumstances which entitle the carrier to grant an employe extra pay in lieu of a vacation. However, one thing is certain and that is that a carrier cannot justify insisting that an employe accept extra pay in lieu of a vacation just because the taking of the vacation would cost the carrier a sum greater than an extra six, nine, or twelve days' pay. It was not the intention of the Emergency Board or this referee, when vacations were granted to the employes, to make the granting of vacations dependent upon the financial convenience of the carriers. It was recognized that the granting of vacations would cost a considerable sum, and that factor was taken into consideration when the length of vacations which should be granted was determined.

"Likewise, the fact that granting a particular employe a vacation may be very inconvenient to the operation of an office and may require a considerable amount of re-arranging of the work of the office, does not justify refusing the vacation and granting extra pay in lieu thereof. There are undoubtedly some instances in which a given employe is the only person available and qualified to do certain work for a carrier, the performance of which cannot be interrupted by a vacation. Under such extraordinary circumstances the carrier would be justified in granting the employe extra pay in lieu of a vacation. It is conceivable that under war conditions there may be such a scarcity of employes in a certain job classification, performing work so vital to the requirements of service, that to interrupt it by the granting of vacations would seriously interfere with the war effort. There can be no doubt about the fact that under such circumstances the carriers have the right to grant extra pay in lieu of vacations. However, the referee is satisfied that the parties realize that such instances are bound to be few and far between in this industry and that as a general practice each employe is to be entitled to actually take his vacation with pay."

Section 4, of the August, 1954 Agreement does not alter this provision. What it does do, is to establish the rate of pay.

The Claimant was entitled to a longer vacation than he received.

For the foregoing reasons we believe the Agreement was violated.

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 violated.

AWARD

Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 14th day of February 1963.

CARRIER MEMBERS' DISSENT TO AWARD 11144
DOCKET TE-9895

This award is palpably wrong. It is erroneously based on Article V of the 1941 Vacation Agreement and Referee Morris' Decision interpreting its application.

To come within the purview of Paragraph 1, Article V, it is mandatory that the vacation be advanced or deferred. There was no contention that the vacation was advanced and the record reflects that Petitioner repeatedly asserted that it was not deferred. Clearly, this paragraph is not applicable.

The Referee's decision relied upon and quoted so extensively by the majority was in answer to Question 2, Article V, reading:

> "Question No. 2: Does a carrier have the option of either granting a vacation with pay to an employe or keeping him at work and paying him in lieu thereof?"

Essentially the parties were in accord on this point. It was carrier's prerogative as dictated by the requirements of the service.

Carrier stated:

> "* * * 'the carrier has this right depending upon the requirements of the service.'"

Labor contended:

> "* * * The second paragraph of Article 5, specifically provides the only condition under which an employe may not be released for a vacation and paid in lieu thereof.
>
> "This condition is where an employe cannot be released because of the requirements of the service. The purpose of the vacation agreement is to grant employes vacation with pay — * * *."

The interpretation was in answer to a question posed some thirteen years before the 1954 Amendment dealing exclusively with the vacation as a unit where carrier worked the employe the entire year without vacation and paid him in **lieu** thereof; NOT a situation where the employe worked four days and was afforded the remaining eleven days of his vacation.

Pertinent part of the 1954 Amendment reads:

> "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."

Comparison of the Amendment with Article V leaves no doubt that the term "such employe" is the individual carrier could not release because of service requirements. The Amendment provides that the employe shall be paid at the rate of time and one-half for **WORK PERFORMED**. When? **DURING** his vacation period. Article V provided pay "in LIEU of the vacation". Obviously the two provisions cover two completely different situations.

Requirements of the service demanded that an agent-operator qualified to weigh cars be on duty at Pomeroy. Such a person was not available on the date claimant's vacation was scheduled. Carrier worked claimant a total of four days until such a person was available, then released claimant who took the remaining eleven days of his vacation.

Claimant was paid time and one-half in addition to vacation pay for the four days worked, and vacation pay for the remainder.

There has been no serious contention that carrier could have relieved claimant. Mr. J. A. Rice, Local Chairman, in the initial claim stated:

> "F. D. Tippie stated that he was available at that time for posting or work".

Carrier's reply that Tippie was and still is unqualified stands unrefuted.

The award overlooks **Awards 14 and 15 of Special Board of Adjustment No. 186,** both of which are directly in point on an identical agreement. The referee who served as neutral has had extensive experience on this Board and the awards are a sound application of the rules in question.

The Agreement between the parties provides for no penalty at rate of time and one-half except as found in the 1954 Amendment which is ONLY "for work performed during his vacation period".

The majority completely disregards the 1954 Amendment by stating:

> "Section 4 of the August, 1954 Agreement does not alter this provision. What it does do, is to establish the rate of pay."

Yet, it includes the only provision spelling out the circumstances under which the rate of time and one-half is applicable.

The Organization's stated purpose for the Vacation Agreement was to "grant employes vacations with pay", not a two weeks' bonus. They have jealously guarded this privilege. The effect of this award is diametrically opposed to that objective.

For these reasons, we dissent.

W. M. Roberts
R. E. Black
R. A. DeRossett
W. F. Euker
G. L. Naylor