Award No. 15912
Docket No. MW-14224

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

(Supplemental)

John J. McGovern, Referee

PARTIES TO DISPUTE:

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES

THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood that:

(1) The Carrier violated the Agreement when it made unauthorized deductions totaling $296.40 from the wages of B&B Carpenter A. J. Bieniewicz, beginning with the payroll week ending May 18, 1962. (Carrier's Docket 9257.)

(2) The Carrier now reimburse the claimant in the amount of $296.40 because of the violation referred to in Part (1) of this claim.

EMPLOYES' STATEMENT OF FACTS: On the 1961 vacation schedule, which was prepared and posted by the Carrier during the early part of 1961, the claimant was scheduled for a vacation of three weeks in December. However, prior to this date, the claimant requested, but was denied, permission to work during this scheduled vacation period. Therefore, in compliance with the Carrier's instructions, he took a vacation as scheduled.

Under date of February 7, 1962, the claimant received a letter reading:

"THE NEW YORK, NEW HAVEN AND HARTFORD
RAILROAD COMPANY

New Haven 6, Connecticut
February 7, 1962

Mr. A. J. Bieniewicz
3391 E. Tremont Ave.
Bronx, New York

Dear Mr. Bieniewicz:

A check by the Director of Audits and Methods has indicated that you accepted payment of $296.40 from the New Haven Railroad for vacation payment which you were not entitled to, since you did not

Christensen, General B&B Foreman E. J. Brady, and B&B Carpenter A. J. Bieniewicz, in connection with claim advanced by Mr. Christensen in favor of Mr. Bieniewicz.

It was developed that immediately prior to Mr. Bieniewicz taking his vacation in December 1961 he asked Mr. Brady if he could work the vacation period, as he felt he needed the extra working days to qualify for a vacation in 1962, for time worked in 1961.

At the meeting Mr. Brady stated that he checked with his office at Stamford, to see if it would be possible for Mr. Bieniewicz to work, as they were short-handed at the time. Mr. Brady was told that Bieniewicz was on the vacation list, and would have to take his vacation before the end of 1961, and Mr. Brady so informed Mr. Bieniewicz.

The question of eligibility for a vacation in 1961 was not raised by Mr. Bieniewicz to Mr. Brady.

My file herewith, as requested.

/s/ H. W. Jenkins
Chief Engineer"

In view of the fact Mr. Bieniewicz did not question his eligibility for the vacation involved the claim was denied in accordance with the understanding reached between the parties as to the disposition of the case. Copy of denial decision dated August 24, 1962, to General Chairman Christensen is attached and marked as Carrier's Exhibit E.

The General Chairman, upon receipt of the Carrier's decision referred to above, disregarded the agreed-upon understanding between the parties as to the disposition of the matter and ignored the fact, as established at conference among the principals involved, that Mr. Bieniewicz had raised no question as to his eligibility to the vacation in dispute. Under date of September 12, 1962, the General Chairman advised he could not agree with the Carrier's decision; copy of this document is attached as Carrier's Exhibit F.

The undersigned replied to the General Chairman on September 18, 1962. Copy of this letter is attached as Carrier's Exhibit G.

Copy of Agreement effective September 1, 1949, as amended, between the parties is on file with your Board and is, by reference, made a part of this Submission.

(Exhibits not reproduced.)

OPINION OF BOARD: The 1961 vacation schedule was prepared and posted by the Carrier during the early part of 1961. The Claimant's name appeared on the schedule, listing him for a three week vacation in December 1961. He took that vacation, and subsequently, upon a routine check by the Carrier's auditor, it was discovered that he was ineligible for that vacation due to the fact that he had not worked a sufficient number of days in 1960 to qualify. There is no dispute between the parties as to this essential fact. Once his ineligibility was discovered, the Carrier suggested that the Claimant work

during his 1962 vacation to compensate it for the monies paid in 1961. The Claimant refused, whereupon Carrier deducted the amount paid from the Claimant's pay check. The facts developed from the record indicate that immediately prior to taking his vacation in 1961, the Claimant asked his General Foreman if he could work this period, because he thought that he needed the extra working days to qualify for a vacation in 1962. The General Foreman refused this request and told him to take his vacation as posted. The Claimant never raised any question as to his eligibility for the 1961 vacation.

The Carrier admits that this vacation schedule in question was wrong, that it was a clerical error, but urges upon us the argument that in accordance with the National Vacation Agreement, it was incumbent upon the Claimant to have questioned his own eligibility; that by so doing, he would have displayed that degree of cooperativeness demanded by the aforesaid Agreement. Carrier further contends that the Claimant himself was in the best possible position to know the number of days he had worked and is charged with the responsibility of knowing whether or not he was eligible for the vacation in accordance with the requirements of the Agreement. Carrier further alleges that Claimant was aware of the "true facts" and did nothing to disclose them.

The Organization does not deny that the Claimant was ineligible, but advances the theory that since the responsibility for the preparation of the vacation list rests solely with the Carrier, it was quite reasonable for the Claimant to assume that he was entitled to the vacation once it had been posted. They further point out and the record on this is clear, that Carrier actually required him to take his vacation against his own wishes. The Organization further propounds the proposition that Carrier, by its action in this case, violated Rule 22 of the Agreement, which reads as follows:

> "Established working hours of regularly assigned Track and Bridge and Building forces will not be reduced below 8 hours per day, five (5) consecutive days each calendar week other than as provided for in this rule and except that this number may be reduced in a week by such holiday as specified in Rule 24 which occurs within the employes work week."

Further that since the Claimant is a regularly assigned Bridge and Building Carpenter, the above cited rule provides that he must receive not less than (8) hours per day, five (5) days each calendar week. Therefore when the Carrier deducted fifteen (15) days' pay, the provisions of Rule 22 were violated.

Although the Carrier states categorically that the Claimant knew that he was ineligible, it does not offer any evidence to sustain such an allegation. It is true that the Claimant was concerned about his vacation eligibility for the year 1962, but the record is devoid of any evidence that would indicate he intentionally deceived the Carrier in 1961. The burden of proof in this regard quite naturally rests with the Carrier. It is therefore our judgment that Carrier has violated the Guarantee Rule of the Agreement, Rule 22 quoted above, and as a result, we will sustain the Claim as submitted.

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 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 Carrier violated the Agreement.

AWARD

Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 31st day of October 1967.

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