Award No. 16844
Docket No. CL-17102

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

John H. Dorsey, Referee

PARTIES TO DISPUTE:

BROTHERHOOD OF RAILWAY, AIRLINE AND STEAMSHIP CLERKS, FREIGHT HANDLERS, EXPRESS AND STATION EMPLOYES

ATCHISON UNION DEPOT AND RAILROAD COMPANY

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood (GL-6269) that:

1. Carrier violated the Clerks' Agreement when, on August 10, 1966, it refused and continued to refuse to allow Clerk L. F. Scheid twenty days' vacation pay in 1966, for the period July 3 through July 29, 1966, for which he qualified in the year 1965;

2. Carrier shall be required to allow Clerk L. J. Scheid pay for twenty days' vacation at the daily rate of $22.30, amount $446.00, for the year 1966.

EMPLOYES' STATEMENT OF FACTS: The Atchison Union Depot and Railroad Company at Atchison, Kansas, is owned by the following four railroads:

Missouri Pacific
Chicago, Rock Island and Pacific
Chicago, Burlington and Quincy
Atchison, Topeka and Santa Fe

and was operated by the Missouri Pacific Railroad. The working Agreement between the Missouri Pacific Railroad and the Brotherhood of Railway Clerks was adopted by Agreement on that property with few exceptions, however, none of the exceptions is here involved.

On and prior to October 2, 1964, Mr. L. J. Scheid, seniority date April 25, 1939, was assigned at the Atchison Union Depot, to a seven day per week position of Baggage Ticket Clerk, rate $20.86 per day, (including the January 1, 1964 increase) assigned hours 10:15 A.M. to 7:15 P.M., meal period 2:15 P.M. to 3:15 P.M., rest days Friday and Saturday. He was relieved on those rest days by furloughed employe M. C. Hauk.

Hence, the referee feels, in regard to this second question which has arisen under Article 1, that both parties are insisting upon interpretations of the words 'renders compensated service' which they would not have insisted upon if the question had been raised on December 17, 1941. He believes that the Carriers, in some cases, have resorted to a very strict and narrow interpretation of the words in opposition to the very novel interpretation of the employes, and that by doing so they have lost sight of the unfair results which their interpretations would produce in certain exceptional cases. The referee does not propose to approve an interpretation of the words 'renders compensated service' which will produce unfair results in individual cases not intended by the parties when they signed the agreement.

* * * * *

It is the ruling of the referee that if an employe is excused from duty and during such off-duty performs no service or work for the Carrier, then the time spent while excused from duty cannot be counted toward the 160 days of service required for vacation eligibility. The fact that the Carrier may continue the employe's pay during the period of time that he is excused from duty is immaterial as far as this issue is concerned.

* * * * *

Again the referee wishes to point out that it is not the pay which an employe receives from the Carrier but the days on which he performs service for the Carrier that determine whether or not any given day shall be counted toward the 160-day vacation requirement.

* * * * *

Finally, and by way of summary of the referee's position on Question 2 under Article 1 which the parties asked him to decide, it is to be understood by both parties concerned that only those days on which an employe performed some service for the Carrier, or was wrongfully deprived by the Carrier of his right to perform service under the rules agreements, are to be counted in calculating the 160 days' vacation qualification yardstick provided for under Article 1 of the agreement of December 17, 1941."

This Carrier has never considered payments under various job protection agreements and requirements to be "compensated service" for vacation purposes. In view of the foregoing it becomes abundantly clear that payments to protected employes pursuant to agreement of February 7, 1965, when no service is performed, is not "compensated service" for vacation purposes. Claim is without merit and we respectfully request that it be denied.

OPINION OF BOARD: Claimant was employed as a Clerk at Atchison, Kansas with seniority date of April 24, 1938. His position was abolished effective October 2, 1964. On February 7, 1965 he was a furloughed employe.

