

Claim is presented as follows:

1. Carrier violated the terms of Article 5 of the Vacation Agreement of December 17, 1941, and as amended in Section 4, August 21, 1954, when it

- (a) Arbitrarily cancelled vacation assigned to G. M. Demick, Agent-Telegrapher at Wells River, Vermont, without ten (10) days' advance notice when no emergency existed, and then
- (b) Arbitrarily required Agent Demick to suspend work for the ostensible purpose of taking vacation time off without giving at least thirty (30) days' advance notice.

2. Carrier shall compensate claimant G. M. Demick eight (8) hours at time and one-half rate of his position for each date, commencing August 29, 1960, that claimant was so relieved, a total of fifteen (15) regularly assigned work days for the three week period commencing August 29, 1960; the actual amount to be paid to be determined by check of Carrier's payroll records, and to include any and all payments due under Article I and II of the August 19, 1960 National Agreement.

Statement of Facts:

Claimant G. M. Demick is the regularly assigned Permanent owner of Agent-Telegrapher position at Wells River, Vermont, with assigned hours of 6:00 A.M. to 2:00 P.M. and assigned rest days of Saturday and Sunday; no assigned dinner hour. The position is one of seven days per week, relieved on rest days by a regularly assigned rest day relief employee.

Claimant's assigned vacation starting date was August 8, 1960, and was shown as such on vacation assignment bulletin dated December 22, 1959, with claimant's vacation duration to be of three consecutive weeks.

On August 4, 1960, claimant Demick was advised by the Chief Train Dispatcher at Boston, Mass., that his (claimant's) vacation would have to be cancelled. No new starting date was set by the Chief Dispatcher at this time, thereby indicating that claimant's vacation was indefinitely postponed to December 31, 1960, which would then require a thirty (30) day advance notice to claimant in order to set a new vacation starting date.

On August 25, 1960, claimant was contacted by the telegraph operator at White River Junction, Vermont, Yard Office, who proceeded to relay instructions issued by the Chief Train Dispatcher's office notifying claimant Demick that he would be relieved four days later, on August 29, 1960, for the purpose of taking his three weeks vacation. Accordingly claimant suspended work on August 29, 1960, for a period of three weeks.

Employee's Position:

The Railroad denied the claim on the basis that the claimant had already been properly paid. However, in subsequent conferences involving this dispute held at the request of the General Chairman, the Company offered in settlement one-half time for three weeks beginning August 8, 1960, (one and one-half weeks' pay, or sixty additional hours) on the basis that "for work performed" during a man's vacation period he is entitled to be paid at the rate of time and one-half as provided in Section 4 of Article I of the August 21, 1954 Agreement, *supra*.

The organization refused to accept the offer.

(Exhibits not Reproduced.)

OPINION OF BOARD: Claimant G. M. Demick is the regularly assigned permanent owner of Agent-Telegrapher position at Wells River, Vermont with forty assigned working hours per week. Claimants assigned vacation starting date was August 8, 1960 for a duration of three consecutive weeks. On August 4, 1960 Claimant was advised by the Carrier that his (Claimants) vacation would have to be postponed. On August 25, 1960 Claimant was notified by the Carrier that he (Claimant) would be relieved on August 29, 1960 for the purpose of taking his three weeks vacation. Accordingly, Claimant suspended work on August 29, 1960, for a period of three weeks. Through the General Committee of the Order of Railroad Telegraphers on the Boston and Maine Railroad, G. M. Demick made claim on the Boston and Maine Railroad in the amount of a day's pay of eight hours each day at the time and one-half rate of his position, commencing August 29, 1960 and continuing for fifteen work-days. This claim was timely denied by the Superintendent of the Carrier and the General Chairman appealed to the Vice President-Personnel on November 12, 1960. On December 21, 1960 the Vice President-Personnel advised the General Chairman that further investigation was necessary for purposes of determining the validity of this claim. On January 19, 1961, the Vice President-Personnel denied the claim. Claimant contends that the Carrier violated the agreement on two counts: First, by improperly assigning Claimant a vacation period; and Second, that the Carrier defaulted on the time limit prescribed for rendering a decision to disallow a claim under the provisions of Article V of the National Agreement of August 21, 1954.

