NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Form 1

Award No. 29659
Docket No. MW-29641
93-3-90-3-632

The Third Division consisted of the regular members and in addition Referee Herbert L. Marx, Jr. when award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employes
(
(CSX Transportation, Inc. (former Seaboard
(System Railroad)

STATEMENT OF CLAIM:

"Claim of the System Committee of the Brotherhood that:

(1) The Carrier violated the Agreement when it refused to allow Maintenance of Way employee, Mr. W. Woods to take his requested fifteen (15) days' vacation Mr. R. Woods to take his requested fifteen (15) days' vacation from December 11, 1989 through December 15, 1989, for which he qualified in 1988 [System Files 89-67/12(90-94) and 89-67A/12 (90-95) SSY].

(2) As a consequence of the aforesaid violations, the Carrier shall compensate Mr. R. Woods twenty (20) days' pay at his time and one-half rate."

FINDINGS:

The Third Division of the Adjustment Board, upon the whole record and all the evidence, finds that:

The carrier or carriers and the employe or employes involved in this dispute are respectively carrier and employe within the meaning of the Railway Labor Act as approved June 21, 1934.

This Division of the Adjustment Board has jurisdiction over the dispute involved herein.

Parties to said dispute waived right of appearance at hearing thereon.

This dispute revisits the well trod ground of the eligibility for vacation of a protected employee who performs no work or insufficient work in the calendar year prior to the year in which vacation is requested. Here, the Claimant is an employee who would unquestionably be entitled to 20 days' vacation in 1989 if he had worked the requisite number of days in 1988.

The Claimant is a protected employee under the so-called "Orange Book" Agreement as a result of the Seaboard-Atlantic Coast Line merger. Section 2 (a) of the Orange Book includes the following familiar protection language:

> "None of the present employees . . . shall be deprived of employment or placed in a worse position with respect to compensation, rules, working conditions, fringe benefits or rights and privileges pertaining thereto at any time during such employment."

The Claimant was furloughed from late 1987 through 1988. During this period he received protective pay benefits. He was recalled to work in January 1989, at which time he had 24 years of continuous service. The National Vacation Agreement provides in Article III as follows:

> "(d) Effective with the calendar year 1982, 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..." [plus other conditions not in dispute here].

In simplest terms, the Organization argues that the compensation received by the Claimant for all of 1988 is sufficient to make the Claimant eligible for 20 days' vacation in 1989, while the Carrier argues that the Claimant did not meet the requirement of an employee "who renders compensated service" in 1988 and thus is not eligible for vacation in 1989. Both parties offer extensive background argument which has been presented many times in other disputes. Among other Awards, the Organization relies on Third Division Awards 16844, 18316, 18385, and 21336, which will be reviewed below. Among the Carrier's references to past Awards is recent Third Division Award 28655.

The Board is specifically required by the statement of the Claim to determine if "the Agreement" (i.e., the vacation provisions of the Agreement between the parties) has been violated by the Carrier's determination. The Board will find that there has been no such violation.

The meaning of "renders compensated service" was settled long ago by Question No. 2 of the Interpretation and Application of the Vacation Agreement by Referee Wayne L. Morse. This stated, following extensive explanation, as follows:

> "It is a well-recognized doctrine of contract construction that when such an ambiguity arises, the words in dispute are to be used in light of their ordinary and common-usage meaning, and not in any technical or trade sense unless the surrounding facts and circumstances make clear that the parties intended the words to be applied in a technical or trade-usage sense. In this instance the common and ordinary meaning of the words 'renders compensated service' permits of only one interpretation; namely, that it was intended that an employee should be required to perform or render service or work for which he was compensated on not less than 160 days during the preceding calendar year before he would become eligible for a vacation subject to the exemptions discussed later" [and not relevant here].

Except as to the number of qualifying days and changes as to illness, injury and military service, the Board finds no basis to conclude that this definitive answer is currently inapplicable.

The Claimant herein was "compensated" for 1988, but he unequivocally did not "perform or render service or work." Thus, he does not qualify for vacation in 1989. Award 28655 involves the same Carrier although not an employee covered under the Orange Book Agreement. That Award reached the same conclusion, stating as follows:

> "Thus, the issue is whether or not an employee receiving a monthly guarantee as a protected employee is rendering 'compensated service' as contemplated by the Vacation Agreement.
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> * * *
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> To be sure, in an isolated sense, monthly guaranteed time is compensated, and it may be argued that it is service in some sense of the word, but when one contemplates a requirement that a person 'render compensated service' there is a strong indication that the employee must actually perform certain action, which is not the case here."

What can be said, however, concerning the four Awards cited by the Organization which reach a different conclusion? The Board finds them distinguishable for a variety of reasons.

Award 16844 found that the Carrier had a "contractual obligation" to return the claimant to active service during the year in question. Whether or not this was a sound conclusion, it is clearly inapplicable here. There is no contention that the Claimant herein had rights to be in active service in 1988.

Award 18316 inexplicably adopts part of "Labor's contention" as related in the Morse Interpretation as if Referee Morse had accepted it as part of his interpretation, which he did not. Thus, reference to an employee being in "standby or call service" was rejected, not adopted, as a criterion for part of the definition of rendering compensated service.

Award 18385 accepts the hypothesized conclusion of Award 16844 as to the obligation of the carrier to retain the affected employee in active service. Again, this is not at issue here.

Award 21336 accepts the three Awards discussed above as stare decisis. It also suggests that the question requires "consideration" of the February 7, 1965 National Stabilization Agreement (the applicable protection Agreement), which has its own dispute resolution mechanism, although the Award further argues that no "interpretation" of the February 7, 1965 Agreement is being made.

With these comments, the Board obviously concludes that the four cited Awards are based on different premises than are extant here.

One of the main points argued by the Organization is stated in summary as follows:

> "Compensation paid under the provisions of the Orange Book Agreement counts as compensated service for vacation qualifying purposes, in accordance with the Vacation Agreement."

The Board has found that the Vacation Agreement does not, by itself, yield to any meaning other than that established years ago by the Morse Interpretation. If it is argued that the Orange Book Agreement has provided a more favorable vacation eligibility definition applicable to employees covered thereunder, there is a ready solution. The Orange Book Agreement, in common with most or all protective Agreements, has its own dispute resolution provisions. If the action taken by the Carrier in denying Claimant 1989 vacation is in derogation of rights allegedly granted by the Orange Book Agreement, surely it is that forum which would be appropriate for resolution of the matter.

A final note: In the opening words of its Submission, the Organization refers to the Carrier's determination that the Claimant "was not entitled to any vacation time during 1989 and would have to work the entire year without the respite afforded by a vacation." It is the parties themselves who determined that vacation eligibility in a given calendar year is determined by service in the previous year. While it may appear unreasonable to the employee required to work 52 weeks in a given year, the fact is that vacation entitlement comes from previous service and not service, however extensive, in the current year.

A W A R D

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Attest: Nancy J. Dever, Secretary to the Board

Dated at Chicago, Illinois, this 7th day of June, 1993.