NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Award Number 19859
Docket Number SG-19582

Frederick R. Blackwell, Referee

PARTIES TO DISPUTE: (Brotherhood of Railroad Signalmen
(
(Norfolk and Western Railway Company

STATEMENT OF CLAIM: Claim of the Virginian General Committee of the Brotherhood of Railroad Signalmen on the Norfolk and Western Railway Company that:

(a) Carrier violated the Agreement dated September 15, 1966, particularly Section 2 (a), when Signal Maintainer G. H. Lewis was improperly compensated (less than his monthly guaranteed rate) for the month of January, 1970.

(b) Carrier should now be required to pay Signal Maintainer G. H. Lewis seven (7) hours overtime at punitive rate, or $39.73.

OPINION OF BOARD: Claimant is covered by a protective allowance agreement resulting from a railroad merger and entitled Implementing Agreement between the parties effective September 15, 1966. The dispute here arises because, for the month of January 1970, in which claimant took five days vacation, the Carrier made a deduction from claimant's protective allowance on account of seven hours of casual overtime worked by claimant's vacation relief. The claim is for compensation for the deduction. Carrier asserts that the matter is not properly before the Board, that it is barred by time limits, and that it should be denied on the merits.

Carrier's first contention is that this dispute should have been adjudicated by an arbitration committee under procedures designed for resolution of controversies arising under the merger agreements on this property. The basis for this position is the language of Section 1 (d) of Merger Agreement dated January 10, 1962, which, in pertinent part, reads as follows:

> "In the event any dispute or controversy arises *** with respect to the interpretation or application of any provision of this Agreement *** or of any implementing agreement *** pertaining to said merger or related transactions, which cannot be settled *** within thirty days after the dispute arises, such dispute may be referred by either party to an arbitration committee for consideration and determination. Upon notice in writing served by one party on the other of the intent by that party to refer the dispute or controversy to an arbitration committee, each party shall, within ten days, select one member of the arbitration committee and the two members thus chosen shall endeavor to select a third member who shall serve as chairman ****. Should the two members be unable to agree upon the appointment of the third member within ten days, either party may request the National Mediation Board to appoint the third member ***." (Emphasis supplied)

The contention discussed here has been previously urged upon this Board in Award No. 17229, which involved this same Carrier and the identical agreement provisions set out in the foregoing quotation. In ruling adversely to Carrier in that Award, this Board stated that:

> "It is clearly seen that the word 'may' is used in said Section 1(d) of said January 10, 1962 Agreement, thus making it voluntary rather than mandatory for a party to use the grievance machinery so provided for in said clause. Therefore, inasmuch as the Organization elected to have this claim decided by this Board, we have jurisdiction to hear this dispute."

In a later ruling on the same contention and similar language in Award No. 18071, this Board again held that the use of the term "may" rendered the provisions permissive so as to allow the Organization to elect to have this Board adjudicate a controversy. In the record before us here, we find no reason to depart from these prior awards and we therefore conclude that we have jurisdiction to consider the claim.

Carrier's time limit defense results from its granting an extension of time which it says was for the purpose of the Organization considering and conferring on certain proposals. The Organization did not confer and, for that reason, the Carrier says the extension is void, thus placing the Organization in violation of the time limit provisions. The document upon which Carrier relies to support this argument does show that the extension was granted for the Organization to have "an opportunity to consider" certain proposals; however, the document says nothing about an obligation to confer on the proposals and, hence, we conclude that the time limit defense is without merit.

With regard to the merits, both parties agree that the dispute is controlled by the Implementing Agreement between the parties effective September 15, 1966. This Agreement provides for each covered employee to have a base month for each calendar month of the base year 1961. Instead of prescribing average monthly test periods, the agreement was geared to the conditions and work habits which prevailed for each individual employee during each month of the base year. Thus, the number of hours worked by a particular employee in a base month, say 200, became the protected number of hours for the corresponding month in any subsequent year. The parties also agree that the pertinent part of the Implementing Agreement is the language in Section 2(a) which reads as follows:

> "2. The Carrier shall furnish lists of employes entitled to preservation of employment to the General Chairman of the Brotherhood as soon as possible:
>
> (a) - One set of lists will consist of employes who, on January 10, 1962, held regularly assigned positions and will be furnished in the form specified in Attachment 'A' appended hereto. The base period for such employes will be the calendar Year 1961, and the total compensation and total time paid for by months, during the base period (adjusted to include subsequent

"wage increases) will be used as hereinafter set forth to determine whether, or to what extent, such an employe has been placed in a worse position with respect to his compensation. When claim is filed by or on behalf of such an employe in the form attached hereto as Attachment 'C', within thirty (30) days following the end of the month for which claim is filed, the month for which the claim is filed will be compared with the corresponding month in his base period (adjusted on the basis of hours paid for in that specific month to include subsequent general wage increases), and if his compensation in the month for which claim is filed is less than his upgraded compensation in the corresponding base period month, he will be paid the difference, less compensation for any time lost on account of voluntary absences to the extent he is not available for service. However, compensation deducted for time lost by an employe who was not available for overtime service shall not be considered or used in arriving at the total compensation and total time paid for of the employe who did perform such service in the month in which it occurred." (Emphasis supplied)

We now come to the narrow issue of whether a vacation absence is a voluntary absence within the meaning of the underlined language in the foregoing quotation. Carrier says that a vacation is a voluntary absence by which the vacationing employee makes himself not available for service. From this premise it follows that casual overtime worked by the vacation relief is properly deductible from the vacationing employee's protective allowance covering the vacation period. The Petitioner says that a vacation is not a voluntary absence in the present context and that the deductions were improper.

