Award No. 13136
Docket No. MW-12266

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Don Hamilton, Referee

PARTIES TO DISPUTE:

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES

TENNESSEE CENTRAL RAILWAY COMPANY

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

(1) The Carrier violated the effective Agreement when it failed and refused to all Section Laborer H. J. Toler either a vacation of fifteen consecutive work days for the year 1959 or pay in lieu thereof.

(2) Section Laborer H. J. Toler now be allowed fifteen days' pay at his time and one-half rate in lieu of the vacation he was entitled to but did not receive in 1959.

EMPLOYES' STATEMENT OF FACTS: The Claimant Section Laborer has been in the Carrier's continuous service in excess of fifteen years, having entered service on August 25, 1941.

The Claimant rendered a sufficient number of days of compensated service during each of the years from 1942 through 1957 to qualify for a vacation in each succeeding year.

The Claimant rendered 116 days of compensated service during the year 1958 and was absent from duty in excess of thirty calendar days during the period from March 26 to July 21 of that year because of his own sickness.

The Agreement in effect between the two parties to this dispute dated September 1, 1942, together with supplements, amendments, and interpretations thereto is by reference made a part of this Statement of Facts.

POSITION OF EMPLOYES: In a letter dated July 10, 1959, the Carrier advised the undersigned General Chairman in part that:

> "Mr. Toler, who was the junior laborer on his gang, was laid off at the end of his tour of duty March 25, 1958, and the number of laborers assigned to the gang was reduced from 3 to 2. He thereafter filed his address to protect his seniority and made application for a disability annuity. We received advice on July 1, 1958, that the application for disability annuity had been denied and Mr. Toler resumed duty on July 21, 1958, and has been working ever since. My investigation indicates that he might have worked as many as 36 days

statement was accepted by Carrier. And, in this connection, it is notable that he worked on every day that the gang worked in 1958 prior to March 25, the date he was furloughed, and subsequent to July 21, the date he returned to work, with exception of his vacation period, and it is found that he also worked on practically every day in 1959 that he had an opportunity to do so.

It is obvious that the evidence submitted by Employes in this case sustains the position of Carrier, and claim should be denied in its entirety.

Carrier also desires to bring to the attention of your Board the fact that no mention was made during the handling on the property of pay in lieu of the claimed vacation at the rate of time and one-half, whereas part (2) of the claim as appealed to your Board specifies the "time and one-half rate", and submits that said portion of the claim not having been handled on the property in accordance with the Railway Labor Act, it is not properly before your Board, and should be dismissed.

If part (2) of the claim is not dismissed for the reason stated in paragraph next above, Carrier submits that such penalty rate as here now claimed is not provided for by any existing rule or practice thereunder.

In fact, the only mention of time and one-half rate in relation to a vacation period is found in Article 5 of the Vacation Agreement of December 17, 1941, as amended by Article I, Section 4 of the August 21, 1954 agreement, the portion of the said original agreement here pertinent reading as follows:

> "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."

and the portion of the amendment thereto by the August 21, 1954 agreement here pertinent, which became effective January 1, 1955, reading:

> "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."

It is self evident that the provision for the time and one-half rate for "such" employe is confined to "work performed during his vacation period", a situation obviously not here present; and where such is the case, the allowance referred to is in addition "to his regular vacation pay." (Emphasis ours.) And further, the amendment to the rule is plainly applicable only in the event Carrier finds that it cannot release "such" emeploy for a vacation during the calendar year because of the requirements of the service, very definitely not the reason for claimant's not having been granted a vacation in 1959. There is no provision here or elsewhere in our agreements for vacation pay at other than the straight time rate.

Moreover, this rule is entirely consistent with the principle so often enunciated by your Board that the straight time rate is all that is ever warranted where no work is performed.

(Exhibits not reproduced.)

OPINION OF BOARD: The instant case turns on two questions of fact.

First we must determine if Petitioner was absent from work, "because of his own illness." Secondly we must determine if during said absence, Petitioner would have been able to work, but for his illness.

There is considerable conflict in the record about the illness. However, there are statements from Claimant's doctor to the effect that the Petitioner was unable to work during this period of time, because of his own illness. We are of the opinion that Claimant made a prima facie case in regard to this allegation. We are not satisfied that his evidence was as strong as it might have been, but at the same time we do not feel that the Carrier successfully refuted the evidence which was presented in support of the claim. Under these conditions we will be forced to conclude that the Claimant met his burden of proof as to the first question of fact to be determined.

In determining the second question, we are persuaded that the Carrier's submission contains an admission that the Claimant could have worked on a total of 36 days during the period he was off on account of illness.

With these conclusions in mind, we hold that the Claimant is entitled to credit for 30 days in computing his vacation allowance for 1959. These days added to the 116 days of compensated service would have made him eligible for a vacation of fifteen consecutive workdays or pay in lieu thereof, for 1959. Therefore, Carrier erred when it did not allow this vacation time for Claimant.

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 11th day of December 1964.