NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Award Number 20326
Docket Number CL-20319

Frederick R. Blackwell, Referee

PARTIES TO DISPUTE: (Brotherhood of Railway, Airline and Steamship Clerks, Freight Handlers, Express and Station Employes
(Kansas City Terminal Railway Company

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood (GL-7392) that:

1. The Carrier violated Article 5 of the National Vacation Agreement when it arbitrarily deferred the assigned vacation dates of Claimant Rodd M. Anthony without any advance notice and without cause, and

2. The Carrier further violated Article 7 of the Vacation Agreement when it failed and refused to properly compensate Claimant for the 10 days vacation to which entitled.

3. That Carrier be now required to pay Claimant the difference between what he was allowed ($10.48 per day - total $104.80) and that to which entitled ($33.4889 per day - total $334.89) for the 10 days vacation period due.

OPINION OF BOARD: The issue here is whether the Claimant's ten days of earned vacation was properly computed. The facts are not in dispute. On December 17, 1971, while assigned to Call Board No. 2 as an Extra Board Mail Handler, the Claimant was involved in an incident which caused him to sustain an on-the-job injury. As a result, he left work early, and received credited compensation of $10.48 for two and one-half hours of work on that date. The incident also resulted in his receiving a disciplinary suspension for the period January 18 to February 17, 1972, which period conflicted with his previously assigned ten day vacation scheduled for February 2 to 6 and February 9 to 13, 1972. After being found physically fit for duty on February 21, his vacation was reassigned for the period February 23 to March 5, 1972. He subsequently received vacation pay of $104.80. (This figure was arrived at by Carrier's computation of vacation pay based on his actual earnings during the last pay period preceeding his vacation, rather than on the rate of the position he worked during such period. And since he worked only part of one day during such period, two and one-half hours on December 17 , the Carrier divided one day into the wages for that fraction of a day, $10.48, and multipled such wages by ten days of earned vacation.) After vacation, the Claimant remained on sick leave status from March 6 through October 5, 1972, except for two days (March 20 & 21) of work on Call Board No. 2. Prior to his vacation, the Claimant's position was not advertised or reassigned and his name was retained on the Call Board.

The Employee's contend that the Carrier violated Article 5 of the National Vacation Agreement by deferring the Claimant's vacation without cause and without advance notice, and that the Carrier violated Article 7 of such agreement by improperly computing the Claimant's vacation pay.

The pertinent agreement provisions from Articles 5 and 7 of the Vacation read as follows:

> "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 affected employe.
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> 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 the allowance hereinafter provided.
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> 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.
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> NOTE: This provision does not supersede provisions of the individual collective agreements that require payment of double time under specified conditions."

> "7. Allowances for each day for which an employe is entitled to a vacation with pay will be calculated on the following basis:
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> (a) An employe having a regular assignment will be paid while on vacation the daily compensation paid by the carrier for such assignment.
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> (b) An employe paid a daily rate to cover all services rendered, including overtime, shall have no deduction made from his established daily rate on account of vacation allowances made pursuant to this agreement.

"(c) An employe paid a weekly or monthly rate shall have no deduction made from his compensation on account of vacation allowances made pursuant to this agreement.

(d) An employe working on a piece-work or tonnage basis will be paid on the basis of the average earnings per day for the last two semi-monthly periods preceding the vacation, during which two periods such employe worked on as many as sixteen (16) different days.

(e) An employe not covered by paragraphs (a), (b), (c), or (d) of this section will be paid on the basis of the average daily straight time compensation earned in the last pay period preceding the vacation during which he performed service."

In their discussion of Article 5, both parties refer to, and dispute one another's version of, the pre-existing policy or past practice for handling conflicts between a vacation period and a suspension period. However, the evidence before us does not establish either parties position in regard to past policy or practice and, consequently, we must appraise the Carrier's deferment action by the facts at hand. The sole reason for the deferment of the Claimant's vacation was to avoid the conflict which arose because the suspension fell in the same period as a previously assigned vacation. Obviously, if the Claimant's vacation were permitted to run coincident with the suspension, the vacation would effectively cancel out and defeat the purpose of the suspension. Vacation deferment was therefore essential to the enforcement of the suspension and, hence, the Carrier's deferment action cannot be said to be "without cause" under Article 5. On the question of notice, the Carrier submission relied primarily upon its assertions concerning past practice, which, as previously noted, are not susceptible to concrete findings on the evidence before us. The Carrier also suggests that the notice of suspension constituted actual notice of the deferment of vacation and, thus, the Article 5 requirement of "advance notice" has been met. However, without contradiction, the Employees' Submission states that the Claimant "had no knowledge of the change in dates until he attempted to pick up his vacation pay on February 25, 1972, the date he would have normally been paid for his assigned dates." In view of this fact, there is no basis on which to conclude that the suspension notice constituted actual notice within the meaning of Article 5; we therefore conclude that the Carrier violated the notice provisions of that Article. We note, though, that this part of the claim makes no reference to or request for compensation and, thus, a compensatory award is not in order.

