SPECIAL BOARD OF ADJUSTMENT NO. 1087

Parties to the Dispute:	)	Case No. 25
	)	Award No. 25
BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES DIVISION, INTERNATIONAL BROTHERHOOD OF TEAMSTERS,	)	
Organization,	)	
and	)	
UNION PACIFIC RAILROAD COMPANY.	)	**OPINION AND AWARD**
Carrier.	)	

Hearing Date: April 6, 2006
Hearing Location: Sacramento, California
Date of Award: June 15, 2006

BOARD MEMBERS

Employe Members: R. B. Wehrli and Donald F. Griffin
Carrier Members: Kenneth Gradia and John Hennecke
Neutral Member: John B. LaRocco

EMPLOYEE STATEMENT OF THE CLAIM

Does a furloughed employee, otherwise retained in service subject to compensation pursuant to Article I, Section 1 of the Mediation Agreement dated February 7, 1965, as amended by Article XII of the Mediation Agreement of September 26, 1996, ("February 7th Agreement" or "the JSA"), remain subject to coverage under the National Vacation Agreement as though he or she were in active service? If the answer is yes, does the Carrier owe the Claimant five weeks' vacation pay and pay for two (2) personal leave days for the calendar year 2001?

CARRIER'S STATEMENT OF THE QUESTIONS AT ISSUE

1. Does this Board have jurisdiction to resolve this dispute?

2. If the answer to 1 above is yes, are protective allowances, which are paid to furloughed employees pursuant to the February 7, 1965 Agreement, as amended, counted as qualifying days for purposes of the National Vacation Agreement?

OPINION OF THE BOARD

This Board, after hearing upon the who record and all evidence, finds that the parties herein are Carrier and Employe within the meaning of the Railway Labor Act as amended; that this Board has jurisdiction over the parties and the subject matter of the dispute herein; that this Board is duly constituted according to the 1996 Mediation (National) Agreement and as specified in a National Mediation Board appointment letter dated August 18, 2004; and that all parties were given due notice of the hearing held on this matter.

I. BACKGROUND AND SUMMARY OF THE FACTS

The Carrier hired Claimant on October 11, 1971. Due to his many years of service, Claimant became a protected employee pursuant to the September 26, 1996 Mediation Agreement which amended the February 7, 1965 Job Stabilization Agreement. Also, due to his lengthy service, Claimant was entitled to the 25 days of paid vacation leave in accord with Article IV, Section 1(e) of the 1971 National Vacation Agreement, which provides:

> Effective with the calendar year 1973, an annual vacation of twenty-five (25) 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 twenty-five (25) or more years of continuous service and who, during such period of continuous service renders compensated service on not less than one hundred (100) days (133 days in the years 1950-1959 inclusive, 151 days in 1949 and 160 days in each of such years prior to 1949) in each of twenty-five (25) of such years, not necessarily consecutive.

During 1999, Claimant qualified for 25 vacation days to be taken during the 2000 calendar year. The Carrier furloughed Claimant from December 30, 1999 through June 21, 2001. The Carrier paid Claimant protective benefits from January 4, 2000 through October 31, 2000.[1] Over the Organization's objection, the Carrier placed Claimant on vacation at the

[1] **Claimant received holiday pay for January 1, 2000 and straight-time pay for January 3, 2000.**

beginning of November 2000. It paid him vacation pay as well as protective pay during the remainder of the 2000 calendar year. During the first six months of 2001, the Carrier continued to afford Claimant Job Stabilization Agreement protective benefits. While the record is not entirely clear, Claimant apparently returned to active service sometime between June 21 and June 30, 2001.

Early in 2001, the Carrier notified Claimant that he had not qualified for any vacation leave to be used during the 2001 calendar year. Maintenance of way employes are also entitled to two paid personal days per calendar year provided they qualify for the requisite vacation leave during the prior calendar year. Thus, the Carrier's notice implied that Claimant was ineligible to take two paid personal days during 2001.

