Award No. 12258
Docket No. MW-11614

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

David Dolnick, Referee

PARTIES TO DISPUTE:

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES

DULUTH, MISSABE AND IRON RANGE RAILWAY COMPANY

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood that:

(1) The time spent by William Riccio in the Armed Forces of the United States (1942-1945) should have been and should be credited as qualifying service in determining the length of Mr. Riccio's vacation for each year subsequent to 1957, consequently

(2) Mr. William Riccio should have been allowed a vacation of fifteen (15) instead of ten (10) working days during the year of 1958 and

(3) Since Mr. William Riccio was required to work on what should have been five (5) days of his 1958 vacation, he shall now be allowed five days' pay at his time and one-half rate in conformance with the provisions of Section 4 of Article I of the National Agreement of August 21, 1954.

EMPLOYES' STATEMENT OF FACTS: Mr. William Riccio entered this Carrier's service as a trackman on June 2, 1941, and worked continuously to the middle of November 1941, at which time he was laid off in force reduction. He was recalled to service in March, 1942, and, after working for several weeks, he was drafted into the Armed Services of the United States of America on March 23, 1942.

He was discharged from the Armed Services late in 1945 and immediately re-entered the Carrier's service, and has worked continuously thereafter for this Carrier.

The Carrier has refused to credit the time spent by Mr. Riccio in the Armed Service in determining the length of his vacation for each year subsequent to 1957.

The Agreement in effect between the two parties to this dispute dated June 1, 1953, together with supplements, amendments, and interpretations thereto is by reference made a part of this Statement of Facts.

five days' pay at his time and one-half rate in conformance with the provisions of Section 4 of Article I of the National Agreement of August 21, 1954."

This issue in paragraph 3, that is, the question of whether the claimant was also entitled to punitive rate was not, as indicated above, discussed or handled on the property by the parties. Therefore, this issue is not before your Board for a decision by it, and the Board does not possess the jurisdiction or authority under the Railway Labor Act to decide the issue.

Without prejudice to the above position of the Carrier, it is also the Carrier's position that Article I, Section 4 of said agreement does not provide or apply so as to require the Carrier to make payment at the punitive rate of pay.

The question of whether Carrier was required to allow claimant 15 days' vacation in 1958 was pending from the time the claim was presented on August 28, 1958 throughout the remainder of the year 1958. There was not time during the remainder of the year to obtain an authoritative decision on the matter from a duly constituted tribunal established by law to deal with such matters. It is obvious that if such decision could have been secured in time and it had been to the effect that the additional five days of vacation were due, the Carrier would have allowed such additional days at the pro rata rate of pay. There is no authority to now render a decision that would be retroactive into the period of pendency of the dispute itself which involved only pro rata pay when the claim was initiated and the question of punitive pay cannot enter the dispute except by reason of alleged working of vacation days, when the year expired before a ruling could be secured.

Carrier holds the circumstances involved do not constitute a carry over of vacation from one year to another which would require a punitive payment on the theory that claimant was required to work on five vacation days, even if it should be held that he was entitled to the additional days claimed under Article I, Section 1 (g) of the Agreement of August 21, 1954. Carrier did not work the claimant on any of his vacation days in the year 1958 and Article I, Section 4 of that Agreement does not apply as none of the elements of the obvious intent and purpose of Section 4 are present in the circumstances here involved.

CONCLUSION

In conclusion, the Carrier is not obligated under the provisions of Section 1 (g) of Article I of the Agreement of August 21, 1954 to credit claimant for the time spent in the armed forces as qualifying service in determining the length of vacation. Consequently, claimant is not entitled to 15 days vacation in 1958. Therefore, the claim should be denied in its entirety.

Without prejudice to the above, the claim for punitive rate as contained in paragraph 3 is not properly before the Board and the Board does not have the jurisdiction or authority to decide this issue as this issue was not handled as required in Circular No. 1 of the rules of the Board

(Exhibits not reproduced.)

OPINION OF BOARD: The basic facts are not in dispute. Claimant entered the service of the Carrier on June 2, 1941. He worked continuously to November 26, 1941 when he was furloughed. He returned to work pursuant to

recall on March 17, 1942, when he was again furloughed. On March 23, 1942, he entered the Armed Forces of the United States from which he was discharged after his term of duty sometime in the latter part of 1945, and he re-entered the service of the Carrier on December 10, 1945.

The claim is for fifteen (15) working days vacation for the year 1958 instead of ten (10) working days allowed by Carrier, and since Claimant worked the five (5) days which should have been allowed to him as vacation, he should receive five (5) days of pay at time and one-half his rate.

