PUBLIC LAW BOARD NO. 2206

AWARD NO. 28

CASE NO. 19

PARTIES TO THE DISPUTE:

Brotherhood of Maintenance of Way Employees

and

Burlington Northern, Inc.

STATEMENT OF CLAIM:

"Claim of the System Committee of the Brotherhood that:

(1) The Carrier violated the effective agreements and particularly Appendix A, 7(a) and 8 when failing to properly compensate Dan Jakinchuk for vacation earned under the Vacation Agreement recorded as Appendix A in the May 1, 1971, Schedule Agreement (System Files S-P-157C)

(2) That Dan Jakinchuk now be paid 66.7 hours pay at $9.90 per hour which is a total of $660.33 for violation referred to in part one (1) of this claim."

OPINION OF THE BOARD:

Claimant, prior to his retirement on July 31, 1977, was employed at Vancouver, British Columbia, in Carrier's Pacific Seniority District (Seniority District #22). The Agreement between Carrier and the Brotherhood of Maintenance of Way Employees applies to all employees in the Maintenance of Way and Structures Department, divided into 24 Seniority Districts named in the Agreement at Rule 6. At least three (3) of those Seniority Districts, including the Pacific Seniority Distrist, encompass some employees and trackage located in Canada.

From 1972 until his retirement date, Claimant was regularly assigned to a position as Drawbridge Operator (Slip Tender) at Carrier's B.I. Dock at Vancouver, British Columbia. He acquired that position as the successful bidder pursuant to the bulletin procedure of Rule 21 of the Agreement. It is important to note that this position was created by Carrier in June 1972 to increase efficiency at the B.I. Dock by filling the Slip Operator job five days a week, 24 hours per day. To this end, Carrier's Superintendent entered into a Letter Agreement with the Organization, dated June 12, 1972, reading in pertinent part as follows:

> 1. The position will be bulletined for Bridge & Building sub-department employees in the Pacific Seniority District.
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> 2. The successful applicant for this position will make himself available for work on a twenty-four (24) hour per day basis and compensated at the Bridge Tender's daily rate plus one (1) two (2) hour and forty (40) minute overtime call per day.
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> 3. (a) A relief position will be bulletined for Bridge and Building Sub-department employees in the Pacific Seniority District for two (2) days per week receiving the Bridge Operator position and three (3) days, or balance of the week, with Crew No. 9.
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> (b) The successful applicant for this position will make himself available for work on a twenty-four (24) hour per day basis on the days assigned to relieve the Bridge Operator and compensated at the rate of his position with Crew No. 9 plus one (1) two (2) hour and forty (40) minute overtime call per day while relieving the position in question. On the days applicant is not relieving the Bridge Operator, he will be paid his regular rate as a member of Crew No. 9.
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> 4. The Agreement is subject to cancellation by either party upon ten (10) days written notice.

Pursuant to the foregoing, Claimant bid onto the job in 1972 and worked every day a regular eight-hour shift from 8:00 A.M. to 5:00 P.M., plus one overtime

call each day. For this he received daily compensation of eight (8) hours at the straight time rate and one two-hour and forty-minute call at the overtime rate.

The merits of the dispute go to Claimant's vacation pay entitlement upon retirement. It is not disputed that Claimant had at least twenty-five years of service when he retired. Consistent with Article 1 of the National Vacation Agreement (Appendix A) he could earn five weeks of vacation annually. The record indicates that for his 1977 vacation (earned in 1976) Claimant was off from January 5-February 6, 1977. It is not disputed that for the 1977 vacation, and presumably for years prior to 1977, he was paid while on vacation the daily compensation paid by the Carrier for his assignment (including the regular overtime call), pursuant to Section 7 A of the National Vacation Agreement. The instant dispute concerns the amount paid to him by Carrier upon his retirement on July 31, 1977 as cash allowance in lieu of his 1978 vacation (earned in 1977). The positions of the parties on the merits developed on the property are summarized fairly in the Carrier's final denial letter reading in pertinent part as follows:

> At this conference it was your position retired claimant Jakinchuk should have been compenstated under the provisions of Article 7A of the Vacation Agreement for vacation not taken but paid in lieu account retirement. It was your contention that the language contained in Article 7A "...will be paid while on vacation the daily compensation paid by the Carrier for such assignment" which would include overtime worked in the amount of $660.33.
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> The fact remains claimant Jakinchuk was no longer a regular assigned employee, having retired from the service of the Carrier and was properly compensated under the provisions of Article 7E. Article 7E provides for payment "...on the basis of the average daily straight time compensation earned in the last pay period..." and claimant was properly paid $1320.00 for 200 vacation hours at pro rata rate.