On July 11, 2001, the Organization initiated a claim contending that the Carrier must permit Claimant to take 25 days of paid vacation and two paid personal days during 2001. In the statement of the claim before this Board, the Organization seeks five weeks of vacation pay and pay for two personal leave days on behalf of Claimant.

II. PERTINENT PROVISIONS OF THE JOB STABILIZATION AGREEMENT

Article I, Section 1 of the February 7, 1965 Job Stabilization Agreement, as amended by Article XII of the September 26, 1996 Mediation Agreement provides:

> "Section 1 - All employees, other than seasonal employees, who are in active service and who have or attain ten (10) or more years of employment relationship will be retained in service subject to compensation as herein provided unless or until retired, discharged for cause, or otherwise removed by natural attrition. For the purpose of this Agreement, the term "active service" is defined to include all employees working, or holding an assignment, or in the process of transferring from one assignment to another (whether or not the date on which such ten or more years of employment

> relationship is acquired was a work day). An employee who is not regularly assigned on the date the employee is otherwise eligible to achieve protected status under this Section will be deemed to be protected on the first day assigned to a regular position in accordance with existing rules of the BMWE Agreement."

Article IV, Section 1 of the February 7, 1965 Job Stabilization Agreement, as amended, reads:

> "Section 1 - Subject to the provisions of Section 3 of this Article IV, protected employees who hold regularly assigned positions shall not be placed in a worse position with respect to compensation than the normal rate of compensation for said regularly assigned position as of the date they become protected; provided, however, that in addition thereto such compensation shall be adjusted to include subsequent wage increases."

The Organization and the Carrier entered into an Agreement on October 25, 1996, to establish the process for adjudicating claims brought under the February 7, 1965 Job Stabilization Agreement, as amended. Section II(A) of the October 25, 1996 October 25, 1996 Dispute Resolution Procedures Agreement states:

> Arbitration Committee
> There shall be established a Special Board of Adjustment, in accordance with Section 3, Second of the Railway Labor Act, which shall be known as Special Board of Adjustment No. 1087, hereinafter referred to as the Board. This Board shall have jurisdiction to hear disputes arising under the Agreement of February 7, 1965 in Mediation Case No. 7218, as amended, and the WJPA. The Board shall not have the authority to add contractual terms or to change existing agreements governing rates of pay, rules and working conditions. [Emphasis added.]

III. THE POSITIONS OF THE PARTIES

A. The Organization's Position

Special Board of Adjustment No. 1087, Award No. 5 (Douglas) controls both the jurisdictional and substantive issues in this case. In *Award No. 5*, this Board held that a protected employee who is receiving protective benefits but not actively in service, is eligible for dental benefits, vision care benefits and health and welfare benefits under Articles V, VI and VII of the National Agreement. This Board specifically found, in *Award No. 5*, that the Carrier can furlough an employee and pay the employee protective benefits but, because the protected employee is retained in service, he is eligible for health and welfare benefits as well as ancillary benefits. Vacation benefits are analogous to, if not identical to, health benefits. Since *Award No. 5* had authority to determine whether protected employees, on furlough, receive health benefits, this Board can decide, and must decide, that Claimant is entitled to vacation benefits.

The Board herein has jurisdiction over this case for three reasons.

First, this Board should follow the precedent laid down by *Award No. 5*.

Second, the phrase in Article I, Section 1 of the Job Stabilization Agreement that a protected employee ". . . will be retained in service subject to compensation . . ." vests the Board with the authority to decide what compensation the protected employee is entitled to receive including what compensation counts towards qualification for fringe benefits like vacation leave and personal leave.

Third, although the decision in *Transportation Communications International Union and Norfolk Southern Corporation* (Mittenthal; 2003) [Hereinafter *TCU/NS decision*] criticized *Special Board of Adjustment No. 1087 Award No. 5,* the *TCU/NS decision* assumed jurisdiction

to decide if the time during which an employee receives protective benefits (while on furlough) counted towards qualification for other kinds of employment benefits.

