

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

(Supplemental)

Thomas J. Kenan, Referee

PARTIES TO DISPUTE:

**TRANSPORTATION-COMMUNICATION EMPLOYEES UNION
(Formerly The Order of Railroad Telegraphers)**

SOUTHERN RAILWAY COMPANY

STATEMENT OF CLAIM: Claim of the General Committee of The Order of Railroad Telegraphers on the Southern Railway, that:

1. Carrier violated Article 4, first (a); Article 5 and Article 7, first (e) of Vacation Agreement dated December 17, 1941, and Article 1, Section 4 of August 21, 1954 Agreement when it caused, required or permitted Extra Agent-Telegrapher C. D. Painter's 1962 assigned vacation to be changed, then required him to perform work during vacation time without properly compensating him for the vacation.

2. Carrier shall now compensate Mr. Painter for ten days' pay between April 1st and 14th, 1962, eight hours each, at time and one-half of pay, in addition to the pro rata rate allowed and paid between those dates for either work performed or for vacation. Total amount of claim \$284.00.

EMPLOYEES' STATEMENT OF FACTS: Claimant C. D. Painter has agent-telegrapher's seniority on the Charlotte Division, dating from October 22, 1957. By this seniority and vacation qualifications he was entitled to receive ten working days of vacation during the calendar year 1962. In accordance with the Vacation Agreement and the route request of the Carrier officer, he submitted his vacation date request which, in due time and in accordance with the Vacation Agreement, was processed and a vacation schedule was established for all the employees. The Carrier and the Organization in cooperation, assigned to Claimant Painter the vacation date of April 1 through 14, 1962.

On March 26, 1962, Claimant Painter was occupying a temporary vacancy as relief at Air Line Junction, North Carolina. Without knowledge of the Employees' Organization Mr. Painter called the Chief Dispatcher and requested that he be given his vacation beginning on March 26. Unilaterally, the Carrier relieved Mr. Painter on March 26 and March 27, but on March 28, the Carrier required Mr. Painter to relieve Agent Phillips at Converse, South Carolina. The reason for the temporary vacancy at Converse was because Agent Phillips became ill.

OPINION OF BOARD: This case involves (1) the rescheduling of a vacation and (2) a Carrier's requesting a vacationing employee to return to work during his vacation.

The Carrier and the Employees' local committee, acting in cooperation, pursuant to the requirements of Article 4(a) of the National Vacation Agreement, fixed the period of April 1 through 14, 1962 as the vacation period of Extra Agent-Telegrapher C. D. Painter.

Early on March 26, Painter telephoned the Carrier and requested that his vacation begin that very day, explaining that his car would not start. The Carrier agreed, without consulting the Employees' local committee.

Painter vacationed for two days. The third day of his vacation he either was ordered back to work or agreed to return to work upon the request of the Carrier.

On April 5, the Employees protested to the Carrier the fact that Painter was at work during his scheduled vacation period. On April 9, the Carrier released Painter for an additional eight days of vacation.

Painter was on vacation and was paid at vacation rates a total of ten days, although the ten days were not consecutive work days.

The first issue concerns the rescheduling of Painter's vacation. Article 4(a) of the National Vacation Agreement provides, in pertinent part, as follows:

"The local committee of each organization signatory hereto and the representatives of the Carrier will cooperate in assigning vacation dates."

Clearly, the original scheduling of Painter's vacation required the participation and cooperation of both the Carrier and the Employees' local committee. Furthermore, as provided in Article 4 of the Interpretations adopted July 20, 1942:

"To carry out this cooperative assignment of vacation dates, a list will be prepared showing the date assigned to each employee entitled to a vacation, and this list will be made available to the local committee of the signatory organizations; such portion of any list as may be necessary for the information of particular employees will be made available to them in the customary manner."

This interpretation of Article 4(a) of the National Vacation Agreement makes clear that the local committees are to be consulted and are to have a voice in the assignment of each employee's vacation period.

Article 5 of the National Vacation Agreement gives to the Carrier the right unilaterally to defer or advance or even cancel an individual employee's vacation, under certain stated circumstances. But the case at hand does not involve the Carrier's advancing Painter's vacation under Article 5. This case involves the rescheduling of Painter's vacation. Painter was the party initiating the change in vacation dates, not the Carrier. The Carrier can only reschedule an employee's vacation period as it schedules it—in accordance with Article

4(a) of the National Vacation Agreement. The Carrier violated the Agreement when it failed to act cooperatively with the Employees' local committee in rescheduling Painter's vacation.

The violation having occurred, it would seem to follow that the Employees could sustain a claim against the Carrier in behalf of any of its members aggrieved by the violation. However, since this Board must confine itself to the claim at hand, it can only be held in this award that the Employees cannot sustain a claim in behalf of Painter solely on the basis of the improper rescheduling of his vacation. It was he who initiated the change in vacation dates. This Board holds that Painter was not harmed by the failure of the Carrier to consult with the Employees' local committee before he was given the vacation change he requested.

The second issue concerns the Carrier's requesting Painter to return to work during his vacation. Once Painter's vacation period had been rescheduled (even though improperly), he was entitled to enjoy a full vacation of ten consecutive work days with pay commencing, as between the Carrier and Painter, on March 26. See Award Numbers 11144 (Moore), 12424 (Dorsey) and 15170 (Lynch). At the Carrier's request, he returned to work the third day of his vacation and worked the last eight days of his vacation.

Article 5 of the National Vacation Agreement, as amended, provides that when a Carrier cannot release an employee for a vacation because of the requirements of the service, such employees shall be paid the time and on-half rate for work performed during his vacation period in addition to his regular vacation pay. Painter should be so paid for the last eight days of his vacation, March 28, 29, 30 and April 2, 3, 4, 5 and 6.

The Carrier argues that this penalty rate of pay provided by Article 5 should not apply since Painter was not ordered back to work but was only requested to return, to which request he agreed. The Board believes this is altogether different from the earlier situation where Painter initiated a request to reschedule his vacation. When a Carrier makes a request of one of its employees to return from his vacation, the dominant position of the Carrier over the employee's life infects the request with an element of coercion. What is more, it is fair to assume that no such request would be made were it not — to use the language of Article 5 — "because of the requirements of the service." For these reasons, the Board holds that the request of the Carrier to Painter was equivalent to its notifying him that the requirements of the service necessitated his return to work. Article 5 of the Vacation Agreement, as amended, and its penalty rate of pay applied and governs the pay Painter should receive for the days he worked during his vacation period of March 26 through April 8.

The Board finally notes that Painter did not work for eight days commencing April 9, for which days he received vacation pay. Carrier was entitled to receive the benefit of Painter's labors during that period, since his vacation period had run. Nevertheless, it was the Carrier's choice not to utilize him, and it cannot make use of the "vacation pay" received by Painter during this period as a setoff against other amounts it owes.

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 Carrier violated Articles 4(a) and 5 of the National Vacation Agreement, as amended.

AWARD

The Carrier will pay to Extra Agent-Telegrapher C. D. Painter, for the days March 28, 29 and 30 and April 2, 3, 4, 5 and 6, all in 1962, the difference between the compensation already paid him and compensation calculated at the time and one-half rate for work performed on those days in addition to his regular vacation pay for those eight days.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 23rd day of June 1967.