Award Number 17791
Docket Number TE-17931
NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Francis X. Quinn, Referee

PARTIES TO DISPUTE:

TRANSPORTATION-COMMUNICATION EMPLOYEES UNION
SOUTHERN PACIFIC COMPANY — TEXAS AND LOUISIANA LINES

STATEMENT OF CLAIM: Claim of the General Committee of the Transportation-Communication Employees Union on the Southern Pacific Company (Texas and Louisiana Lines), that:

1. Carrier violated the agreement when on the 28th day of May, 1967, it ordered Telegrapher Clyde L. Frost to start his vacation and on June 1, 1967, it required Mr. Frost to work one day (June 1, 1967) of his vacation period and then resume the rest of said vacation.

2. Carrier shall be required to pay claimant Frost as follows:

   8 hours at pro rata rate vacation pay
   8 hours at time and one-half rate working vacation June 1, 1967
   8 hours pro rata rate vacation pay May 28, 29, 30, 31, 1967, June 4, 5, 6, 7, 8, 11, 12, 13, 14, 15, 1967.
   8 hours time and one-half rate account being improperly suspended from work because his assigned vacation was not properly deferred and vacation not granted in accordance with the terms of the vacation agreement, May 28, 29, 30, 31, 1967, June 4, 5, 6, 7, 8, 11, 12, 13, 14, 15, 1967, less compensation already paid.

(Dates emphasized are not involved, included in error.)

EMPLOYES' STATEMENT OF FACTS:

(a) STATEMENT OF THE CASE

The dispute involved herein is based upon various provisions of the collective bargaining agreement, between the Southern Pacific Company (Texas and Louisiana Lines) hereinafter referred to as Carrier and the Transportation-Communication Employees Union hereinafter referred to as employees or Union, effective December 1, 1946, as amended and supplemented, is available to your Board and by this reference is made a part hereof. The claim was handled on the property in the usual manner, up to and including the highest officer of the Carrier designated to handle claims and grievances, and declined. Conference was held February 16, 1968.

The dispute arose on June 1, 1967 when Claimant worked during his scheduled vacation.

and allowed at rate of position at Tower 100 for this day which was claimant's regular assignment for June 1. These claims were allowed.

On July 3, 1967, claimant presented an additional claim for eight (8) hours vacation pay and eight (8) hours time-and-one-half rate for "working part of vacation June 1, 1967." This was same claim as was made on claimant's time card for June first period. Also, additional claim reading, "8 hours pro rata vacation pay each date shown below and 8 hours at time-and-one-half rate each date shown below paid not worked due to being improperly suspended from work, because my assigned vacation date was not properly deferred and the vacation not granted in accordance with the terms of the vacation agreement. Dates claimed May 28, 29, 30, and 31st, 1967, and June 4, 5, 6, 7, and 8th, 1967. This claim less compensation already allowed" was made by claimant. This latter claim was declined. However, the payment claimed for June 1 had been allowed currently as this was the claim originally made for that date.

July 31, 1967, District Chairman, TCU, appealed to the Superintendent, stating the claim to be: First, that it was violation of agreement when Carrier "ordered" the claimant "to start his vacation and on June 1, 1967 it required Mr. Frost to work one day (June 1, 1967) of his vacation period and **then resume the rest** of the vacation period." (Emphasis supplied to the quotation.)

The District Chairman presented monetary claims on behalf of Frost which were stated as follows:

> "8 hours at pro rata rate vacation pay
> 8 hours at time and one-half rate working vacation June 1, 1967.
> 8 hours pro rata rate vacation pay May 28, 29, 30, 31, 1967, June 4,
> 8 hours time and one-half rate account being improperly suspended from work because his assigned vacation date was not properly deferred and vacation not granted in accordance with the terms of the vacation agreement, May 28, 29, 30, 31, 1967, June 4, 5, 6, 7, 8, 11, 12, 13, 14, 15, 1967, less compensation already paid."

It must be observed that the District Chairman included claims for June 11, 12, 13, 14, and 15, 1967, about payment for which days claimant presented no claim or contention.

The Superintendent, after explaining the circumstances, declined this appeal.

General Chairman, on September 19, 1967, appealed to Carrier's Manager of Personnel, attaching copy of the District Chairman's letter of appeal as the support of his appeal. This appeal was declined October 25, 1967. It was discussed in conference on the property January 24, 1968, and again April 25, 1968, at which conferences the Union representative added nothing to his written appeal.

(Exhibits not Reproduced)

OPINION OF BOARD: Claimant was regularly assigned a vacation period May 28 through June 8 and fully observed his vacation during that period except that on June 1 he voluntarily performed service under emergency conditions. A towerman reported ill unexpectedly and other relief was not immediately available without infraction of the Hours of Service Law. The chief dispatcher contacted Claimant to determine his willingness to work one shift and Claimant consented. Performance of the service was voluntary on Claimant's part. This Board has consistently followed the obviously sound rule that one who does a particular act voluntarily when he could decline to act without penalty has on claim to compensation under rules that provide for compensation to em-

ployes who are either "required" or "directed" or "instructed" to perform the act. Hence we will deny 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 Agreement was not violated by the Carrier.

AWARD

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 27th day of March 1970.