Turning to the merits, *Award No. 5* definitively decided that employees are entitled to fringe benefits predicated on compensation received pursuant to the February 7, 1965 Job Stabilization Agreement, as amended. The Board properly relied on the record presented to Presidential Emergency Board No. 229. Carrier officials and counselors represented to the Presidential Emergency Board that the February 7, 1965 Job Stabilization Agreement covered 100 percent of wages and "full health insurance coverage" and "fringe benefits."[2]

Just like health and welfare benefits, Claimant herein is entitled to have the days that he received protective pay count towards qualifying days for vacation leave and personal paid days. *Award No. 5* is controlling and dispositive on this issue.

Award No. 5 rejected the arguments and prior awards cited by the Carrier. Nevertheless, the decisions cited by the Carrier are inapplicable. *NRAB Fourth Division Award No. 4902* (Benn) did not interpret or construe an employee's rights under the Job Stabilization Agreement. In the claim herein, Claimant's rights rest on the "retained in service" phrase expressly set forth in the Job Stabilization Agreement.

While Arbitrator Mittenthal, in the *TCU/NS decision* found that an employee receiving protective pay was not eligible for health and welfare benefits, Arbitrator Mittenthal was interpreting a different job stabilization arrangement. More significantly, even though Arbitrator

[2] **In addition, in an affidavit filed in a federal court action, a Carrier labor relations official attested that the protective benefits under the Job Stabilization Agreement include "full health insurance coverage."**

Mittenthal criticized *Award No. 5*, the *TCU/NS decision* did not overrule or otherwise dilute the precedential value of *Special Board of Adjustment No. 1087, Award No. 5.*

Finally, the Awards construing the National Vacation Agreement are irrelevant because of the split in authority. In several decisions, the National Railroad Adjustment Board concluded that days on which an employee received protective benefits under the February 7, 1965 Job Stabilization Agreement counted towards qualification for vacation leave. *NRAB Third Division Award No. 16844 (Dorsey); NRAB Third Division Award No. 18316 (Criswell); NRAB Third Division Award No. 18385 (Rosenbloom);* and, *NRAB Third Division Award No. 21336 (Blackwell).* Contrarily, several Board decisions held that protective pay cannot make an employee eligible for vacation leave when the employee is exclusively receiving protective benefits. *NRAB Third Division Award No. 29761 (Gold); NRAB First Division Award No. 24293 (Twomey);* and, *NRAB Third Division Award No. 28655 (Sickles).* Given that National Railroad Adjustment Board decisions do not establish any definitive line of authority, this Board should follow the judgment issued in *Special Board of Adjustment No. 1087, Award No. 5.*

In sum, when Claimant received protective payments during the calendar year 2000, he met the qualifications to take vacation pay and personal leave during 2001 in accord with Article IV, Section 1(e) of the National Vacation Agreement.

B. The Carrier's Position

This Board lacks jurisdiction to decide if the days on which Claimant received only protective benefits pursuant to the February 7, 1965 Job Stabilization Agreement, as amended, count towards the 100 qualification days set forth in Article IV, Section 1(e) of the National Vacation Agreement.

This dispute concerns whether Claimant rendered "compensated service" during the calendar year 2000 as specified in Article IV, Section 1(e) of the National Vacation Agreement. Pursuant to the October 25, 1996 Dispute Resolution Procedures Agreement, this Board's jurisdiction is confined to disputes arising under the February 7, 1965 Job Stabilization Agreement, as amended. This limitation does not permit the Board to interpret and apply the terminology in Article IV, Section 1(e) of the National Vacation Agreement. More specifically, Section II(A) of the October 25, 1996 Agreement emphasizes that the Board has no authority to change existing agreements, which includes provisions like the vacation eligibility rule of the National Vacation Agreement.

