



Award No. 14296

Docket No. MW-11807

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

(Supplemental)

G. Dan Rambo, Referee

PARTIES TO DISPUTE:

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES

CHICAGO, BURLINGTON & QUINCY RAILROAD 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 allow Mr. R. Maes pay in lieu of ten consecutive work days vacation due for the year 1958.

(2) Because of the violation referred to in Part (1) of this claim, the Carrier now be required to allow Mr. R. Maes pay for the ten day vacation due him at the time of his retirement.

EMPLOYEES' STATEMENT OF FACTS: Section Laborer R. Maes, who entered the Carrier's service on September 8, 1952, rendered compensated service on not less than 133 days during the calendar year of 1957, thereby qualifying for a vacation of ten consecutive workdays during the year of 1958 in accordance with the provisions of Section (b) of Article I of the August 21, 1954 Agreement, which reads:

"(b) Effective with the calendar year 1954, an annual vacation of ten (10) consecutive work days with pay will be granted to each employee covered by this Agreement who renders compensated service on not less than 133 days during the preceding calendar year and who has five or more years of continuous service and who, during such period of continuous service, renders compensated service on not less than 133 days (151 days in 1949 and 160 days in each of such years prior to 1949) in each of five (5) of such years not necessarily consecutive."

Subsequent to June 27, 1958, the claimant, who had ceased working for the Carrier as of that date, applied for and was granted insurance benefits under the Social Security Act in accordance with the provisions of the 1951 amendments to the Railroad Retirement Act.

Nonetheless, the Carrier has refused to allow Mr. Maes payment in lieu of the ten days' vacation due him in the year 1958.

The Agreement in effect between the two parties to this dispute dated September 1, 1949, together with supplements, amendments, and interpretations thereto is by reference made a part of this Statement of Facts.

CARRIER'S STATEMENT OF FACTS: Claimant is a former section laborer who entered Carrier's service on September 8, 1952, and who resigned from Carrier's service on June 27, 1958, for the purpose of accepting Old Age Benefits under the provisions of the Social Security Act. On February 24, 1959 the General Chairman presented claim in behalf of claimant for payment in lieu of his 1958 vacation, citing Article 8 of the Vacation Agreement applicable to non-operating employees. Claim was declined on the basis that Article 8 is not applicable to employees with less than ten years of railroad service inasmuch as such employees are not eligible for retirement benefits under the Railroad Retirement Act. Copies of the pertinent correspondence exchanged between the parties while handling the claim on the property are attached hereto identified as Carrier's Exhibits Nos. 1, 2, 3 and 4.

The schedule of rules agreement between the parties, effective September 1, 1949 and amendments thereto, and the Vacation Agreement of December 17, 1941 and amendments thereto, are by reference made a part of this submission.

(Exhibits not reproduced.)

OPINION OF BOARD: This claim arose as a result of the retirement of Claimant on June 27, 1958, after performing compensated railroad service of 88 months, or seven years, four months. Parties agree that in 1957 Claimant had rendered compensated service on at least 133 days and had qualified under the Vacation Agreement as amended August 21, 1954 for a ten-day vacation, or payment in lieu thereof in the year 1958.

Claimant's retirement came about before he had taken any vacation in 1958 and the controversy arose over whether Claimant had by accepting Old Age Benefits under the Social Security Act upon retirement forfeited his rights to the above vacation benefits by failure to qualify under Article 8 of the aforesaid Vacation Agreement, which reads:

"8. No vacation with pay or payment in lieu thereof will be due an employee whose employment relation with a Carrier has terminated prior to the taking of his vacation, except that employees retiring under the provisions of the Railroad Retirement Act shall receive payment for vacation due." (Emphasis ours)

The issue here becomes whether or not Claimant retired under the provisions of the Railroad Retirement Act.

There is no question that Claimant was not eligible for annuity benefits under the Act since it sets out a minimum length of creditable railroad service of 10 years or 120 months for such qualification. But must one be eligible to receive annuities to "retire under" the Act?

The great bulk of the Act certainly deals with annuities and their computation and the various rights connected therewith. Part 1, Section 5(k) of the Act, though, is as follows:

"(k) Provisions for Crediting Railroad Industry Service Under the Social Security Act in Certain Cases. — (1) For the purpose of determining (i) insurance benefits under title II of the Social Security Act to an employee who will have completed less than ten years of service and to others deriving from him or her during his or her life and with respect to his or her death, and lump-sum death payments with respect to the death of such employee, and (ii) insurance benefits with respect to the death of an employee who will have completed ten years of service which would begin to accrue on or after January 1, 1947, and with respect to lump-sum death payments under such title payable in relation to a death of such an employee occurring on or after such date, and for the purposes of section 203 of that Act, section 15 of the Railroad Retirement Act of 1935, section 210 (a) 10 of the Social Security Act, and section 17 of this Act shall not operate to exclude from 'employment', under title II of the Social Security Act, service which would otherwise be included in such 'employment' but for such sections. For such purpose, compensation paid in a calendar year shall, in the absence of evidence to the contrary, be presumed to have been paid in equal proportions with respect to all months in the year in which the employee will have been in services as an employee. In the application of the Social Security Act pursuant to this paragraph to service as an employee, all service as defined in section 1 (c) of this Act shall be deemed to have been performed within the United States. 35

"(2) (A) The Board and the Federal Security Administrator shall determine, no later than January 1, 1954, the amount which would place the Federal Old-Age and Survivors Insurance Trust Fund (hereafter termed 'Trust Fund') in the same position in which it would have been at the close of the fiscal year ending June 30, 1952, if service as an employee after December 31, 1936, had been included in the term 'employment' as defined in the Social Security Act and in the Federal Insurance Contributions Act.

"(B) On January 1, 1954, for the fiscal year ending June 30, 1953, and at the close of each fiscal year beginning with the fiscal year ending June 30, 1954, the Board and the Federal Security Administrator shall determine, and the Board shall certify to the Secretary of the Treasury for transfer from the Railroad Retirement Account (hereafter termed 'Retirement Account') to the Trust Fund, interest for such fiscal year at the rate specified in subparagraph (D) on the amount determined under subparagraph (A) less the sum of all offsets made under subparagraph (C).

"(C) At the close of the fiscal year ending June 30, 1953, and each fiscal year thereafter, the Board and the Federal Security Administrator shall determine the amount, if any, which if added to or subtracted from the Trust Fund would place such Trust Fund in the same position in which it would have been if service as an employee after December 31, 1936, had been included in the term 'employment' as defined in the Social Security Act and in the Federal Insurance Contributions Act. . . ."

From this quoted language it may be seen that the parties to the Agreement not only took into account the employee who would retire with less

than ten years of service but established a permanent relationship between the Railroad Retirement Board, the supreme administrative body under the Act, and the Federal Security Administrator, chief executive of the Social Security Act. This Board can come to no other conclusion than that this relationship was to guarantee the rights of that employee to Social Security benefits because he retired under the Railroad Retirement Act with less than ten years service.

Much controversy appears in the record concerning an earlier grievance on similar facts which was resolved at the property level. The reasoning and result in such a settlement might be persuasive when presented to this Board as a part of the record in this or any subsequent grievance, but the result itself can be of no probative value as precedent since it was not obtained at this level under the same conditions of review.

It is the opinion of this Board that Claimant retired under the Railroad Retirement Act.

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 Employees involved in this dispute are respectively Carrier and Employees 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 been violated.

AWARD

Claim is sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 31st day of March 1966.