Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 32314
Docket No. CL-32301
97-3-95-3-131

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

PARTIES TO DISPUTE: (Transportation Communications International Union
(
(Southeastern Pennsylvania Transportation Authority
((SEPTA)

STATEMENT OF CLAIM:

"Claim of the System Committee of the Organization (GL-11132) that:

(a) Carrier violated TCU-TC Division Section 901 (B)(iii) - Vacations (sic), when Tower Operator J.E. Karcher (001686) was not compensated for his vacation time, which should be granted him from his original hire date of March 20, 1987."

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.

This dispute contains a Carrier-originated jurisdictional contention which must be addressed as our initial action. Carrier insists that this Board lacks jurisdiction to consider the instant dispute for the reason that the on-property Agreement contains

specific provisions for the final resolution of disputes by means of a Section 3, Second, Railway Labor Act arbitration board. It contends that the Organization's attempts to have this Section 3, First, Railway Labor Act arbitration board hear and decide the instant dispute circumvents the provisions of the Agreement, and, therefore, our Board should summarily dismiss this claim for lack of jurisdiction.

To be sure, Section 403 (not 402 as stated by Carrier in their ex-parte Submission to this Board) of the Agreement between the parties does, in fact, provide for the use of a Section 3, Second, RLA board of arbitration to hear, consider and decide claims which are not satisfactorily settled by the parties during their normal on-property claims procedures. However, the case record of this dispute clearly indicates that Carrier refused to accept the Organization's request to arbitrate the unresolved dispute. Carrier insisted that, in their opinion, the claim as handled through the normal claim procedure was untimely and on that sole basis refused to present the dispute to arbitration. Carrier erroneously argued before this Board that the Organization had "abandoned the opportunity to grieve."

From our review of the case record, the Organization did not abandon its opportunity to grieve. Rather, Carrier, by its refusal to submit the claim to the Section 403 arbitration board, precluded the Organization from achieving a final resolution of this dispute leaving the Organization with no option other than to seek a final resolution of the dispute before this Section 3, First, Board of Adjustment. Carrier can not prevent the final resolution of a dispute through arbitration by the simple act of refusing to submit the dispute to the agreed-upon arbitration board. It is our conclusion, therefore, that because of Carrier's violation of the provisions of Section 403 of the Agreement, this Board has jurisdiction to hear and decide the instant dispute.

On the merits, this dispute involves a request for paid vacation time based upon Claimant's complete continuous service with Carrier. The fact situation is reasonably clear and straightforward. Claimant first entered Carrier's service in a non-agreement position on March 20, 1987. In September, 1988, Claimant left his non-agreement position and was assigned to an agreement-covered position. The actual date in 1988 is variously stated as September 3, 4 and 6. Regardless of the exact date in September 1988, Claimant requested to take his 1994 vacation on the basis of the original 1987 employment date. Carrier's refusal to grant vacation on the basis of the 1987 employment date is the dispute presently before our Board for resolution.

The Organization argues that the agreed-upon Vacation Rule on this property provides that vacation entitlement is based upon total service with SEPTA. The Organization points with favor to the language of Article IX - Section 901 of the agreement which, in pertinent part, reads as follows:

"Article IX - Section 901. Vacations

* * *

(b) Subsequent vacations will be provided based on the following:

* * *

(ii) Employes hired on or after January 1, 1983 other than pursuant to the implementing Agreement: Compensated days and years of service with SEPTA.

* * *"

The Organization goes on to remind the Board that paragraph (e) of this Section 901 provides that:

"Employees will qualify for vacation as follows:

Years of compensated service - 8: 15 days"

Therefore, the Organization contends that Claimant's original entered service date in 1987 is the measure of time for vacation entitlement and Claimant was entitled to 15 days paid vacation in 1994 on the basis of eight years of compensated service with SEPTA.

Carrier, on the other hand, insists that the 1988 date on which Claimant began service on an agreement-covered position is the date to use to measure vacation entitlement time. Carrier argues that the claim was untimely presented coming as it does several years after the employee began service on the agreement-covered position. They also insist that when Claimant began service on the agreement- covered position, it was as a "new hire" and, therefore, he did not carry with him the previous service time as

a non-agreement employee for vacation entitlement. Carrier further argued that there are no "transfer" rights in the Agreement which would permit Claimant to move from a non-agreement position to an agreement-covered position except that he resign as a non-agreement employee and be re-hired as a new agreement-covered employee. Carrier points with favor to the language of Section 1002 of the rules Agreement which states:

> "This agreement is applicable solely to employees comprising the Union unit when performing work in a job within said Union unit."

This language, it states, precludes Claimant from counting his non-agreement employment time for vacation entitlement.

After reviewing all of the arguments and contentions of the parties, the Board is not impressed with Carrier's time limit arguments. This claim was not ripe for presentation until 1994 and was timely made. There does not appear to be any contention relative to the correctness of Claimant's seniority date as an agreement-covered employee. From the record, there is no question but that he was a "new hire" as an agreement-covered employee beginning in September, 1988. The only question to be decided in this dispute is whether or not the clear and unambiguous language of Article IX - Section 901 permits Claimant to receive credit for vacation entitlement for the time during which he performed service as a non-agreement employee. The Board's conclusion is that he does receive vacation entitlement credit for that time period. His "days and years of service with SEPTA" were continuous. The specific language of Article IX makes no exception for non-agreement or agreement-covered service. It is conditioned only upon compensated days and years of service -- not in an agreement-covered position -- but with SEPTA. On the basis of this case record, Claimant meets that criteria. The claim as presented is sustained.

AWARD

Claim sustained.

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 13th day of November 1997.