Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 32214
Docket No. CL-31789
97-3-94-3-67

The Third Division consisted of the regular members and in addition Referee Martin F. Scheinman when award was rendered.

PARTIES TO DISPUTE: (Transportation Communications International Union
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(Terminal Railroad Association of St. Louis

STATEMENT OF CLAIM:

"Claim of the System Committee of the Organization (GL-11006) that:

1. Carrier violated the TCU Agreement, expressly Rule 52 (National Vacation Agreement Synthesis) when it refused to consider days of compensation received pursuant to Mediation Agreement A7128 of February 7, 1965 as amended by Clerk, Mr. E. T. Higdon, Madison, Illinois in the year 1992 as qualifying credits toward annual vacation in year 1993.

2. Carrier shall now be required to allow this employe, Mr. E. T. Higdon his earned vacation in 1993 as claimed, counting all days which are paid or should be paid pursuant to Mediation Agreement No. A7128 of February 7, 1965 as amended, as compensated service."

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.

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

Parties to said dispute were given due notice of hearing thereon.

Claimant worked 57 days during calendar year 1992 and was compensated more than 43 days in 1992 under a protective Agreement (Mediation Agreement A7124 of February 7, 1965). Pursuant to Claimant's seniority, he would be entitled to 25 days under the Vacation Agreement if he "rendered compensated service" on not less than 100 days during the preceding calendar year. Thus, the dispute presented is a simple one, namely, whether under the Vacation Agreement, compensation received pursuant to Mediation Agreement A7128 may be credited along with time Claimant actually performed service in order to meet the 100 day threshold.

Both parties introduced an extensive number of prior Awards and Interpretations of this question. We carefully analyzed all of them. Frankly, we agree with the Carrier that the more up-to-date and better line of reasoning holds that only compensation for actual time worked may be credited towards the 100 day threshold necessary under the Vacation Agreement. We find particularly on point Third Division Award 28655 which states that the Vacation Agreement "contemplates a requirement that a person ' renders compensated service.'" We agree with the finding there that this language establishes a strong indication that the employee must actually perform certain activity.

However, here, it is undisputed that prior to the claim at issue that Carrier had erroneously credited the time an employee was compensated under a protective Agreement along with time worked in order to meet the threshold under the Vacation Agreement for 27 years! Apparently, not until this particular claim was denied by Carrier did these parties have even a single time when an employee was denied vacation time due to not having sufficient credited time when he or she had a combination of actual compensated service and protection time that crossed the 100 day threshold. This prior practice which Referee Roukis called an "interpretive past practice" in Award 1 of the Special Board of Adjustment between the Organization and the Norfolk and Western Railway Company, is significant. Thus, we are confronted with language which on its face is clear and unambiguous requiring that only actual compensated service may

be credited contrasted with a longstanding open and notorious practice in which these parties operated in conflict with the express language of the Vacation Agreement.

There is a fundamental principle of labor relations that where clear and unambiguous language and a long-standing past practice are in conflict that the clear and unambiguous language shall prevail, after timely notice. In this way, the side wishing to resort to the specific language of the Agreement may do so, but only after providing the other side with advance notice that it intends to hold to the express language of the applicable Agreement. Here, we note that the first indication that the Organization or the Claimant had any notice of Carrier's intention to deviate from its historic practice and to rely upon the express terms of the Vacation Agreement was when the claim was denied. We cannot view such a procedure as providing the Organization with timely notice. In fact, we find the absence of notice unfair.

Thus, we conclude that the instant claim shall be sustained under the parties' historic past practice. However, obviously, the Organization and its membership are now on notice as a result of the denial in this claim that Carrier intends to hold to the express language of the Vacation Agreement. It is free to do so. Therefore, prospectively, the language of the Vacation Agreement between these parties shall require that an employee, in order to be eligible for vacation, render actual compensated service in the calendar year preceding the time in which he or she seeks vacation.

In any event, we shall sustain this particular claim with the understanding that the language herein shall be interpreted in the future in accordance with the current better line of authority.

AWARD

Claim sustained in accordance with the Findings.

ORDER

This Board, after consideration of the dispute identified above, hereby orders that an award favorable to the Claimant(s) be made. The Carrier is ordered to make the Award effective on or before 30 days following the postmark date the Award is transmitted to the parties.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Dated at Chicago, Illinois, this 17th day of September 1997.