

NATIONAL RAILROAD ADJUSTMENT BOARD**THIRD DIVISION**

George S. Ives, Referee

PARTIES TO DISPUTE:**BROTHERHOOD OF RAILWAY AND STEAMSHIP CLERKS,
FREIGHT HANDLERS, EXPRESS AND STATION EMPLOYES****CHICAGO, MILWAUKEE, ST. PAUL AND PACIFIC
RAILROAD COMPANY**

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood (GL-5490) that:

(1) The Carrier violated and continues to violate the parties' current agreement, particularly the Vacation Agreement of December 17, 1941, as amended, at Tacoma, Washington, by its failure and refusal to assign Mr. L. C. Smith a fifteen (15) day vacation in the calendar year 1963.

(2) Carrier shall now be required to assign Mr. L. C. Smith fifteen (15) days' vacation allowance in 1963 in accordance with the terms of the Vacation Agreement of December 17, 1941, as amended.

EMPLOYEES' STATEMENT OF FACTS: The Claimant in this case, Mr. L. C. Smith, is a clerical employe of the Chicago, Milwaukee, St. Paul and Pacific Railroad Company who holds an established seniority date of September 2, 1944 in Seniority District No. 45. During the periods of time involved in this dispute, he held regular assignments at Tacoma, Washington. The July 1959 seniority roster for District No. 45 indicates Claimant Smith as the occupant of Swing Position No. 1. Both the January and July 1963 seniority rosters for District No. 45 indicate Claimant Smith as the occupant of Checker Position No. 6783.

On or about October 28, 1959, Mr. Smith became incapacitated for service in his regular assignment at Tacoma by reason of illness. This condition continued until August 10, 1962 when Mr. Smith returned to active service on a regular assignment at Tacoma. Throughout the period extending from on or about October 28, 1959 to August 10, 1962, inclusive, Claimant Smith was regarded as on leave of absence, retaining seniority pursuant to Rule 25 of the parties' current working conditions agreement (effective September 1, 1949) reading as follows:

Appropriate claim was filed on behalf of Claimant Smith and that claim has been duly progressed up to and including the highest officer designated by Carrier to consider such matters and declined. Copies of the correspondence exchanged by the parties in handling the claim on the property are attached as Employees' Exhibits Numbers 1, 2, 3, 4, 5, 6, 7 and 8. Further efforts were made to compose the dispute during conferences held on October 18, 1963, but satisfactory settlement could not be obtained. The handling of the claim on the property was consistent with the provisions of the Railway Labor Act, as amended, and within the time limits of the parties agreement. This dispute is now properly referred to the Disputes Committee.

(Exhibits not reproduced.)

CARRIER'S STATEMENT OF FACTS: The claim which the Organization has progressed to your Board is not, for reasons that will be fully explained in "Carrier's Position," the same claim that was presented and handled on the property.

Claimant L. C. Smith was absent from Carrier's service from October 28, 1959 to August 10, 1962 and during the period June 30, 1961 to July 31, 1962 he was retired under the provisions of the Railroad Retirement Act and was the recipient of an annuity thereunder.

Under the provisions of Rule 25(b) of the currently effective agreement between the parties herein dispute which reads as follows:

"An employe retired under the disability provisions of the Railroad Retirement Act will retain seniority until he attains the age of sixty-five (65) years (female employes sixty (60) years), but his position will be bulletined as a permanent vacancy. Should he recover sufficiently to resume service prior to reaching the age of sixty-five (65) years (female employes sixty (60) years), he may exercise seniority to displace any junior employe for such position as he is qualified to handle."

claimant Smith returned to Carrier's service on August 10, 1962 and performed compensated service on 98 days in the calendar year of 1962, or, in other words, 2 days short of the 100 days he needed in order to qualify for a 15 day vacation in the year 1963 under the provisions of the Non-Operating Employees Vacation Agreement.

There is attached hereto as Carrier's Exhibit A copy of letter written by Mr. S. W. Amour, Assistant to Vice President, to Mr. H. V. Gilligan, General Chairman, under date of May 22, 1963.

(Exhibits not reproduced.)