Besides the October 25, 1996 Agreement, two prior decisions emanating from Special Board of Adjustment No. 605 adjudged that it did not have jurisdiction to determine if protective pay under that Agreement can qualify an employee for other benefits such as vacation benefits, holiday pay benefits, and health and welfare benefits. *Special Board of Adjustment No. 605, Award No. 99 (Friedman)*; and, *Special Board of Adjustment No. 605, Award No. 342 (Friedman)*. In the latter case, the Board specifically found that it lacked jurisdiction over claims about whether protective pay under the Job Stabilization Agreement could be credited towards vacation eligibility. Just as *Special Board of Adjustment No. 605* held that it cannot interpret the National Vacation Agreement, the National Railroad Adjustment Board has determined that it cannot interpret an employee's status achieved under the February 7, 1965 Job Stabilization Agreement. *NRAB Fourth Division, Award No. 4902 (Benn).*

Assuming, *arguendo*, that this Board rules that it has jurisdiction over the substance of the claim herein, days on which an employee receives a protective allowance under the February

7, 1965 Job Stabilization Agreement, as amended, do not count as qualifying days under Article IV of the National Vacation Agreement. In the Answer to Question No. 2, interpreting the National Vacation Agreement, Referee Wayne Morris ruled that the clause "renders compensated service" does not refer to each and every day on which an employee receives compensation. Rather, Referee Morris determined that, according to the ordinary and literal meaning of the words in the clause, an employee must perform service or work on a day to qualify for vacation. Referee Morris elaborated that the controlling word in the phrase is "service" as opposed to "compensated." This principle derived from Morses' interpretation of the National Vacation Agreement has been followed by the overwhelming weight of arbitral authority. *NRAB Third Division Award No. 29659 (Marx); NRAB Third Division Award No. 29761 (Gold); NRAB Third Division Award No. 30769 (Benn);* and, *NRAB Third Division Award No. 30848 (Wallin).*

Inexplicitly, this Board, in *Award No. 5,* ignored the well established interpretation of Article IV of the National Vacation Agreement as well as the overwhelming weight of National Railroad Adjustment Board precedents. Nevertheless, the rationale set forth in *Award No. 5* does not support the Organization's position herein. In *Award No. 5*, the Board primarily based its decision on oral statements proffered by Carrier witnesses during the proceedings of Presidential Emergency Board No. 229. Those statements, while taken out of context, solely related to a protected employee's eligibility for health and welfare benefits while the employee was receiving exclusively a protective guarantee under the Job Stabilization Agreement. The witnesses did not utter any statement with regard to paid vacation leave or vacation qualification.

More importantly, Article IV, Section 1 of the February 7, 1965 Job Stabilization Agreement, as amended, refers to ". . . the normal rate of compensation for said regularly

assigned position . . ." which can only mean the wages an employee receives on a position. The words "normal rate of compensation," implicitly preclude any vacation compensation.

Finally, Arbitrator Mittenthal, in the *TCU/NS decision* rejected the holding in *Special Board of Adjustment No. 1087, Award No. 5* by finding that employees, who are receiving exclusively protective pay and not performing any active service under another (but virtually identical) job stabilization arrangement, are not eligible for health and welfare benefits. Therefore, *Award No. 5* is of no precedential value.

IV. DISCUSSION

The threshold question before this Board is whether we have jurisdiction to adjudicate the merits of this dispute.

Before considering the arbitration awards cited by both parties, this Board must examine the express language of the applicable agreements as the starting point for its analysis over whether it has authority to determine if days on which Claimant received protective pay during the 2000 calendar year counted as qualifying days for vacation leave and personal leave to be taken during the 2001 calendar year.