The question presented is whether Carrier failed to comply with Article V of the National Agreement of August 21, 1954.

The merits of the claim are not before us.

The pertinent provisions of Article V are:

"1. All claims or grievances arising on or after January 1, 1955 shall be handled as follows:

(a) All claims or grievances must be presented in writing by or on behalf of the employe involved, to the officer of the Carrier authorized to receive same, within 60 days from the date of the occurrence on which the claim or grievance is based. Should any such claim or grievance be disallowed, the carrier shall, within 60 days from the date same is filed, notify whoever filed the claim or grievance (the employe or his representative) in writing of the reasons for such disallowance. If not so notified, the claim or grievance shall

be allowed as presented, but this shall not be considered as a precedent or waiver of the contentions of the Carrier as to other similar claims or grievances.

(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 or disallowance, and the representative of the Carrier shall be notified in writing within that time of the rejection of his decision. Failing to comply with this provision, the matter shall be considered closed, but this shall not be considered as a precedent or waiver of the contentions of the employees as to other similar claims or grievances. It is understood, however, that the parties may, by agreement, at any stage of the handling of a claim or grievance on the property, extend the 60-day period for either a decision or appeal, up to and including the highest officer of the Carrier designed for that purpose.

(c) The requirements outlined in paragraphs (a) and (b), pertaining to appeal by the employee and decision by the Carrier, shall govern in appeals taken to each succeeding officer, except in cases of appeal from the decision of the highest officer designated by the Carrier to handle such disputes. All claims or grievances involved in a decision by the highest designated officer shall be barred unless within 9 months from the date of said officer's decision proceedings are instituted by the employee or his duly authorized representative before the appropriate division of the National Railroad Adjustment Board or a system, group or regional Board of adjustments that has been agreed to by the parties hereto as provided in Section 3 Second of the Railway Labor Act. It is understood however, that the parties may be in agreement in any particular case extend the 9 months' period herein referred to."

CONTENTIONS OF THE PARTIES

The Employee contends that the Vice President-Personnel, on appeal, having failed to disallow the claim within 60 days from the date the appeal was filed with him, failed to comply with Article V 1; and therefore, the claim, by mandate of that article, must be allowed as presented.

Carrier contends that: The time limitation for a denial of the claim was waived because of a letter from the Vice President-Personnel to the General Chairman dated December 21, 1960 in which the Vice President-Personnel stated, "It was agreed that further investigation was necessary for purposes of determining the validity of this claim. Upon completion thereof, you will be furnished with a reply."

RESOLUTION OF THE ISSUES

The only way the time limitations in Article V 1. can be waived is "by agreement" of the parties (Article V 1(B)). When Carrier proffers an affirmative defense that such an agreement was entered into it has the burden of proof. (Award No. 11496). The only evidence tendered by the Carrier, in this case, attempting to establish a waiver of the 60 day time limit, is the letter dated December 21, 1960 wherein the Vice President-Personnel stated to the General Chairman representing the Claimant that it was agreed that further

investigation was necessary for the purposes of determining the validity of this claim. This letter appears to be nothing more than a unilateral expression on the part of the Carrier and does not constitute an "agreement" to waive or extend the time limitation. In order to establish an agreement to waive or extend the time limitation in this instance, it would be necessary for the Carrier to prove; 1. that a request had been made, and 2. that the Claimant had granted the request. Neither of these elements have been proven by the Carrier in its contention that the 60 day time limit for denying the claim had been waived or extended. Awards 11496 and 11597.

We find upon the record, that the Carrier has failed to prove that the time limitations prescribed in Article V 1 were extended "by agreement" of the parties. Also we find that the Vice President-Personnel did not disallow the claim in writing, within 60 days from the date the appeal was filed with him. Therefore, upon the foregoing reasons and findings we must, by mandate of Article V 1, sustain the claim in the amount of a day's pay of eight hours each day at the time and one-half rate of his position, commencing August 29, 1960, and continuing for 15 workdays.

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 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 Carrier violated the Agreement.

A W A R D

Claim sustained as originally presented.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 22nd day of September, 1966.