Award No. 16867
Docket No. SG-17776

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

(Supplemental)

Morris L. Meyers, Referee

PARTIES TO DISPUTE:

BROTHERHOOD OF RAILROAD SIGNALMEN

THE BALTIMORE AND OHIO RAILROAD COMPANY

STATEMENT OF CLAIM: Claim of the General Committee of the Brotherhood of Railroad Signalmen on the Baltimore and Ohio Railroad Company that:

(a) Carrier has violated the Vacation Agreement, as amended, particularly Article IV, Section (g), of the August 19, 1960 Agreement, when Mr. D. H. Burns has not been allowed fifteen (15) days' vacation in 1967.

(b) Mr. Burns now be allowed an additional five (5) day's vacation or payment therefore.

EMPLOYES' STATEMENT OF FACTS: Claimant D. H. Burns was furloughed from the service of the Carrier January 20, 1961, entered the Armed Forces September 22, 1961, and was discharged August 23, 1963.

In 1967, he requested 15 days vacation in accordance with the January 13, 1967, Agreement.

The Carrier would only permit 10 days' vacation, asserting that Claimant had not qualified in the year 1961, and had only 9 years in which he was qualified for vacation purposes.

There is no dispute between the parties concerning the qualifications of Claimant for vacation purposes in 1957, 1958, 1959, 1960, 1962, 1963, 1964, 1965 and 1966. The dispute arises over the number of qualifying days of Claimant in the year 1961.

Article II, Section 1(h) of the January 13, 1967 Agreement to which the Carrier involved herein is a party reads as follows:

"(h) In instances where employes have performed seven (7) months' service with the employing carrier, or have performed, in a calendar year, service sufficient to qualify them for a vacation in the following calendar year, and subsequently become members of the

"qualifying" years for the purpose of determining the length of his 1967 vacation, namely, 1957, 1958, 1959, 1960, 1962, 1963, 1964, 1965 and 1966. **Claimant contends that the year 1961 should have been counted as a qualifying year on the basis of his military service. That is the issue to be decided.**

Between January 1 and January 20, 1961, Burns performed fourteen days' compensated service. He was furloughed from Carrier's service from January 20, 1961, until September 22, 1961, the date he was inducted into the U. S. Army. He was in the military service for the remainder of 1961.

Had the claimant not been inducted into the Army, the total time he could have worked for the Carrier between September 22 and December 31, 1961 was 69 days, i.e., six days in September, twenty-two days in October, twenty-one days in November and twenty days in December. That, added to the fourteen days' of compensated service he performed during the month of January, 1961, totals 83 days. Our records reveal, however, that Burns would not have been recalled at all during 1961 after being furloughed on January 22 of that year.

Petitioner contends that every calendar day the claimant spent in the Army in 1961 should have been counted toward "a creditable vacation in 1961" and if it had been he would have had 114 days to his credit and could have counted 1961 as a qualifying year and in support thereof cites Article IV, Section 1(g) of the Agreement of August 19, 1960, retained verbatim in Article II, Section 1(h) of the Mediation Agreement of January 13, 1967, which provides that:

> "In instances where employes have performed seven (7) months' service with the employing carrier, or have performed, in a calendar year, service sufficient to qualify them for a vacation in the following calendar year, and subsequently become members of the Armed Forces of the United States, the time spent by such employes in the Armed Forces will be credited as qualifying service in determining the length of vacations for which they may qualify upon their return to the service of the employing carrier."

If the claimant had qualified in 1961, he would have had ten qualifying years effective January 1, 1967 and would, therefore, have qualified for fifteen days' vacation in 1967. Based upon nine qualifying years, he was allowed ten days' vacation. The instant claim is for five days' vacation or payment in lieu thereof, i.e., the difference between what he was allowed (ten days) based upon nine qualifying years and fifteen days, the number he would have been allowed had he had ten qualifying years, effective January 1, 1967.

