Award No. 18401
Docket No. TE-18747

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

John H. Dorsey, Referee

PARTIES TO DISPUTE:

TRANSPORTATION-COMMUNICATION DIVISION, BRAC

SOUTHERN PACIFIC TRANSPORTATION COMPANY (PACIFIC LINES)

STATEMENT OF CLAIM: Claim of the General Committee of the Transportation-Communication Division, BRAC, on the Southern Pacific Company (Pacific Lines), T-C 5727, that:

1. Carrier violated the Agreement between the parties when during the year 1965, it did not allow C. R. Longcor and K. M. Robblee their vacations and refused to compensate them for time worked in accordance with the Agreement.

2. Carrier shall be required to pay Claimants named in paragraph 1 above at the rate of time and one-half for the number of days to which they were entitled during the year 1965.

3. Carrier shall be required to reimburse Claimant Longcor, in the amount of $157.50, account said amount was improperly deducted from his wages and returned to the Railroad Retirement Board, which had been paid to Claimant Longcor, in the form of sick benefits during the calendar year 1965.

EMPLOYES' STATEMENT OF FACTS:

(a) STATEMENT OF THE CASE

The dispute involved herein is predicated on various provisions of the collective bargaining Agreement, entered into by the parties effective December 1, 1944 and understanding appertaining thereto. Claim was submitted to the proper officers of the Carriers, at the time and in the usual manner of handling, as required by Agreement rules and applicable provisions of law. The dispute was discussed in conference between representatives of the parties on August 6, 1969.

The controversy arose on March 22, 1966 when the Carrier's Superintendent disallowed the measure of compensation set out in the above Statement of Claim.

Employes contended in the handling on the property, and now contend before the Board, that certain provisions of the collective bargaining Agree-

rier's Exhibit "C"), Petitioner's District Chairman gave notice that the claim would be appealed.

By letter dated April 11, 1966 (Carrier's Exhibit "D"), Petitioner's General Chairman appealed the claim to Carrier's Assistant Manager of Personnel and by letter dated August 11, 1969 (Carrier's Exhibit "E"), the latter denied the claim.

(Exhibits not reproduced.)

OPINION OF BOARD: Carrier moves for dismissal of the Claim on the grounds that the Claim submitted to the Board is at variance with the one handled on the property. Our comparison of the claims supports a finding that the substance of each of them is the same. The gravamen of each is alleged violation of the Vacation Agreement. The compensation prayed for is incidental post a finding of contract violation. This Board can not award compensation in excess of that prayed for in the usual manner in the handling on the property. Finding no fatal variance, as argued by Carrier, the motion is **DENIED.**

I. THE FACTS

The dispute is as to whether the following undisputed facts support a finding of violation of the Vacation Agreement:

A. Claimant Longcor

Longcor, in accordance with established procedure for scheduling vacations, requested and was scheduled to be relieved for a vacation of 15 days from September 13, 1965 to October 1, 1965. Prior to that period he requested permission to postpone his vacation to an unspecified later period in the calendar year—permission was granted. Longcor thereafter having failed to make known to Carrier his desires and preferences as to a vacation period and with time running out in the calendar year, Carrier notified him that it had re-scheduled his vacation for the period December 13 to 21, at which time he would be relieved. Longcor requested permission to work the vacation period on the basis that Carrier would pay him in lieu of his vacation (8 hours per day at pro rata rate plus 8 hours at time and one-half)—the request was denied. Thereupon Longcor entered into an agreement with Carrier that he would work his scheduled vacation period at pro rata rate and Carrier would, in addition, pay him for 15 days—July 12 to 30, 1965—at pro rata rate, during which period he had been absent, because of illness. To recover sickness benefits allowed by the Railroad Retirement Board for the 15 days, Carrier deducted from the 15 days pay the amount of said benefits and refunded it to that Board. The parties are in disagreement as to the amount deducted but this can be readily ascertained from the records of Carrier or the Railroad Retirement Board.

B. Claimant Robblee

Robblee qualified for 10 days' vacation during the calendar year 1965. He had requested and was scheduled for vacation from February 15 to 26, 1965. He observed 6 days of his vacation and requested permission to postpone the remaining 4 days to a future unspecified time — permission was granted. Robblee not having made known to Carrier his desires and preferences for scheduling the 4 vacation days, Carrier informed him that it had scheduled

December 28 to 31, 1965 as his vacation days, at which he would be relieved. Robblee then requested Carrier to back date his vacation to cover dates he was not working earlier in the year, i.e., January 1, 2, 3 and 5, 1965, with pay at pro rata rate and to permit him to work December 28 to 31 at pro rata rate—Carrier agreed.

II. THE ISSUE

The ultimate issue is whether Claimants herein contractually required to take their vacations at the times scheduled in December 1965.

III RESOLUTION

A. The Merits

That the Claimants and Carrier agreed to the arrangements here involved is immaterial in our consideration of the dispute. Individual employes within a collective bargaining agreement may not in consort with an employer agree to digress from their respective obligations prescribed in the collective bargaining Agreement. Awards No. 4461, 13960, 14679, 15056, 16078, 16098 and 17235. It is mandated by the Railway Labor Act that it is the duty of all carriers and their employes (which includes their collective bargaining representatives) to maintain collective bargaining agreements concerning rates of pay, rules and working conditions. Section 2. First.

