NATIONAL RAILROAD ADJUSTMENT BOARD
Form 1 THIRD DIVISION Award No. 29744
Docket No. MW-29658
93-3-91-3-1

The Third Division consisted of the regular members and in addition Referee Elizabeth C. Wesman when award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employes
(
(Davenport Rock Island and North Western
(Railway Company

STATEMENT OF CLAIM:

"Claim of the System Committee of the Brotherhood that:

(1) The Agreement was violated when the Carrier failed and refused to grant Mr. M. Hughes fifteen (15) days of vacation during the 1989 calendar year (System File C-90-VO30-1).

(2) As a consequence of the aforesaid violation, Mr. M. Hughes shall be allowed fifteen (15) days of 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.

Claimant has a seniority date of November 17, 1975. This dispute arises from Carrier's failure to grant Claimant a 15 day vacation during the 1989 calendar year.

The pertinent Agreement provisions read as follows:

"ARTICLE IV - VACATIONS - Section 1(c)

> An annual vacation of fifteen (15) 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 ten (10) or more years of continuous service and who, during such period of continuous service renders compensated service on not less than (100) days ...in each of ten (10) of such years, not necessarily consecutive.

ARTICLE IV, Section 1 (h)

> Calendar days in each current qualifying year on which an employee renders no service because of his own sickness or because of his own injury shall be included in computing days of compensated service and years of continuous service for vacation qualifying purposes on the basis of a maximum of ten (10) such days for an employee with less than three (3) years of service; a maximum of twenty (20) such days for an employee with three (3) but less than fifteen (15) years of service; and a maximum of thirty (30) such days for an employee with fifteen (15) or more years of service with the employing carrier."

Claimant was furloughed on December 21, 1985. He was recalled to work on or about May 23, 1988, and the Carrier subsequently scheduled a return-to-work physical for Claimant on June 3, 1988. Prior to June 3, Claimant contacted Carrier and requested a postponement of the physical, maintaining that he was ill from a severe allergy attack and taking medication. On June 27, 1988, the Claimant reported for his physical, and subsequently returned to work on June 29, 1988. At the time Claimant asked for the postponement of his physical, Carrier raised no question concerning the legitimacy of his excuse. Claimant rendered a total of 88 actual days of compensated service in the remainder of 1988.

On December 7, 1988, the General Chairman sent a letter to the Assistant General Manager requesting that Claimant be certified for vacation in 1989, so he could schedule his 1989 vacation days. By letter of January 27, 1989, the Assistant General Manager denied the request, stating that Claimant did not have the 100 days in 1988, which were necessary in order for him to qualify for vacation in 1989.

On February 2, 1989, the Organization appealed the decision, noting that Article II, Section (h) of the Agreement provides that an employee unable to work due to illness or injury was entitled to additional qualifying days up to a maximum of 20 such days for an employee with Claimant's length of service. Adding 20 days to his 88 days of compensated service rendered in 1988, would qualify Claimant for vacation.

Carrier denied the appeal by letter of March 28, 1989, from the General Manager, which reads in pertinent part:

> "Mr. Hughes' vacation was declined because he failed to report to take a physical that was necessary for him to return to work. He stated the reason he could not take the physical was that he was under medication for an allergy and could not pass the physical. He provided no other reason for failing to take the physical. Had he taken the physical and been considered by the Carrier physician as unable to return to work due to an illness, then your request for an appeal of Mrs. McBride's decision could be considered. However, his reason for not taking the physical is insufficient and, therefore, he cannot be considered to be off due to illness, nor can his time be computed as prescribed by the agreement."

In its July 25, 1989 appeal the Organization noted that in conference held on June 15, 1989, it had provided Carrier with a letter from Claimant's personal physician confirming Claimant's severe allergic condition during the time at issue.

On November 9, 1989, Claimant requested his three weeks vacation pay be included in his next paycheck. The Carrier again denied the claim stating that Claimant was not qualified for vacation in 1989, due to having worked only 88 days in 1988. Subsequent correspondence and a conference held on August 30, 1990, failed to resolve this dispute.