OPINION OF BOARD: The Claimant, Mr. D. H. Burns, had a seniority date of March 25, 1957 with the Carrier. Prior to the year 1967, he had accumulated beyond dispute nine "qualifying" years for determining the length of his 1967 vacation, namely 1957, 1958, 1959, 1960, 1962, 1963, 1964, 1965 and 1966. Mr. Burns make the claim herein that the year 1961 should have been counted as a "qualifying year" so as to have entitled him to 15 days of vacation in 1967 for having had 10 qualifying years of service. The Carrier contends that 1961 should not be counted as a qualifying year. Thus, according to the Carrier, Mr. Burns was entitled only to 10 days of vacation in 1967, having had only 9 "qualifying years" of service. The ultimate issue, then, to be decided in this case is whether 1961 was a "qualifying year" in determining the length of the Claimant's 1967 vacation.

The relevant facts regarding this issue are as follows: The Claimant had worked 14 days for the Carrier in January, 1961 prior to his being furloughed from the service of the Carrier on January 20, 1961. He remained on furlough until his entrance into the Armed Forces on September 22, 1961, and he was discharged from military service on August 23, 1963. It is undisputed in the Record that had the Claimant not entered the Armed Forces on September 22, 1961, he would have remained on furlough from the service of the Carrier at least through December 31, 1961. The Record, however, does not reveal when after December 31, 1961 the Claimant would have been recalled from furlough had he not been in military service.

Under the vacation provisions of the Agreement between the parties, in order to consider the year 1961 to be a "qualifying year" for determining the length of a vacation, an employe must have had 100 days of "compensated service" in that calendar year. The Claimant asserts that, by virtue of the provisions of Article II, Section 1, (h) of the Mediation Agreement of January 13, 1967 between the parties (hereinafter called Section 1(h) of the Agreement), each day that he was in military service in 1961 — to wit, August 23, 1961 through December 31, 1961 — must be counted as a day of "compensated service" a total of 100 days. Since he actually worked 14 days for the Carrier in 1961 prior to being furloughed, the Claimant alleges that he should have been credited with 114 days of "compensated service" for 1961, and, therefore, 1961 should have been considered as a "qualifying year."

The Carrier makes two alternative defenses to this claim. The first defense is that the Claimant is not entitled under the aforementioned Section 1(h) of the Agreement to be credited with any days that he was in military service in 1961 because he would have been on furlough from the Carrier even had the Claimant not entered military service. The second Carrier defense is that even if the Claimant had been recalled from furlough on the date that he in fact entered military service, he would have worked only 5 days a week, and that the Claimant should, therefore, only be credited on that basis with 69 days of "compensated service" for the period that he was in military service in 1961. That 69 days, when added to the 14 days of actual service of the Claimant in 1961, only totals 83 days of "compensated service" in 1961 according to the Carrier, short of the 100 days of "compensated service" required to consider 1961 as a "qualifying year."

The provisions of Section 1(h) of the Agreement are critical to a determination of the issue in this case, and read as follows:

> "(h) In instances where employes have performed seven (7) months' service with the employing carrier, or have performed, in a calendar year, service sufficient to qualify them for a vacation in the following calendar year, and subsequently become members of the Armed Forces of the United States, the time spent by such employes in the Armed Forces will be credited as qualifying service in determining the length of vacations for which they may qualify upon their return to the service of the employing carrier."

There is no denial that the Claimant had performed seven (7) months' service with the Carrier at the time that he became a member of the Armed Forces of the United States. Neither is there a denial that he was an "employe" at that time, albeit a furloughed employe. Therefore, it would appear that the Claimant was entitled to have "the time spent . . . in the Armed

Forces" in 1961 credited to him as qualifying service in determining his length of vacation in 1967 by the clear and unambiguous terms of Section 1(h).

The Carrier would have the Board add a proviso to Section 1(h) either (1) to the effect that the Claimant is entitled to have "the time spent . . . in the Armed Forces" credited to him only if he would not have been on furlough had he not been in military service, or (2) to the effect that the Claimant is entitled to have only the number of days credited to him while in military service as he would have worked for the Carrier, if he had not been on furlough and had not been in military service.