DISSENT TO AWARD 17791, DOCKET TE-17931

We believe the majority erred in several respects: Assumption that "Performance of the service was voluntary on Claimant's part" does not square with well known facts in the railroad industry. The Carrier Members, especially, know that in this industry which they have characterized as semi-military (Dissent to Award 8887) a request such as was made here has the effect of a command. In Award 15665, which was cited to the referee but ignored, the Board said:

> ". . . When a Carrier makes a request of one of its employes to return from his vacation, the dominant position of the Carrier over the employe's life infects the request with an element of coercion. . .".

Furthermore, such an assumption ignores the fact—equally well known—that an individual employe may not, by agreement, acquiescence, or otherwise modify or vary the terms of a collectively bargained agreement. Typical of Awards on this point is Award 14679 (Referee Dorsey):

> "Since no less an authority than the Supreme Court has held that terms of a collective bargaining agreement may not be evaded by the actions of an individual employe in concert with an employer, we are compelled to reject Carrier's defense that Claimants asked for the assignments with willingness to perform the work at the pro rata rate. **Order of Railroad Telegraphers v. Railway Express Agency, Inc.**, 321 U S 342; **J. I. Case Co. v. N. L. R. B.** 321 U.S. 332. The collective bargaining agent has the statutory duty to police and enforce the collective bargaining agreement."

Such an assumption also ignores an official interpretation of the Vacation Agreement itself. In Interpretations dated July 20, 1942, a copy of which was furnished the referee, the following question and answer appears:

"ARTICLE 5

"Question 1: May an employe at his option forego the taking of a vacation, remain at work and accept pay in lieu thereof?

"Answer: No."

As was pointed out to the referee, the only option given an employe is that provided by Article 11. The break in the vacation on June 1, 1967 in the present case, was not an Article 11 option.

The majority erred in misinterpreting the doctrine of estoppel, as applied in a number of Awards, by assuming that Claimant here could decline without penalty. Appearances to the contrary notwithstanding, we have seen too many "penalties" follow failure of employes to favorably respond to a Carrier suggestion that they agree to something to accept such an assumption. The Carrier Members' "semi-military industry" would have no compunction in dealing with such a situation.

Numerous Awards, cited to the referee, amounting to a respectable precedent, have decided cases essentially similar to the present one in accordance with the intent of the Agreement as above indicated: 6714, 11144, 12424, 15170, 15664, 15665, 15703 and 16324 (Claim 3). Even Awards 16335 and 16668, which denied the monetary claims on a tortured application of the estoppel theory, found a basic violation of the Vacation Agreement when employes were required or induced to work a part of their vacation periods under circumstances comparable to the present case.

Award 17791 also runs counter to another well known principle, so well stated in Award 13491:

> "The Board is a statutory body of limited jurisdiction. It may only interpret and apply collective bargaining agreements negotiated and executed by the disputants. It may not insert in such agreements its sense of equity or economic and labor relations predilections. Where the parties to an agreement, or one of them, find it wanting, recourse lies in the collective bargaining procedures prescribed in The Railway Labor Act."

Award 17791 fails to give effect to the controlling agreement and interpretations thereof, ignores applicable precedent and principles of law controlling the Board's function. It is clearly and palpably erroneous, and it should be treated as a nullity.

C. E. KIEF
Labor Member

CARRIER MEMBERS' ANSWER TO LABOR MEMBER'S DISSENT
TO AWARD 17791

DOCKET TE-17931—REFEREE QUINN

The Dissenter characterizes the Board's finding that performance of the service was voluntary on Claimant's part as an assumption that is contrary to "well known facts in the railroad industry"; and the balance of his dissent is largely dependent upon the correctness of that characterization. The unrefuted evidence of record, which was not even denied by the Claimant himself, proves that the performance of this service was indeed voluntary on Claimant's part. Thus, the dissent necessarily rests on the untenable theory that in the railroad industry there is a conclusive presumption that an employe does not accept such service voluntarily. Where the evidence is clearly to the contrary, such an arbitrary presumption would be contrary to the constitutional guarantee of due process. The fact that the referees serving on this Board have generally not attempted to exceed their jurisdiction and indulge in such an absurd presumption is plainly evidenced by the numerous awards of this Board denying claims involving voluntary service. Award 14338 (Bailer) and the awards cited therein.

The Dissenter's remarks about an option indicate that he fails to recognize the elementary distinction between an option (an enforceable right of election created by the contract) and a gratuitous privilege or opportunity. Claimant had no contract right to insist on working instead of taking a day of his vacation; but nothing in the contract prohibited him from accepting an opportunity to do so when such opportunity was gratuitously extended by Carrier.

While the Dissenter states that numerous awards have sustained claims in cases essentially similar to the present case, the fact is that most of the award to which he refers are clearly distinguishable in that the element of compulsion was present and the claimants objected to the service. Other awards he cites are erroneous, being contrary to the sound reasoning found in our correct awards. See recent Awards 16355 (Zack), 16668, 17737 (McGovern).

/s/ G. L. NAYLOR
G. L. Naylor

/s/ G. C. WHITE
G. C. White

/s/ R. E. BLACK
R. E. Black

/s/ P. C. CARTER
P. C. Carter

/s/ W. B. JONES
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