With respect to the computation of vacation pay, the Employees contend that the Claimant was an employee "having a regular assignment" within the meaning of Article 7 (a) and, in consequence, the Carrier should have paid him "while on vacation the daily compensation paid by the Carrier for such assignment." This would amount to $33.4889 per day (Mail Handler's daily rate) for a total of $334.892, in contrast to Carrier's payment for ten days at $10.48 per day for a total of $104.80. The Employees also contend that the higher rate should obtain even if the situation is governed by Article 7 (e), as the Carrier asserts. In support of its argument concerning Article 7 (a), the Employees point to the Memorandum Agreement of January 31, 1967, and other evidence, as showing that the Claimant's position as an Extra Board assignee gives him the status of being "regularly assigned" and therefore subject to Article 7 (a) of the Vacation Agreement. Assuming this to be so, the question still remains of whether this status continued to exist during the pre-vacation period while he was on sick leave and under disciplinary suspension. Award Nos. 18255 and 18914 have ruled on similar facts' involving regularly assigned MofW foremen who had been on sick leave prior to vacation. In each instance the foreman was determined not to have had a regular assignment while on leave of absence due to sickness and, therefore, this Board found that Article 7 (e) was applicable. The foreman vacancies in these prior Awards were bulletined, whereas the Extra Board vacancy in the instant case was not; however, since there are a number of Extra Board positions, rather than just one as in a foreman's situation, and since the retention of Claimant's name on the Board appears to have been a record-keeping function, the present issues are not significantly different from the issues in the prior Awards. Also, we have here the additional element of a disciplinary suspension in combination with sickness. Consequently, and since we do not find them to be palpably erroneous, we shall accept Award Nos. 18255 and 18914 as determinative that the Claimant did not have regularly assigned status during his vacation. We also disagree with the Employees' contention that the Mail Handlers' rate of pay was the proper basis for computing vacation pay even if Article 7 (e) is applicable. On this point the Employees say that use of the words "basis" and "daily" in the text of Article 7 (e) requires the text to be interpreted as meaning the daily rate of the position worked during the qualifying pay period. Absent this interpretation, situations involving fractional days of work will result in serious inequities not intended by the parties signatory to the Vacation Agreement. For example, an employee who worked one full 8 hour day would receive more vacation pay than one who worked 11 1/2 days; also, an employee who worked only 30 minutes, and then became ill, would receive an extremely small sum for vacation pay. In arguing their point on Article 7 (e), the Employees refer to past practice of 15 years as having used the "daily rate" in situations such as the one here; however, the record is barren of evidence concerning such past practice and we must therefore render a decision on the meaning of Article 7 (e) in accordance with the ordinary rules of construction. The text of Article 7 (e) is written in

clear, straightforward language. It does not refer to a daily or hourly rate, either expressly or impliedly, or otherwise indicate that the vacation pay of an employee governed by its terms is to be based on any factor other than the average daily straight time compensation earned in the pay period preceeding the employee's vacation. The Awards cited by the Employees do not control. In these Awards, Nos. 14351, 15571, 15600 and 15570, the issue involved was whether an employee who worked a monthly rated, 6 days per week, position during the pertinent pay period, was entitled to have vacation pay computed on a 5 or 6 day week. In ruling that a 6 day work week was the proper basis, this Board made reference to Article 7 (e) vacation pay as being "predicated on the work week and rates of pay of the position worked." This reference was appropriate in the context of these prior Awards, because Article 7 (e) was under review in conjunction with Section 1 (d) of the Vacation Agreement which speaks explicitly of vacations for "weekly and monthly rated employees'". Here, however, we are concerned solely with the text of Article 7 (e); section 1 (d) of the Agreement is not involved and, thus, the cited Awards are not apropos.

In view of the foregoing we shall deny paragraphs 2 and 3 of the claim, and sustain, in part, paragraph 1 of the claim. Because of the basis of our decision, it has not been necessary to determine whether an employee assigned to the Call Board is regularly assigned. Likewise, since the claim as presented does not raise an issue on the propriety of Carrier's action in reassigning the Claimant's vacation dates, it has not been necessary to discuss or determine this aspect of the facts.

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

The Carrier violated the notice provisions of Article 5 of the Vacation Agreement.

A W A R D

The part of paragraph 1 of the claim, which asserts a Carrier violation of the notice provisions of Article 5 of the Vacation Agreement, is sustained. In all other respects, the claim is denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: A. W. Paulos
Executive Secretary

Dated at Chicago, Illinois, this 31st day of July, 1974.