On February 7, 1965, National Mediation Agreement, herein called the February 7 Agreement, was executed. Pertinent provisions of that Agreement are:

"ARTICLE I. PROTECTED EMPLOYES

Section 1. All employes, other than seasonal employes, who were in active service as of October 1, 1964, or who after October 1, 1964, and prior to the date of this Agreement have been restored to active service, and who had two years or more of employment relationship as of October 1, 1964, and had fifteen or more days of compensated service during 1964, will be retained in service subject to compensation as hereinafter provided unless or until retired, discharged for cause, or otherwise removed by natural attrition. **Any such employes who are on furlough as of the date of this Agreement will be returned to active service before March 1, 1965,** in accordance with the normal procedures provided for in existing agreements, **and will thereafter be retained in compensated service** as set out above, provided that **no back pay will be due to such employes by reason of this Agreement.** For the purpose of this Agreement, the term 'active service' is defined to include all employes working, or holding an assignment, or in the process of transferring from one assignment to another (whether or not October 1, 1964 was a work day), all extra employes on extra lists pursuant to agreements or practice who are working or are available for calls for service and are expected to respond when called, and where extra boards are not maintained, furloughed employes who respond to extra work when called, and have averaged at least 7 days' work for each month furloughed during the year 1964. (Emphasis ours.)

* * * * *

ARTICLE IV.

COMPENSATION DUE PROTECTED EMPLOYES

Section 1. Subject to the provisions of Section 3 of this Article IV, protected employes entitled to preservation of employment who hold regularly assigned positions on October 1, 1964, shall not be placed in a worse position with respect to compensation than the normal rate of compensation for said regularly assigned position on October 1, 1964; provided, however, that in addition thereto such compensation shall be adjusted to include subsequent general wage increases."

The parties agree that: (1) Claimant qualified as a protected employe under Article I, Section 1, of this Agreement; (2) Carrier failed to return Claimant to active service until May 11, 1965; (3) for the 51 day period from March 1, 1965 through May 10, 1965, Carrier compensated Claimant in the amount he would have earned had he been returned to active service before March 1, 1965; (4) on September 17, 1965, Claimant's position was abolished; and (5) in the period from May 11 to September 16, 1965, Claimant had 83 days of compensated service.

Article IV of the National Mediation Agreement of November 20, 1964, provides in pertinent part:

"Section 1. Insofar as applicable to the employes covered by this Agreement who are also parties to the Vacation Agreement of Decem-

ber 17, 1941, Article 1 of that Agreement, as amended by the Agreement of August 21, 1954, and the Agreement of August 19, 1960, is hereby further amended to read as follows:

* * * * *

(d) Effective with the calendar year 1965, an annual vacation of twenty (20) 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 twenty (20) 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 1950-59 inclusive, 151 days in 1949 and 160 days in each of such years prior to 1949) in each of twenty (20) of such years, not necessarily consecutive." (Emphasis ours.)

Clerks, maintaining that Claimant had performed more than 100 days of compensated service in 1965 — 51 days from March 1 through May 10, 1965; and, 83 days from May 11 to September 16, 1965, a total of 134 days — filed claim for 20 days' vacation pay earned by Claimant in the year of 1965. Carrier's highest officer disallowed the claim giving as reasons for the disallowance:

"Article 1 of the National Vacation Agreement provides that to qualify for a vacation in the following year, the employe must have 100 or more days of compensated service in the preceding year. Since Clerk Scheid performed only 83 days of compensated service in the year 1965, he did not qualify for any vacation in the year 1966.

Days on which an employe receives a protective allowance under Agreement of February 7, 1965 but does not actually perform service are not to be counted in determining the number of days of compensated service for vacation purposes.

In view of these facts, claim for twenty days' vacation allowance is without merit and is respectfully declined."

Further, Carrier contends that: (1) Claimant performed no compensated service in the period from March 1 to May 10, 1965; and (2) the compensation paid to him for that period was as a "protected employe" pursuant to Article IV, Section 1, of the February 7 Agreement, **supra.**

The parties agree that the sole issue in dispute is whether the 51 day period was "compensated service" within the contemplation of those words in Article IV, Section 1 (d) of the National Mediation Agreement of November 20, 1964, **supra.**

The contractual obligation of Carrier, under Article I, Section 1, of the February 7 Agreement to return Claimant "to active service before March 1, 1965," was, in the posture of the facts and issues of record in this case, absolute. There is no provision in that Agreement that says the obligation can be satisfied by payment of compensation in lieu of a protected furloughed employe being returned to active service. The protections afforded the fur-

roughed employe by this Section are: (1) return to active service before March 1, 1965; (2) retention in compensated service. Article IV, Section 1, of the Agreement does not qualify those protections. It deals only with the rate of compensation that the protected employe is guaranteed.