OPINION OF BOARD: Claimant, who had continuous service from September 2, 1944, became incapacitated for service by reason of illness on October 28, 1959. From October 28 until November 9, 1959, Carrier paid Claimant for time absent account illness pursuant to provisions of a Memorandum Agreement. From November 9, 1959, until December 31, 1960, Claimant received sick benefits under the provisions of the Railroad Unemployment Insurance Act. Carrier also paid Claimant 15 days' vacation in the year 1960

for service performed in 1959 and prior years. Beginning June 30, 1961, Claimant obtained a disability annuity under the provisions of the Railroad Retirement Act. Such annuity continued until August 10, 1962, when Claimant's physical condition improved sufficiently to permit his return to active service. On returning to active service Claimant exercised his seniority and thereafter rendered compensated service on 98 days in the calendar year 1962. Claim was made for vacation of 15 days in the year 1963 on the basis that Claimant was entitled to include an additional 30 days credit for vacation purposes in the year 1962 by reason 30 days' credit for vacation purposes in the year 1962 by reason of absence due to his own illness under the provision of Article 1 (f) of the Vacation Agreement and was, therefore, fully qualified in all respects for such vacation.

Initially Carrier requests that we dismiss the claim for lack of jurisdiction on the basis that the claim presented to the Board differs from that which was handled on the property. While some minor change has been made in the wording of the claim as presented to the Board from that presented on the property such change does not in any manner affect the substance of the claim nor enlarge upon it. It is properly before us and will be considered on its merits.

Carrier's contention is to the effect that during the period Claimant received a disability annuity he had, in effect, "retired" and could not receive the benefits of Article 1, paragraph (f) of the Vacation Agreement of December 17, 1941, as amended, and at the same time receive a disability annuity.

It is not disputed that during the period Claimant was absent from duty he was regarded as being on leave of absence and retained his seniority rights and employment relation pursuant to the provisions of Rule 25, reading as follows:

"RULE 25.

LEAVE OF ABSENCE

(SICKNESS OR PHYSICAL DISABILITY)

(a) An employe detained from work because of sickness or disability shall notify his Supervising Officer as early as possible; an employe detained from work because of sickness or personal injury of himself or an immediate member of his family will be regarded as on leave of absence and his return to service will be governed by the provisions of Rule 23(e). In maternity cases the leave of absence shall not extend beyond thirty (30) days after birth of child and the provisions of this Rule 25(a) will govern extension of the leave beyond that period.

(b) An employe retired under the disability provisions of the Railroad Retirement Act will retain seniority until he attains the age of sixty-five (65) years (female employes sixty (60) years), but his position will be bulletined as a permanent vacancy. Should he recover sufficiently to resume service prior to reaching the age of sixty-five (65) years (female employes sixty (60) years), he may exercise seniority to displace any junior employe for such position as he is qualified to handle."

Article 1, paragraph (f) of the Vacation Agreement of December 17, 1941, as amended by the Agreement of August 19, 1960, reads as follows:

"ARTICLE 1.

(As Amended August 19, 1960)

(c) Effective with the calendar year 1961, an annual vacation of fifteen (15) consecutive work days with pay will be granted to each employe covered by this Agreement who renders compensated service on not less than one hundred (100) days during the preceding calendar year and who has fifteen (15) or more years of continuous service and who, during such period of continuous service renders compensated service on not less than one hundred (100) days (133 days in the years 1950-1959 inclusive, 151 days in 1949 and 160 days in each of such years prior to 1949) in each of fifteen (15) of such years, not necessarily consecutive.

(f) Calendar days in each current qualifying year on which an employe renders no service because of his own sickness or because of his own injury shall be included in computing days of compensated service and years of continuous service for vacation qualifying purposes on the basis of a maximum of ten (10) such days for an employe with less than three (3) years of service; a maximum of twenty (20) such days for an employe with three (3) but less than fifteen (15) years of service; and a maximum of thirty (30) such days for an employe with fifteen (15) or more years of service with the employing Carrier."

The issue confronting us in this dispute is similar to that in a dispute decided by Second Division Award 4045 (Daugherty). In that dispute Claimant was granted sick leave from July 3, 1959, until February 23, 1960. On February 23, 1960, Claimant applied for a disability annuity which was granted effective July 3, 1959. Prior to July 3, 1959, Claimant had compensated service for 125 days in the year 1959 and had more than 15 years' service. Claim was made for 15 days' vacation in 1960 on the basis that the creditable days for his own illness under Article 1, paragraph (f) of the Vacation Agreement, as amended, qualified Claimant for such vacation even though he was granted a disability pension July 3, 1959. The Board there found: "Even though the instant claimant's retirement annuity was made effective before he had accumulated the required number of 'compensated' work days in 1959, he at his age retained, under the Railroad Retirement Act, the right to return to Carrier's service." So it is in the issue before us. Claimant retained the right to return to Carrier's service at all times while receiving a disability annuity. He thus continued to maintain his status as an employe within the purview of Article 1, paragraph (f) of the Vacation Agreement as amended. The claim will therefore be sustained. Also see Third Division Award 14586 (Lynch).

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 Agreement was 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 22nd day of September 1967.