NATIONAL RAILROAD ADJUSTMENT BOARD

Award Number 21221

THIRD DIVISION Docket Number MW-20215

Irwin M. Lieberman, Referee

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employes
(
(Chicago, Milwaukee, St. Paul and Pacific Railroad Company

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood that:

(1) The Carrier violated the Agreement when it failed and refused to allow Extra Gang Laborer Loyd Berry ten days of paid vacation in 1971 (System File D-1721/Grievance File No. 3).

(2) Loyd Berry be allowed five days' pay because of the aforesaid violation.

OPINION OF BOARD: Claimant worked as an extra gang laborer on System Extra Gangs in 1969, 1970 and 1971. He worked from March 17 until October 6, 1969 when he was laid off; he was rehired April 4, 1970 and worked until December 1970 when he was terminated; he was rehired on May 10, 1971 and worked until December 18, 1971. Carrier granted Claimant five days of vacation pay in 1972 and Petitioner alleges he should have been given ten days of vacation.

Petitioner relies on Section 1(b) of Article II of the May 17, 1968 National Agreement, which provides:

> "(b) Effective with the calendar year 1968, an annual vacation of ten (10) consecutive work days with pay will be granted to each employee covered by this Agreement who renders compensated service on not less than one hundred ten (110) days during the preceding calendar year and has two (2) or more years of continuous service and who, during such period of continuous service renders compensated service on not less than one hundred ten (110) days (133 days in the years 1950-1959 inclusive, 151 days in 1949 and 160 days in each of such years prior to 1949) in each of two (2) of such years, not necessarily consecutive.
>
> In all other respects amended Article I of the Vacation Agreement of December 17, 1941, as contained in Section 1 of Article II of the Agreement of January 13, 1967, is continued in effect."

Carrier, however, bases its position on paragraphs (a) and (i) of Article 1, Section 1 of the Vacation Agreement, which read:

"(a) Effective with the calendar year 1965, an annual vacation of five (5) consecutive work days with pay will be granted to each employee covered by this Agreement who renders compensated service on not less than one hundred twenty (120) days during the preceding calendar year."

* * * * * * *

(i) An employee who is laid off and has no seniority date and no rights to accumulate seniority, who renders compensated service on not less than one hundred twenty (120) days in a calendar year and who returns to service in the following year for the same carrier will be granted the vacation in the year of his return. In the event such an employee does not return to service in the following year for the same carrier he will be compensated in lieu of the vacation he has qualified for provided he files written request therefor to his employing officer, a copy of such request to be furnished to his local or general chairman."

The resolution of this dispute rests on whether or not claimant had two or more years of continuous service as required by Section 1(b) above. The record is quite clear that Claimant had no seniority rights and no right to be recalled; the fact that he was indeed called back to service in 1970, 1971 and 1972 does not establish the fact of a right or seniority. Rule 2(a) of the schedule agreement provides:

"(a) Except as otherwise provided for in these rules, seniority begins at the time an employe's pay starts as of last entry into service. This does not apply to extra gang laborers who will not establish seniority rights until after they have been in continuous service for a period of nine (9) months."

Claimant never worked for Carrier for a continuous period of nine months at any time, which was required to establish seniority: he was a temporary seasonal employe only.

It is quite apparent that this dispute could be resolved one way based on equity and quite differently based on the rules. This Board's authority, however, is restricted to only construe the rules as agreed to and drafted by the parties. Hence, Claimant is entitled to vacation only in accordance with Section 1 (a) of the Vacation Agreement, as amended.

FINDINGS: The Third Division of the Adjustment Board, after giving the parties to this dispute due notice of hearing thereon, and upon the whole record and all the evidence, finds and holds:

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.

A W A R D

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: A. W. Paulos
Executive Secretary

Dated at Chicago, Illinois, this 31st day of August 1976.