Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 37977
Docket No. SG-38410
06-3-04-3-361

The Third Division consisted of the regular members and in addition Referee Ann S. Kenis when award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Railroad Signalmen
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(Texas Mexican Railway Company

STATEMENT OF CLAIM:

"Claim on behalf of Claimant E. Peralez, for compensation for two weeks vacation, account Carrier violated the Agreement dated January 20, 2003, the understanding dated February 2, 2003, respectively, and the National Vacation Agreement, when it refused to allow the Claimant two weeks vacation pay after meeting his qualifying requirements. Carrier is also in violation of section 2, Second and Sixth of the Railway Labor Act when it refused to conference this dispute with the Organization. Carrier's File No. 258. General Chairman's File No. UPGC-1190. BRS File No. 13036 -TexMex."

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.

The Claimant began working at the Carrier's facility as a contractor employee on January 1, 2001, performing the duties of a Signal Maintainer. As a contractor employee, the Claimant was not covered by the parties' Agreement.

On January 20, 2003, the parties reached an agreement in which the Organization withdrew certain outstanding claims that had arisen in connection with the Carrier's alleged use of outside contractors to fill vacant Signal Maintainers' positions. In return, new rates of pay for Signal Maintainers were established. Additionally, the parties agreed to give the Claimant a seniority date of January 1, 2001, in recognition of the fact that he had been providing services to the Carrier since that time.

The Organization set forth the circumstances surrounding the Claimant's seniority date in a February 2, 2003 letter to the Carrier, stating in pertinent part:

> "During our discussions in Las Vegas we agreed to give Ed Peralez [Claimant] a seniority date of January 1, 2001. We also agreed the only benefit for doing this was to provide him the vacation credits for this period of time. It was understood he will not go back to recover any vacation time in previous years."

The Claimant became an employee of the Carrier in January 2003. He submitted his resignation effective June 3, 2003. In a memorandum to the Claimant dated July 22, 2003, the Carrier acknowledged the Claimant's resignation and outlined a list of payments that were pending. Item 2 on the list was "2 weeks vacation" to which the Carrier responded: "no vacation pay due."

On August 3, 2003, the Organization wrote the Carrier and requested the vacation payment. The Carrier responded by letter dated August 22, 2003, stating as follows:

> ". . . we gave Mr. Peralez [Claimant] an earlier seniority date for the purpose of greater vacation benefits, but neither of us agreed or would have even considered granting this individual any time off for vacation until such time as he qualified for such by completing the necessary days of compensated service.
>
> The request for vacation pay after performing less than a year of service is denied."

The Organization contends that it received the Carrier's letter on September 2 and a claim was filed on September 26, 2003. The claim requests that the Claimant be

allowed ten days of vacation pay at the Signal Maintainer's rate of pay based on his seniority date of January 1, 2001.

The Carrier denied the claim, and the matter was appealed on the property without resolution. The Organization thereafter requested by letters dated December 1, 2003 and February 10, 2004 that the parties meet in conference. There is no evidence in the record to show that the Carrier responded to either request. It is undisputed that a conference did not take place prior to progressing the claim to the Board.

With that as a factual predicate, we now turn to the jurisdictional matters that must be addressed prior to reaching the merits of the case. First, both parties insist that the other is to blame for the failure to conference the claim. The Organization argues that the Carrier refused to meet in conference, and the Carrier asserts that it was willing to conference the claim via telephone but that the Organization refused to do so. As we discussed at length in Third Division Award 37976, in order for the Carrier to argue that the claim has not been handled in the usual manner, it must first establish what the usual manner on the property has been for claims conferencing. The Carrier did not provide such evidence and, therefore, we reject its contention that there was a proper basis to refuse to meet as requested by the Organization. As the Board noted in Third Division Award 13120, "The statutory indispensable condition precedent is satisfied if either party requests a conference and the other fails, refuses or evades its obligation to confer within a reasonable time." Under the circumstances, we find that the Board is vested with jurisdiction and the Carrier's objection must fail.

We recognize that the Organization's position is that this claim should be allowed as presented because the Carrier refused to conference the dispute as required. However, the Board carefully reviewed the precedent Awards cited by the parties on this subject and there is not a single instance in which a sustaining Award was issued without reaching the merits based solely on a circumstance where a carrier arguably failed or otherwise evaded its conference obligations. See, e.g., Fourth Division Award 3246 (". . . our analysis of the plethora of cases cited on this point persuades us that the better reasoned Awards and the weight of authority requires not a reflexive sustaining decision irrespective of the merits but rather a careful consideration of the merits of the case notwithstanding the lack of conference on the property.") In each of the cases cited, the carrier was estopped from asserting the defense of a lack of jurisdiction because its own action, or inaction, contributed or caused the conference not to be held on the property and the matter proceeded to the merits. Fourth Division Award 5074; Third Division Awards 19738, 15880, 13563 and 12853. We shall adopt that approach in this case as well.

Second, insofar as the Carrier's untimeliness argument is concerned, we find that this issue was raised on the property, but no evidence or explanation was offered to support the assertion. Most important, the Carrier did not present the contractual language that we would necessarily have to examine in order to determine whether the Organization in fact breached the time limits. The contention that the Organization failed to comply with the contractual time limits was an affirmative defense for which the Carrier shouldered the burden of proof. It did not meet that burden and, therefore, the argument must be rejected.

Turning to the merits, the National Vacation Agreement provides for vacation entitlement to employees who render "compensated service" during the preceding calendar year:

> "Effective with the calendar year 1973, an annual vacation of ten (10) 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 ten (110) days during the preceding calendar year and who has two (2) or more years of continuous service and who, during such period of continuous service renders compensated service on not less than one hundred ten (110) days . . . in each of two (2) of such years, not necessarily consecutive."

The Organization argues that when the parties agreed to adjust the Claimant's seniority date to January 1, 2001, it was for the sole purpose of providing him with sufficient "compensated service" so as to qualify for vacation benefits in 2003. The Carrier disagrees, and asserts that the intent was to give the Claimant credit for the two prior years in satisfaction of the length of service qualifying criteria. The Carrier points out that there are two prerequisites or qualifications that must be met for vacation entitlement. To be eligible for vacation days, an employee must render compensated service on not less than 110 days in the year preceding the calendar year, and he must have two years of continuous service. The Carrier submits that the Claimant's seniority date in effect gave him the two years of continuous service, but because the Claimant worked only three months in 2003, he had not accumulated sufficient compensated service under the National Vacation Agreement to meet the vacation eligibility requirements.

After considering the respective positions of both parties, the Board finds that the Organization's argument most logically explains the basis for granting the Claimant a January 1, 2001 seniority date. The Carrier's argument is based on a

prospective approach to vacation eligibility. Essentially, the Carrier would have required the Claimant to render the requisite number of days of compensated service in 2003 in order to be eligible for a vacation in 2004. If that had been the parties' intent, it seems they most assuredly would have said so. As the record stands, the parties agreed to give the Claimant two years of seniority for the sole purpose of vacation eligibility. We believe that this was done so as to render him eligible for vacation in 2003 by considering the work he performed in 2001 and 2002 as compensated service. The fact that the parties determined that the Claimant would not go back and try to receive vacation time for previous years further bolsters the conclusion that he was qualified for vacation in 2003.

On the basis of the foregoing, the claim will be sustained. The Carrier is directed to pay the Claimant ten days of vacation pay.

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 25th day of October 2006.