Petitioner contends that Claimant was entitled to the additional vacation of five working days because the time Claimant spent in military service should have been credited as qualifying service in determining the vacation to which he was entitled for 1958. The Rule relied upon by the Petitioner is Article I, Section 1 (g) of the National Vacation Agreement dated August 21, 1954, which reads as follows:

> "(g) In instances where employes have performed seven (7) months' service with the employing carrier, or have performed, in a calendar year, service sufficient to qualify them for a vacation in the following calendar year, and subsequently become members of the Armed Forces of the United States, the time spent by such employes in the Armed Forces will be credited as qualifying service in determining the length of vacations for which they may qualify upon their return to the service of the employing carrier."

It is agreed that Claimant did not fulfill the requirements of the second alternative in Section 1 (g) of Article I, i.e., he did not perform 160 days of compensated service in either the calendar years of 1941 or 1942. Petitioner argues, however, that Claimant "performed seven (7) months' service" with the Carrier from June 2, 1941 to March 21, 1942 because Claimant worked all or part of the months of June, July, August, September, October and November, 1941 and March, 1942.

The record shows that Claimant did work the months of June, July, August, September and October, 1941, that he worked most, but may not have worked all of the scheduled work days in the month of November, 1941, and that he worked only five (5) days in March, 1942. For our purpose here, however, Claimant worked six months in 1941 and one week in March, 1942. This is confirmed by a letter dated November 10, 1958, from Carrier's Chief Engineer to Petitioner's General Chairman which, in part, reads:

> "According to our records Mr. Riccio had service for not more than six months in 1941 and for not more than one week in 1942. This does not constitute seven months of service; consequently he has not met the provisions of Section 1 (g) of Article I of the August 21, 1954 Agreement."

The issue before this Division is whether Claimant "performed seven (7) months' service" with this Carrier prior to the time he entered the Armed Forces of the United States on March 23, 1942. Specifically, the question is whether the five days of service performed by Claimant in March, 1942, constitutes a month of service as contemplated in Article I, Section 1 (g) of the August 21, 1954 Agreement. We hold that it does not meet the requirement of that Agreement.

The Rule says that the employe must "have performed seven (7) months' service with the employing carrier." It does not say that the employe must

perform service with the employing Carrier "in seven months". If Petitioner's position is correct, an employe could work one day in a month and that would be counted as a month of service. That, obviously, was not the intention of the parties. The fact that Claimant worked one week in the month of March, 1942, does not make Petitioner's position any more reasonable or valid. The language of Article I, Section 1 (g) of the August 21, 1954 Agreement is clear and unambiguous. It contemplates that an employe must perform seven full months of service to qualify thereunder.

This question has never been decided by this Division. The Second Division has, however, rendered five Awards on the precise issue. While the parties are not identical, the same Rule under the same National Vacation Agreement of August 21, 1954 was involved in each of the five cases.

In Award 3386 (Bailer) the Second Division said:

> "Claimant Mastel's employment relationship with the carrier extended over a period of more than 7 consecutive months prior to his entrance into the Armed Forces. Due to his furlough from October 1 to November 11, 1940, however, claimant's active service extended over 6 months and 7 days. The period of furlough cannot be counted as part of the 7 months prescribed in the controlling provision since no service was 'performed' with the carrier during this layoff. Nevertheless the organization contends the claimant met the requirements of the contract language because he performed some service in seven different calendar months. Under this line of reasoning however, an employe would meet the requirements of the rule so long as he performed as little as one day of service in each of the seven different calendar months. If this had been the intent of the parties, it is to be expected that they would have so provided in unambiguous terms. The interpretation here urged is contrary to the common, everyday understanding of the language in question. The organization's reference to the language of the Railroad Retirement Act and the 'health and welfare plan' do not support its contention here. To the contrary, these references show it would not have been difficult for the parties to have incorporated in Article I, Section 1 (g) express language setting forth the interpretation now urged by the organization, if this interpretation reflected their mutual intent.
>
> We are of the opinion and find that Claimant Mastel did not perform seven months' service with the carrier prior to his entrance into the U. S. Armed Forces. A denial award is required."

This ruling was followed by the Second Division in Awards 3475, 3878, 3879 and 3971. In Award 3971 the Second Division sustained the claim because the employe performed seven months of service with the Carrier in 1952 and 1953 before he entered the Armed Forces in 1953. That Division dismissed the Carrier's argument that the claim should be denied because the employe "did not work the required number of days in either 1952 or 1953 to qualify for a vacation in the following calendar year." They held that Article I, Section 1 (g) of the August 21, 1954 Agreement requires only that the employes perform "seven months service" with the Carrier before entering the Armed Forces.

Consistency and uniformity are desirable and necessary in the administration of a labor agreement. Except where an Award of any Division of the Board is palpably erroneous, it should be reaffirmed and applied if involved

therein is the same issue, the same labor agreement and, more particularly, the same Rule.

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 Carrier did not violate the Agreement.

AWARD

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 27th day of February 1964.