Award No. 14749
Docket No. SG-12034

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

(Supplemental)

G. Dan Rambo, Referee

PARTIES TO DISPUTE:

BROTHERHOOD OF RAILROAD SIGNALMEN

THE PENNSYLVANIA RAILROAD COMPANY

STATEMENT OF CLAIM: Claim of the General Committee of the Brotherhood of Railroad Signalmen on the Pennsylvania Railroad Company that:

(a) The Carrier violated Article 5 of the National Vacation Agreement of December 17, 1941, and the amendments thereto of the August 21, 1954 National Agreement, when it paid pro-rata rate for the time worked during their vacation period.

(b) The following men be compensated at time and one-half for the time worked during the first half of December 1958 at the rate of the position filled, equal to the vacation period:

R. F. Kohler	(10 days)	W. F. Robertson	(10 days)
G. L. Sodini	(10 days)	D. S. Morton	(5 days)
A. L. Liberatore	(5 days)	J. E. Gongloff	(10 days)
W. C. Durbin	(5 days)	J. G. Trimble	(10 days)
C. C. Bell	(10 days)	Sherman Barnhart	(10 days)

[Carrier's File: System Docket No. 100 — Pittsburgh Region Case No. 56]

EMPLOYES' STATEMENT OF FACTS: The signal employes listed in the Brotherhood's Statement of Claim, hereinafter referred to as the claimants, had each qualified in the year 1957 for a vacation in the calendar year 1958. Prior to receiving their vacations as scheduled in 1958, the claimants were furloughed from the service of the Carrier. During the latter part of 1958, the claimants were recalled to service and worked during the month of December. After the claimants worked the period of December 1 through 15, 1958, they were advised by the Carrier that they would be paid vacation pay for the period of December 1 through December 15, 1958. Upon receipt of their respective pay checks for that period it was found that the Carrier had paid

lar monthly meeting on February 6, 1959. During the discussion, the Local Chairman was advised that the action taken had his approval and, therefore, no additional compensation could be due to any of the Claimants. Claim was denied in letter dated February 24, 1959.

In a letter dated March 4, 1959, the Local Chairman advised that he had no recollection of an agreement and requested that the necessary action be taken to prepare a joint submission, unless the Carrier intended to change its decision in order that the matter could be progressed for further handling by the General Chairman of the Organization and the Manager, Labor Relations (the highest officer of the Carrier designated to handle disputes on the property). The Superintendent, Personnel responded by submitting a proposed "Joint Statement Of Agreed Upon Facts" to the Local Chairman on March 16, 1958.

In a letter dated April 4, 1959, the Local Chairman requested that certain changes be made in the "Facts". The proposed "Joint Statement Of Agreed Upon Facts" was revised and returned for the Local Chairman's approval on April 10, 1959. In a letter dated April 15, 1959, received April 17, 1959, attached to which was an approved copy of the "Joint Statement Of Agreed Upon Facts", the Local Chairman submitted the "Position Of Employes", to permit completion of the joint submission. In the same letter, the Local Chairman noted that the time limitation for progressing the case would expire on April 24, 1959, and requested an extension of time as provided in Article 5 of the Agreement dated August 21, 1954. The Carrier did not agree to extend the time limits for progresing this dispute.

On May 5, 1959, the General Chairman docketed this matter with the Manager, Labor Relations for discussion at the regular monthly meeting on May 19, 1959. Claim was denied by the Manager, Labor Relations in letter dated July 8, 1959.

Therefore, insofar as the Carrier is able to anticipate, the questions to be decided by your Honorable Board are whether or not the Carrier violated Article 5 of the National Vacation Agreement dated August 21, 1941, and the Article 1, Section 4 Amendment contained in the Agreement dated August 21, 1954, when it allowed the Claimants payment at the straight-time rate for time worked during the first half of December, 1958, and whether Claimants are entitled to time and one-half rate equal to the vacation period claimed.

OPINION OF BOARD: The dispute involved herein was referred to the National Disputes Committee established by Memorandum Agreement dated May 31, 1963, to decide disputes involving interpretation or application of certain stated provisions of specified National Nonoperating Employee Agreements. On March 17, 1965, that Committee rendered the following Findings and Decision (NDC Decision 5).

> FINDINGS: (ART. V) Paragraph 1(b) of Article V of the August 21, 1954 Agreement provides that —
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> > "'(b) If a disallowed claim or grievance is to be appealed, such appeal must be in writing and must be taken within 60 days from receipt of notice of disallowance, . . .'"
>
> In its submission to the Third Division, carrier contends that the above claim is barred by Article V of the August 21, 1954 Agree-

ment because appeal from the decision of the Superintendent of Personnel was not made to the succeeding officer until after expiration of the sixty-day time limit for such appeals as specified in paragraph 1(b) of Article V. It asserts that the Local Chairman acknowledged that he was required to progress the claim to the Manager, Labor Relations not later than April 25, 1959 when, in his letter of April 15th, he requested an agreement to extend the time limits, which request the carrier did not grant. The carrier did not contend during handling on the property that Article V had been violated.

