NATIONAL RAILROAD ADJUSTMENT BOARD

Award Number 22478
THIRD DIVISION Docket Number CL-22381

Abraham Weiss, Referee

PARTIES TO DISPUTE: (Brotherhood of Railway, Airline and Steamship Clerks, Freight Handlers, Express and Station Employes
(Bangor and Aroostook Railroad Company

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood (GL-8488) that:

1. Carrier violated the National Vacation Agreement, specifically Section 3, and its application in Carrier's General Office, in refusing to allow Claimant Donald Breen, Lead Clerk, Bangor and Aroostook Railroad Company, Northern Maine Junction Park, RR 2, Bangor, Maine, one (1) week's vacation on his Anniversary Date.

2. Claimant Donald Breen shall now be compensated an additional five (5) days' pay for the week of August 6th through the 12th, 1976.

OPINION OF BOARD: Petitioner alleges that Carrier was in violation of Article 3 of the National Nonoperating Vacation Agreement of December 17, 1941 by refusing, in 1976, to grant Claimant, a clerical employe in its Accounting Department, an additional week's vacation based on Claimant's anniversary date rather than on the basis of calendar year service. Article 3 reads:

> "The terms of this Agreement shall not be construed to deprive any employe of such additional vacation days as he may be entitled to receive under any existing rule, understanding or custom which additional vacation days shall be accorded under and in accordance with the terms of such existing rule, understanding or custom:

Petitioner argues that for many years, the Accounting Department, in which Claimant was employed, based vacation entitlement on an employe's anniversary date. Accordingly, it reasons, the Carrier's policy for so long a period of time constituted a "custom" which Article 3 was designed to preserve. Petitioner adds that Carrier has

at no time denied the existence of such custom or practice but that in 1973 Carrier unilaterally changed the practice from alloting vacations in the Accounting Department from an employe's anniversary date to a calendar year basis.

In the handling of the claim on the property, the Employes cited Third Division Award 16688 (Dugan) which reads in pertinent part as follows:

> "There is no question that by past practice Carrier has used the Anniversary Date of an Employe's employment as the basis for computing an employe's qualification for vacation time during the first three years of said employe's employment. And in fact, Carrier allowed eight employes vacation time based on their 'Anniversary Date' of 15 years service with the Company. (Carrier attempts to excuse the allotment of these 15 days vacation time to said eight employes on the grounds that this was done without the knowledge or sanction of Carrier's Director of Personnel, even though six of said eight employes were allocated said vacation time in 1962 and 1963).
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> "Therefore, we are of the opinion that by past practice Carrier has used the 'Anniversary Date' for computing an employe's vacation allowance and Article 3 of the 1941 National Vacation Agreement as amended preserves this custom. Thus, Claimant is in this instance entitled to the additional five days vacation pay claimed.
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> "In view of the foregoing, the claim will be sustained."

Carrier's position in denying the claim is that the 1941 National Nonoperating Vacation Agreement restricts qualifying periods to each calendar year for establishing vacation eligibility and that Claimant "did not have sufficient qualifying years of continuous service and compensated service as of January 1, 1976"; that no agreement existed on the property before 1941; that neither the

first (1945) agreement on the property nor the subsequent (1949) agreement contained any exceptions to the vacation qualifications set forth in the National Vacation Agreement; that the Accounting Department (and no other), by mistake, applied the vacation qualification criteria of the National Operating Vacation Agreement, which are based on "service years" rather than calendar years in determining the length of an employe's vacation; and that paragraph 1(d) of Addendum #4, synthesis of the National Vacation Agreement between the parties, provided that:

> "Effective with the calendar year 1973, an annual vacation of twenty (20) 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 (100) days during the preceding calendar year and who has twenty (20) or more years of continuous service and who, during such period of continuous service renders compensated service on not less than one hundred (100) 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 twenty (20) of such years, not necessarily consecutive."

Carrier also asserts that Referee Morse's interpretation of the National Nonoperating Vacation Agreement rules, insofar as they preserve existing customs (or practices) was based on practices in effect prior to December 17, 1941, whereas the Accounting Department's mis-interpretation of that Agreement took place subsequent to 1941. Hence, Carrier states, Referee Morse's interpretation is not applicable to the instant claim. Moreover, Carrier adds, the instant case is distinguishable from the situation covered by Award 16688, relied upon by Petitioner, inasmuch as in that case, there was an existing Agreement (and vacation practices) in effect prior to the 1941 National Vacation Agreement.

We agree with Petitioner's assertion that Article 3 of the 1941 National Vacation Agreement was designed to preserve existing customs or practices presumably more favorable then those provided in the 1941 vacation agreement. Article 3 refers to an "existing rule, understanding or custom" (underlining added) which is to preserve for employes affected "additional vacation days" beyond that provided for in the 1941 National Vacation Agreement.

The question before us is whether there was, on this property, an "existing /vacation/ rule, understanding or custom" to be preserved in accordance with Article 3. On this point, Petitioner has failed to bear the burden of proof. The record is barren of any evidence that a vacation plan or policy was in effect for employes of the Accounting Department prior to the effective date of the 1941 National Vacation Agreement, or if there were such a plan or policy, whether vacations were based on service (anniversary) years or calendar years.

Carrier's statement in its Ex Parte Submission that "the terms of the National Vacation Agreement were adopted by the parties to this dispute and there was no existing rule, practice or understanding predating December 17, 1941 in effect on this property" was not rebutted by Petitioner.

While alleging past practice or custom in granting vacations based on an employe's anniversary date, Petitoner has not demonstrated that such custom predated the 1941 National Nonoperating Vacation Agreement, or, for that matter, the parties' first working agreement or the August 21, 1954 Amendment of the 1941 Vacation Agreement. Petitioner has furnished no probative evidence concerning pre-1941 vacation practices, policies, or customs on this property or at the company's Accounting Department.

We find that Award 16688 is distinguishable in that in that case there was a pre-1941 vacation plan which assigned vacations on an anniversary date basis. This is not the situation in the case before us.

Third Division Awards 13140 and 21594, cited to us by the Labor Member during panel discussion before the Referee, are also based on fact situations distinguishable from the instant case.

Carrier cites a number of Awards which hold, in essence, that practice may not supersede clear and express language of an applicable agreement, or that, conversely, "the unequivocal language of the agreement must generally prevail over contrary custom or practice." (First Division Award 20540, Referee Anrod). The 1941 Vacation Agreement as amended and as interpreted clearly provides for the calculation of vacation credits on the basis of calendar years. No evidence has been submitted to confirm the existence of a contrary practice or

custom in effect prior to 1941. Inasmuch as no proof has been submitted by Petitioner that prior to 1941 vacations were granted on the basis of an employe's anniversary date, we must 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

The Agreement was not violated.

A W A R D

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: A.W. Paulus
Executive Secretary

Dated at Chicago, Illinois, this 31st day of July 1979.