Pertinent Articles of the Vacation Agreement read:

> 4. (a) Vacations may be taken from January 1st to December 31st and due regard consistent with requirements of the service shall be given to the desires and preferences of the employes in seniority order when fixing the dates for their vacations.
>
> The local committee of each organization signatory hereto and the representatives of the Carrier will cooperate in assigning vacation dates.
>
> * * * * *
>
> **5. Each employe who is entitled to vacation shall take same at the time assigned,** and while it is intended that the vacation date designated will be adhered to so far as practicable, the management shall have the right **to defer** same provided the employe so affected is given as much advance notice as possible; not less than ten (10) days notice shall be given except when emergency conditions prevent. If it becomes necessary **to advance** the designated date, at least thirty (30) days' notice will be given the affected employe.
>
> If a Carrier finds that it cannot release an employe for a vacation during the calendar year **because of the requirements of the service,** then such employe shall be paid in lieu of the vacation allowance hereinafter provided. (Emphasis ours.)

The intended objective of the Vacation Agreement is sumed up in Referee Morse's Award of Interpretations of that instrument which issued on November 12, 1942:

* * * The important point for the parties to keep in mind is that the primary and controlling meaning of the first paragraph of Article 5 is that employes shall take their vacations as scheduled and that **vacations shall not be deferred or advanced by management except for good and sufficient reason, growing out of essential service requirements and demands.** (Emphasis ours.)

Article 5 of the Vacation Agreement, **supra,** vests Carrier with the right "to defer" or "advance" an employe's scheduled vacation period provided it gives the employe notice. But, in any event, the employe, contractually, must be given and must take his vacation during the calendar year except under the circumstances prescribed in the second paragraph of Article 5. That circumstance, Carrier admits, did not exist in this dispute. We find, therefore, that Carrier violated the Agreement when it acceded to Claimants unorthodox proposals.

B. Compensation

Carrier argues that Claimants can not be heard to complain since they agreed to the vacation pay renumeration they received and no one was adversely affected by the arrangement.

We hold no brief for Claimants. However, our function is to interpret and apply the Agreement and preserve its integrity. The Agreement is fruit of the collective bargaining process. Amendment of its terms are attainable only by recourse to the same process; not by an edict of this Board which does not find its essence in the contract in being. It is the terms ofthe Agreement which prevail; not this Board's personal predilictions of fairness.

We do note in this case that Carrier was prepared to relieve Claimants on their scheduled vacation days in December 1965. Certainly, the employes who would have worked in Claimants' assignments in their absence were adversely affected in that they were denied their contractual right to the work on those days.

Section 4 of Article I - Vacations of the National Agreement of August 21, 1954, provides:

> Effective January 1, 1955, Article 5 of the Vacation Agreement of December 17, 1941 is hereby amended by adding the following:
>
> > Such employe shall be paid the time and one-half rate for work performed during his vacation period in addition to his regular vacation pay.

Reading this together with the second paragraph of Article 5 of the Vacation Agreement, **supra** we find that Claimants rate of pay for work on each of their scheduled vacation days in December 1965 was 8 hours at pro rata rate plus 8 hours at time and one-half.

For the number of vacation days which each Claimant was scheduled to enjoy in December 1965, Carrier has paid each of them — with an exception covered, **infra**—8 hours pay at pro rata rate for a day not worked plus 8 hours of pay at pro rata rate for work on the scheduled December 1965, vacation days—a total of 16 hours at pro rata rate. For work on a vacation

day each Claimant was contractually entitled to a total of 20 hours at pro rata rate. We find that Claimants will be made whole and the requirements of the Vacation Agreement satisfied by Carrier now paying each Claimant an additional 4 hours at pro rata rate for the respective number of days involved; and, we shall so award. To fulfill this make whole formula Carrier will also pay to Claimant Longcor the amount it withheld from his pay and turned over to the Railroad Retirement Board, said amount being readily ascertainable.

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 Carrier violated the Agreement.

AWARD

Claim sustained with compensation to each Claimant to the extent prescribed in the Opinion, **supra.**

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 19th day of February 1971.

CARRIER MEMBERS' DISSENT TO AWARD 18401, DOCKET TE-18747
(Referee Dorsey)

A careful study of all the rules cited as justification for sustaining this claim discloses that not one of them prohibits Carrier from acceding to the request of an employe to advance the employe's vacation dates. The rules cited deal with advancing or deferring vacations at the insistance of Carrier and they impose requirements of notice to the employe. The binding interpretation of these vacation rules made by Referee Morse which is cited with emphasis in the award, states that a vacation shall not be deferred or advanced by **management** except for good and sufficient reasons. Here again, it is clear that the restriction is on unilateral action of management.

We believe one must go far beyond the manifest purpose of these rules and the interpretation thereof by Referee Morse in order to say that they prohibit an employe who has unavoidably lost time before the scheduled date of his vacation from having his vacation rescheduled so that it falls within

that period of lost time, thereby enabling himself to more nearly maintain full employment. In this case we are concerned only with interests of the Claimants. When one recognizes that the Claimants were the instigators of the action taken, that they had no right to the work, that others were available who could have filled the positions at the regular rate, and that the sole objective of Carrier in acquiescing in the requests of Claimants was as an accommodation to them, it becomes apparent that there is no basis in the agreement nor in law for enriching the Claimants at the expense of Carrier for what was done.

We respectfully direct attention to our prior awards unholding rights of employes and carriers to agree on changes in the scheduled dates of the employes' vacations, many of which were cited to the Referee during the panel discussion of this case. Note especially Award 16747 (Zack). The action taken by Carrier was not in conflict with any rule of the agreement and no right of any employe under the agreement was violated.

For these and other reasons, we dissent.

G. L. Naylor

R. E. Black

W. B. Jones

P. C. Carter

H. F. M. Braidwood

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