The National Disputes Committee rules that inasmuch as the carrier did not raise the contention that Article V of the August 21, 1954 Agreement was not complied within the handling on the property, it may not raise such contention before the Third Division.

If the issue of non-compliance with the requirements of Article V is raised by either party with the other at any time before the filing of a notice of intent to submit the dispute to the Third Division, it is held to have been raised during handling on the property.

DECISION: The carrier waived the contention that Article V was not complied with by its failure to raise that question on the property.

Thus, this dispute is properly before this Board for a hearing on its merits.

Claimants herein all signal employes, had each qualified in the year 1957 for a vacation in the calendar year 1958. Prior to receiving their vacations as scheduled in 1958 they were furloughed from the service of the Carrier. All were recalled to service and worked the entire month of December, being advised by Carrier through their Organization on December 12, 1958 that they would receive regular straight-time vacation pay in lieu of vacation for the period December 1 — December 15, 1958 along with and added to their regular straight-time pay for working during that period.

Claimants, upon returning from furlough, had not requested and were not re-scheduled for vacation. Neither is there evidence in the record that a choice was offered them of accepting the payment or of scheduling time off with pay.

It is the position of the Organzation that Carrier violated Article 5, National Vacation Agreement of December 17, 1941 as amended by Article 1, Section 4, of the August 21, 1954 National Agreement set out below when it refused to compensate Claimants at the time and one-half rate of pay for the time worked during the period December 1 through December 15, 1958. The Agreement as amended:

"'5. Each employee 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 employee so affected is given as much advance notice as possible; not less than ten (10) days' notice shall be given except when emer-

gency conditions prevent. If it becomes necessary to advance the designated date, at least thirty (30) days' notice will be given affected employee.

If a carrier finds that it cannot release an employee for a vacation during the calendar year because of the requirements of the service, then such employee shall be paid in lieu of the vacation the allowance hereinafter provided.' "

" 'Section 4. Effective January 1, 1955, Article 5 of the Vacation Agreement of December 17, 1941 is hereby amended by adding the following:

" 'Such employee shall be paid the time and one-half rate for work performed during his vacation period in addition to his regular vacation pay.

Note: This provision does not supersede provisions of the individual collective agreements that require payment of double time under specified conditions.' "

Carrier's position is that Claimants were returned to service on temporary assignments during the month of December, that none of Claimants had vacations scheduled in December and that since none had a "vacation period" scheduled he couldn't have been working during one; therefore, Article 1, Section 4, amending, providing for "time and one-half rate for work performed during . . .vacation period" is not applicable.

Carrier further urges that the intent of making payment in lieu of vacation in December rather than at some other time was purely humanitarian and that such payment was agreed to by the local chairman of the Organization; that such payment was considered by Carrier as a special vacation payroll and bearing no relation to the work period December 1 — December 15.

Since the local chairman denies any agreement or acquiescence to such an arrangement and no evidence is offered other than assertion and denial, any such aspect of the controversy may not be considered by this Board.

As to Carrier's subjective intent in making payment in lieu of vacation in the second-half December payroll, the act of payment on a specific payroll must be considered in light of the provisions of the Agreement in effect and under which these parties were operating.

The Vacation Agreement was entered into to guarantee to employes a vacation with pay as earned. Provision was made that if requirements of service prevented the release of employes to take such vacations, that they should receive certain payment, i.e. time and one-half, for services during what normally would have been their paid leisure time. The vacation or pay in lieu thereof was thus recognized by all as an earned right and time and one-half pay for work during a vacation period become a contract obligation of the Agreement as amended.

Carrier in response to requirements of service furloughed the Claimants, cancelling their scheduled vacation periods, and then recalled them in December without re-scheduling vacation periods. Carrier chose to pay in lieu of

vacation for the period December 1 — December 15, and since the vacation year ended on December 31 and no vacations were scheduled for Claimants for the second half of December it must be concluded that the "vacation period" of each Claimant became fixed by the payment during the first half of December. Any other conclusion would allow the avoidance of the express obligations of the Vacation Agreement at issue here by the simple expediant of failing to re-schedule vacations during any given year.

FINDINGS: The Third Division of the Adjustment Board, upon the whole record and all the evidence, finds and holds:

That the parties waived oral hearing;

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 4th day of August 1966.

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