

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISIONAward No. 30848
Docket No. MS-31550
95-3-93-3-567

The Third Division consisted of the regular members and in addition Referee Gerald E. Wallin when award was rendered.

(Burke B. Carter
PARTIES TO DISPUTE: (
(Norfolk Southern Corporation

STATEMENT OF CLAIM:

"Whether or not as part of my final separation allowance from Norfolk Southern Corp. in July of 1992, I was entitled to be compensated for three weeks vacation and one personal day for each of the years 1990, 1991, and 1992."

FINDINGS:

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

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

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

Claimant was furloughed from his position in 1988. Since he was a protected employee, he received monetary protective payments thereafter as provided by Rule 34 of the June 1, 1982 Schedule Agreement between the Carrier and the Transportation - Communications International Union. In addition, Claimant performed extra and/or relief work for a total of 41 days in 1991 and 28 days in 1992. Claimant requested, and was granted by Carrier, a separation allowance effective July 7, 1992. As part of the transaction, Claimant released Carrier from all claims he might have subject to certain limited exceptions. One of the exceptions protected his entitlement to payment for vacation earned but not yet taken.

By letter dated September 3, 1992, which was received by Carrier on September 8, Claimant demanded additional payment for three weeks of vacation for each of the years 1990, 1991 and 1992. His claim also included a demand for payment for one personal day for each of those years.

Carrier denied the claim asserting that protective payments are not used in determining an employee's eligibility for vacation or personal leave pay. It also raised the signed release of all claims in defense.

Claimant took no appeal action in response to Carrier's denial until July 2, 1993 when he served a written notice of his intent to file an ex-parte Submission with this Board.

In its Submission, Carrier raises both procedural defenses and a defense on the merits. First, it says this Board does not have jurisdiction because Rule 34 provides for an Arbitration Committee for the adjustment of disputes. Second, Carrier alleges that the dispute should be dismissed by this Board because Claimant failed to handle it in the customary manner on the property. Carrier cites this Board's requirements, set forth in its Circular No. 1, as well as the statutory requirements expressed in Section 2, Second and Section 3, First (i) of the Railway Labor Act, as amended, in support of this second contention. Third, Carrier says portions of the claim are untimely. Fourth, and finally, Carrier says, on the merits, that Claimant did not perform the requisite amount of "compensated service" during any of the three calendar years in dispute so as to entitle him to vacation payments under the effective National Vacation Agreement.

The record in this dispute establishes that this claim must fail on procedural grounds. It is clear that the matter was not properly handled on the property in the usual and customary manner prior to being submitted to this Board. There was no appeal from the Carrier's initial denial and the matter was not conferenced on the property. Where such procedural defects are demonstrated by the record, this Board has consistently dismissed claims. Third Division Awards 20574 and 19751 are typical of those dismissing claims under such circumstances. This claim must be dismissed likewise. Because of this determination, we do not reach the other procedural defenses raised by the Carrier.

Notwithstanding the foregoing procedural determination, the record also reflects adversely on the merits of the claim. The National Vacation Agreement imposes a "compensated service" requirement on the entitlement to vacation pay. Receipt of protective payments does not constitute compensated service within the meaning of the National Vacation Agreement. See Award 1 of the Special Board of Adjustment Established Pursuant to Article VIII of the February 25, 1971 Mediation Agreement. See also Third Division Award 29659. Moreover, the record demonstrates that the amount of compensated service Claimant did perform (41 days in 1991 and 28 days in 1992) was insufficient to entitle him to vacation credit for any of the three years claimed.

For the foregoing reasons, this claim must be dismissed.

AWARD

Claim dismissed.

O R D E R

This Board, after consideration of the dispute identified above, hereby orders that an award favorable to the Claimant(s) not be made.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Dated at Chicago, Illinois, this 27th day of April 1995.