The essence of Carrier's argument that a vacation is a voluntary absence is found in its June 8, 1970 letter to the General Chairman which stated that:

"You further state, 'The act of being on vacation is not an act of voluntary absence ***.' We take exception to such statement since the vacation agreement was established through actions which were voluntarily initiated by, or on behalf of, the employees themselves and it was as a direct result of such voluntary actions that Lewis was entitled to said vacation.

"Then, too, since the vacation agreements existed during the 'test period' years, as well as on the dates the Implementing Agreement was being negotiated, it cannot be logically argued that the granting of a vacation places an employee 'in a worse position with respect to compensation.'"

This argument was further buttressed by dictionary definitions of "voluntary" and "absence" in Carrier's submission and by the statement that claimant "voluntarily, intentionally, deliberately and willfully absented himself of his own volition by requesting that he be permitted to schedule vacation." Carrier also asserted that other classifications of employees on this property have long ago abandoned Petitioner's position and made reference to the following provision from its Agreement with the UTU effective January 1, 1970:

> "2. In the processing of a merger connected claim for a road brakeman or yardman for a month in which all or any portion of vacation is involved, neither vacation days involved nor compensation for such vacation days will be considered. The employe's 'Test Period' will be prorated to the number of days in such month, excluding the vacation days involved."

And finally, Carrier cited the following from Special Adjustment Board No. 774, Case No. 2, which found favorably to Carrier on the question of making vacation deductions from displacement allowances:

> "The Question
>
> "The question, as jointly stipulated by the parties, reads: 'Does the January 10, 1962 agreement or any implementing agreement permit the Carrier to reduce the guarantee of an employee the difference between his daily pay on vacation and what he could have earned had he not been on paid vacation a portion of the month?'
>
> "Discussion and Findings
>
> "On the basis of the entire record the Board finds as follows:
>
> (1) Paragraph 1 of the Memorandum of Understanding, effective January 10, 1962, provides:
>
> * * * * * * * * * * * * * * * *
>
> (b) It was further agreed that any compensation whatsoever (including vacation pay, arbitraries, pay for time lost, etc.) received from the Railway Company, but excluding payments made on account of personal injuries when such payments are for reasons other than time lost, would be used to reduce the amount of displacement allowances due any employe.
>
> (2) It is crystal clear from Note (b) that the Carrier had the right to make the relevant vacation deductions in calculating displacement allowances.

"Award

The question is answered in the affirmative."

For its part the Petitioner asserts that neither claimant nor any other employee has the option to forego his vacation period and continue on his assignment during his vacation. Only the Carrier is afforded an option in this respect. Thus, unless the employee's vacation period is cancelled or postponed by the Carrier, the employee is required to take his vacation as scheduled. Petitioner also notes that compensation for casual overtime performed on the assignment of a vacationing employee was not included in such employee's base month for the base year 1961 and, consequently, Carrier's deduction action amounts to taking something away from claimant which it never afforded him in the first place.

From our study of the foregoing, and the whole record, it becomes apparent that Carrier considers it unfair, for purposes of paying protective allowances, to be required to compare a base month of 1961, during which the employee took no vacation, with a subsequent year's corresponding month which includes a vacation period. From a practical viewpoint, we recognize that Carrier has no convenient method for having employee vacations fall in the same month, year after year, or otherwise arranging for vacations to have a more equitable impact under the protective allowance provisions. We observe that, apparently, the operating organizations have also recognized this element of equity, for the above cited UTU Agreement, effective January 1, 1970, appears to provide for vacation deductions. Nonetheless, our function is to interpret the Agreement of the parties as written and, in this context, we are not persuaded by Carrier's arguments that a vacation absence is voluntary within the meaning and intent of the written provisions in Section 2(a) of the Implementing Agreement effective September 15, 1966. From a careful study of all material in the record, we conclude that the term "voluntary absence" in Section 2(a)means an absence which the employee has an option to prevent. In such a case there is no doubt that the intent of Section 2 (a) is to reduce the employee's protective allowance because of his unavailability for work. But the vacationing employee stands on a different footing. In this case the employee does take the initiative on the timing of his vacation, and possibly other factors, so that, in a general sense, his action represents voluntary action; however, the employee has no option to take a vacation, or to remain at work if he so chooses and, consequently, we think it cannot be said that a vacation is a voluntary absence within the meaning of Section 2 (a). Nor do we believe that this dispute is resolved in Carrier's favor by Special Adjustment Board No. 774, Case 2. The Agreement language considered in that case clearly supported the vacation deductions in issue, but that particular language has not been presented in this dispute. Moreover, we observe that the agreement language involved in that case, as well as the language in the UTU Agreement, effective January 1, 1970, clearly and unambiguously provides for vacation deductions. However, no such language is contained in the agreement under consideration here, the Implementing Agreement effective September 15, 1966, and this Board is not empowered to add to or otherwise rewrite the Implementing Agreement between the parties. We shall therefore 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 Agreement was violated.

A W A R D

Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: A.W. Paulos
Executive Secretary

Dated at Chicago, Illinois, this 27th day of July 1973.