To accept either of these provisos would, in the opinion of the Board, add conditions to Section 1(h) which simply are not there. This the Board cannot do.

As to the Carrier's contention that the Claimant was entitled to be credited only with 5 days for every 7 days he spent in military service, the Board would first need to find an ambiguity in the words, "time spent . . . in the Armed Forces." We find no such ambiguity in those words. Every day that a person is in military service is "time spent . . . in the Armed Forces." Therefore, the clear and unambiguous terms of the contract must control.

It should be observed that were this Carrier contention to be upheld for one reason or another by the Board, it would not necessarily follow that only 5 days per week should be credited to Claimant. It would have to be determined it seems to the Board, whether the Claimant would have worked either less than or more than 5 days per week had he not been in service and had he not been on furlough, recognizing that the Carrier at times works an employe more than 5 days a week at times and less than 5 days a week at other times. The parties to the Agreement could well have decided that the chore of reconstructing how many days an individual would have worked had he not been in military service and had he not been on furlough would be such a difficult, if not nigh impossible, task that the individual should be credited with every day he was in military service. Indeed, had that been their intent, they could not have worded Section 1(h) better.

That this may have been the parties' intent is, of course, conjectural. But, is does meet, it seems to the Board, the Carrier's contention that it could not conceivably have been the intent of the parties to place a person in military service in a better position that he would have been in had he not been in military service and not been on furlough. In other words, in deciding against the Carrier in its contention that only five days a week should be credited to Claimant while he was in military service, the Board, in relying upon the language in the contract, is not reaching an absurd result. We also note that all the Carrier did was to argue that it must have been the parties' intent not to place the man in military service in a better position that he would otherwise have been in; there was absolutely no evidence in the Record, to show that this was the intent of the parties.

As stated earlier, the Carrier alternatively asserts that the Claimant should not have been credited for any time spent in military service in 1961 on the basis that he would have remained on furlough throughout the entire period of 1961 that he served in the Armed Forces. This argument has more internal consistency, it seems to the Board, than does crediting the Claimant with 5 days per week that he was in military service, because it is more logical that it was the intent of the parties to place a person in the same position while in military service as he would have been in had he not been in military service.

While it is tempting to adopt this contention of the Carrier, were the Board to do so it would be adding a condition to Section 1(h) that does not exist and it would be assuming that there could have been no other intent of the parties, neither of which the Board can properly do. It this were in fact the intent of the parties, they could easily have so provided in Section 1(h). They did not do so, and it is not the prerogative of this Board to do so for them. Furthermore, we repeat that there was no evidence in the Record that this was the parties intent; it was only asserted by the Carrier that it **must** have been their intent. Here again, the parties might have concluded that the difficultly of attempting to reconstruct after the fact what a person might have done and how many days he would have worked had he not been in military service was not "worth the candle," and on that basis decided to credit him, as the Agreement states with "time spent . . . in the Armed Forces." Again, this the Board does not know to have been the parties' intent. (In all deference to the negotiators, it is possible that this question did not even occur to them.) But we again state that to credit all of the time spent in the Armed Forces to the Claimant as the Agreement clearly states is to be done, instead of **some** of the time spent in the Armed Forces as the Carrier would have us do, does not lead to a result that the Board can with any safety say could not possibly have been intended by the parties.

While it is conceded that this is a case of first impression insofar as this exact issue is concerned, the Carrier cites Award No. 12456 of this Division in support of its position. While that Award does appear to support the proposition that an employe entering the Armed Forces should not be placed in a better position than he would have been in had he not done so, that assertion was not necessary to the determination of that case. Furthermore, that Award equally stands for the proposition that the words "continuous active service" in the service of the Carrier mean exactly what they say just as we conclude in this case that the words in Section 1(h) "time spent . . . in the Armed Forces" mean exactly what they say.

For the above-stated reasons, the claim will be sustained.

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 Agreement was violated.

AWARD

Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 23rd day of January 1969.

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