By its failure to return Claimant to active service before March 1, 1965, Carrier violated Article I, Section 1, of the February 7 Agreement. Had it complied with that provision Claimant would have been returned to active service before March 1, 1965 and been "retained in compensated service" during the 51 days. Under such circumstances Claimant must be held to have the status of rendering compensated service which he was contractually entitled to and would have enjoyed in the absence of the violation. We, therefore, find and hold that Claimant: (1) rendered **de jure** if not **de facto** compensated service in the 51 day period from March 1 through May 10, 1965, within the contemplation of Article IV, Section 1 (d) of the November 20, 1964, National Mediation Agreement; and (2) he earned 20 days' vacation for services performed in 1965. We will sustain the Claim.

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 Carrier violated the Agreements.

AWARD

Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 19th day of December 1968.

CARRIER MEMBERS' DISSENT TO AWARD 16844, DOCKET CL-17102

In order to arrive at a decision to sustain this claim it was first necessary for the majority to interpret the provisions of Article I, Section 1, of the National Job Stabilization Agreement dated February 7, 1965, and to find a violation of that Agreement as is stated in the Opinion of Board reading as follows:

"By its failure to return Claimant to active service before March 1, 1965, Carrier violated Article I, Section 1, of the February 7 Agreement. * * * "

Article VII of the February 7, 1965 Agreement provides that disputes arising under that Agreement shall be referred to a Disputes Committee established by said Article VII.

In Award 15696, with Referee Dorsey participating, we held as follows:

"The parties herein are parties to the February 7, 1965 National Stabilization of Employment Agreement. They implemented that Agreement by instrument executed on March 5, 1965 in compliance with Article III of the Stabilization Agreement. The dispute herein concerns interpretation and application of both Agreements. Petitioner, on February 15, 1966, referred the dispute to the Disputes Committee as provided for in Article VII of the Stabilization Agreement which in pertinent part reads:

* * * * *

Subsequently, on March 4, 1966, it gave written notice of intention to file ex parte submission with this Board. The filing with two forums creates a procedural issue as to whether we should exercise our jurisdiction.

In Award No. 14979 we held that 'procedures established and accepted by the parties themselves for resolving disputes under the Job Stabilization Agreement should be respected.' We reaffirm that holding. * * * "

In Award 16552, with Referee Dorsey also participating, we stated:

"In the record Clerks allude to the February 7, 1965 National Agreement. Should there exist a dispute involving the interpretation and application of that Agreement the forum to resolve it is the Disputes Committee established under that Agreement. See Award Nos. 14979, 15696."

The dispute in Award 16844 involved the interpretation and application of the Job Stabilization Agreement of February 7, 1965. This Board should have recognized the procedures established and accepted by the parties themselves for resolving disputes under that Agreement just as it did in Awards 14979 and 15696 and as it stated should be done in Award 16552, all of which awards were cited to the Referee in the dispute in Award 16844. However, the majority proceeded to ignore such prior awards in direct contravention of the following statement in Award 11788 with Referee Dorsey participating:

"We have no hesitation or compunctions in reversing prior Awards when we are convinced they are palpably wrong. But, we cannot and do not lightly regard precedent Awards, for, if we did so, it would engender the prompt and orderly settlement of disputes on the property within the contemplation of Section 2 (4) and (5) of The Railway Labor Act, herein called the Act. * * * "

Awards 14979, 15696 and 16552 should have been followed since there is no finding in Award 16844 to the effect that such prior awards were in palpable error.

G. C. White
R. E. Black
W. B. Jones
P. C. Carter
G. L. Naylor

LABOR MEMBER'S ANSWER TO CARRIER MEMBERS' DISSENT TO AWARD 16844 (DOCKET CL-17102)

Compensation paid under protective agreements, of which there are many in the railroad industry, is properly used in computing days of compensated service under the National Vacation Agreement for vacation purposes.

Reading the clear and unambiguous language of an agreement, and applying those provisions in deciding a dispute, does not necessarily constitute an interpretation. It has been necessary many times, in order to settle a dispute, to consider the provisions of all agreements in effect between the parties to that dispute. That is all that was done by the Majority in this instance.

C. E. Kief
Labor Member
1-20-69

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