The most pertinent contractual provision is Section II(A) of the October 25, 1996 Dispute Resolution Procedures Agreement. Section II(A) unambiguously provides that our jurisdiction is restricted to hearing and deciding disputes arising under the February 7, 1965 Job Stabilization Agreement, as amended (and the Washington Job Protection Agreement). In addition, the third sentence of Section II(A) directs this Board to refrain from changing the construction of other agreement provisions. The unmistakable import of the second and third sentences Section II(A) is that this Board must find a provision in the Job Stabilization Agreement, as amended, that

touches on the issue of vacation qualification or vacation entitlement. Since there is not any express provision in the February 7, 1965 Job Stabilization Agreement regarding vacations, the question becomes whether there is any implied reference to vacations.

Two provisions of the amended Job Stabilization Agreement are relevant to determining our jurisdiction. Article I, Section 1, as amended, provides that a protected employee ". . . will be retained in service subject to compensation as herein provided unless . . ." certain events occur which did not transpire in this case. In addition, Article IV, Section 1, as amended, specifically describes that the compensation, referred to in Article I, Section 1, is the normal rate of compensation for a regularly assigned position. Neither of these provisions implicitly pertains to vacations or vacation eligibility. The phrase "retained in service," in Article I, Section 2, governs a protected employee's employment status with the Carrier as opposed to whether the compensation to which the furloughed employee is entitled to receive encompasses vacation leave eligibility. *Special Board of Adjustment No. 1087, Award No. 2.* Also, the term "compensation" in Article I, Section 1 clearly refers to payments provided "herein," that is, protective guarantees, protective benefits and displacement allowances. Indeed, nothing in the February 7, 1965 Job Stabilization Agreement, as amended, even hints at whether a protected employee's exclusive receipt of protective benefits on a particular day should count towards qualifying for vacation pay or personal days under the National Vacation Agreement. The absence of any express or implied language within the four corners of the February 7, 1965 Job Stabilization Agreement propels this Board to follow the decisions of *Special Board of Adjustment No. 605* which ruled that we lack jurisdiction. *Special Board of Adjustment No. 605, Award No. 99* (Friedman); and, *Special Board of Adjustment No. 605, Award No. 342*

(Friedman). Concomitantly, a well reasoned decision issued by the National Railroad Adjustment Board states that while the Adjustment Board can address an employee's entitlement to fringe benefits, the Adjustment Board cannot determine an employee's status under the February 7, 1965 Job Stabilization Agreement. *NRAB Fourth Division, Award No. 4902 (Benn).* These decisions draw the demarcation between forums. In addition, the *TCU/NS decision* lends no support to the Organization's position on jurisdiction herein inasmuch as there is nothing in that decision that either party contested Arbitrator Mittenthal's jurisdiction to reach the substance of the parties' dispute. In this case, the Carrier timely and vigorously challenged this Board's jurisdiction which distinguishes the instant case from the *TCU/NS decision*.

Award No. 5 of this Board derived its authority to decide whether an employee's receipt of protective pay entitles the employee to health and welfare benefits coverage from statements made by Carrier representatives before Presidential Emergency Board No. 229 and in litigation. Except for one statement alluding to "fringe benefits," the statements relied on by this Board in *Award No 5*, specifically mentioned health and welfare benefits or health insurance coverage. The record herein does not include any statements proffered by Carrier officials to Presidential Emergency Board No. 229 concerning entitlement to vacation leave based on days where a protected employee receives only a Job Stabilization Agreement protection guarantee. Therefore, we need not decide whether it was appropriate for the Board, in *Award No. 5*, to extend jurisdiction over the merits of that dispute simply because facts similar to those underlying that Board's jurisdictional decision are not contained in the record before us.

In sum, we lack the authority to decide whether Claimant, when he received his protective guarantee during 2000, qualified for vacation and personal days to be taken during 2001.

AWARD AND ORDER

1. The Employee's Claim is dismissed for lack of jurisdiction;

2. The Answer to the Carrier's Question and Answer No. 1 is No; and,

3. The Carrier's Question and Answer No. 2 is moot.

Dated: June 15, 2006

Rick Wehrli
Union Member

Ken Gradia
Carrier Member

Donald F. Griffin
Union Member

John Hennecke
Carrier Member

John B. LaRocco
Neutral Member