The Carrier asserts that Claimant was notified that his physical examination date was June 3, 1988, but he did not actually submit to the exam until June 27, at which time the Claimant was fully recuperated. If the Carrier physician had examined Claimant on June 3, and confirmed the Claimant's inability to return to work, "Paragraphs C and H of Article I of the National Vacation Agreement would then have come into play," according to the Carrier. For this reason, the Carrier maintains that Claimant is

not entitled to the 20 days stipulated in the Agreement, and therefore does not qualify for vacation in 1989.

The Organization maintains that Article IV, Section 1(h) of the National Vacation Agreement provides that calendar days in each current qualifying year on which an employee renders no service due to his own sickness shall be included in computing days of compensated service and years of continuous service for vacation qualifying purposes. In this instance, the Claimant, with approximately 13 years of service with the Carrier, rendered 88 days of compensated service in 1988, and was additionally absent due to personal illness. Thus, according to the Organization, the Claimant is qualified to have a maximum of 20 calendar days included in computing days of compensated service and years of service for vacation qualifying purposes. The Organization maintains that the Carrier violated the Agreement when it failed to include 20 days in the computation for vacation qualifying purposes.

Moreover, although the Carrier contended that the Claimant was not entitled to the additional days credit as provided for in the National Vacation Agreement, because Claimant did not submit to a physical examination by the Carrier's physician and return to service from recall immediately, Carrier presented no evidence that the Claimant would have been able to return to work sooner had he submitted to a physical examination by the Carrier's physician.

Further, the Organization points out that Claimant's personal physician stated that he was not able to return to work due to a "severe allergic reaction." The Organization contends that if the Carrier questioned the legitimacy of the Claimant's illness, it should have contacted his personal physician. The Carrier did not charge the Claimant for failure to submit to an examination by the Carrier's physician, nor did the Carrier charge Claimant with an unauthorized absence. Therefore, "there can be no question here but that the cause for the Claimant's absence was for his personal illness, and for that reason he was entitled to have twenty (20) calendar days included in computing days for vacation qualifying purposes for the year 1988, as provided for by the National Vacation Agreement."

Both Parties submitted information in relation to this dispute which is clearly in conflict. The Organization asserted that Claimant worked for 88 days PRIOR to the onset of his illness, and then remained out of service until 1989.

On the other hand, the Carrier stated that Claimant was called for a return-to-work physical on June 3, 1988, subsequent to an extended furlough, and that pursuant to the physical exam which was

actually conducted on June 27, Claimant returned to work on June 29, 1988. The Carrier maintains that Claimant then worked throughout 1988. The correspondence between the Parties indicates that the timing reported by Carrier is correct; to wit, Claimant returned to work on June 29, 1988 and worked the remainder of the year. Notwithstanding these initially contradictory statements of fact, the issue in this dispute remains the same: was the Agreement violated when the Carrier refused to grant Claimant 15 days of vacation during the 1989 calendar year?

The Organization maintains that Claimant was entitled to vacation in 1989, due to the 20 days to which he was entitled because of his 13 year tenure with the Carrier.

Carrier maintains that Claimant is not entitled to the 20 days because he failed to report for his physical on June 3, 1988, making it impossible for the Carrier to discern if the Claimant was legitimately ill.

We find Carrier's objections to be tardy at the very least. Claimant's personal physician attested to his illness, and, had Carrier doubted the legitimacy of Claimant's reason for postponing his physical exam, it should have notified Claimant of that doubt at the time, rather than attempting to discredit his bona fides several weeks later. There is no evidence in this record which would lead us to believe that Claimant either faked his illness, or extended it unnecessarily. In light of Carrier's own position stated in its letter of March 28, 1989 that "but for" his unsatisfactory excuse for postponing his physical, Claimant could have been considered to be off due to illness and his time computed in accordance with Section (h), the claim is sustained. It should be noted that Carrier's argument concerning the time and one-half rate of pay was not argued on the property. Accordingly, it must be rejected.

A W A R D

Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Attest: Nancy J. Dever
Nancy J. Dever, Secretary to the Board

Dated at Chicago, Illinois this 12th day of August 1993.