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Before looking at the merits of the dispute, however, we are met by a jurisdictional objection raised by Carrier. Citing some NRAB precedents from the First Division, Carrier insists that because the dispute concerns vacation pay earned for work performed by Claimant exclusively in Canada, it is not properly appealable to this Board established under Section 3, First of the RLA. We have reviewed the Collective Bargaining Agreement at issue, as well as the cited precedents and law. We have no doubt that the present dispute properly is subject to our jurisdiction. It is patent beyond reasonable debate that this is a dispute covering the interpretation or application of an agreement covering working conditions between a group of employees of which Claimant is a part and a Carrier. The fact that a minimal portion of Carrier's operation extends into Canada or that the employee worked in Canada does not eradicate the fundamental nature of the dispute nor defeat its referability to this Board of Adjustment established under Section 3, First of the RLA. The better reasoned Awards have so held, and specifically so with respect to the Great Northern Railway Company, whose successor is the present Carrier. See Awards 2-2806; 2-3093. Judicial precedent cited by Carrier deals primarily with the airline industry and involves collateral issues not before us and which, in our judgment, are ineffective as stare decisis.

Turning to the merits of the case, the question may be stated simply as whether Section 7A or Section 7E governs the computation of vacation pay in lieu of vacation for employees who have earned a vacation but who retire prior to actually taking that vacation. The contract language at issue appears in Sections 7-8 of Appendix A as follows:

> 7. Allowances for each day for which an employe is entitled to a vacation with pay will be calculated on the following basis:

A. An employe having a regular assignment will be paid while on vacation the daily compensation paid by the carrier for such assignment.

B. An employe paid a daily rate to cover all services rendered, including overtime, shall have no deduction made from his established daily rate on account of vacation allowances made pursuant to this Agreement.

C. An employe paid a weekly or monthly rate shall have no deduction made from his compensation on account of vacation allowances made pursuant to this agreement.

D. An employe working on a piece-work or tonnage basis will be paid on the basis of the average earnings per day for the last two semi-monthly periods preceding the vacation, during which two periods such employe worked on as many as sixteen (16) different days.

E. An employe not covered by paragraphs A, B, C, or D of this section will be paid on the basis of the average daily straight time compensation earned in the last pay period preceding the vacation during which he performed service.

* * *

8. The vacation provided for in this Agreement shall be considered to have been earned when the employe has qualified under Article 1 hereof. If an employe's employment status is terminated for any reason whatsoever, including but not limited to retirement, resignation, discharge, non-compliance with a union-shop agreement, or failure to return after furlough he shall at the time of such termination be granted full vacation pay earned up to the time he leaves the service including pay for vacation earned in the preceding year or years and not yet granted, and the vacation for the succeeding year if the employe has qualified therefor under Article 1 ***.

The interplay of the foregoing language was summarized succinctly in Award 3-11734, to wit: Article 8 provides assurance that a retiring employee will receive his earned vacation pay but Article 7 tells us how much vacation money is due. In another case involving the identical parties and a closely

related issue, the record shows that the Organization maintained and the Board concurred that Section 7E controlled in the computation of a retiree's earned vacation money. See Award 3-21643. Even more to the point is the above-cited Award 3-11734 which answered the question of how to compute a retiree's vacation pay entitlement as follows:

> It is Article 7 of the Vacation Agreement to which we must turn in order to ascertain how much vacation money is due. The opening clause shows the precise purpose of this section: "Allowances for each day for which an employe is entitled to a vacation with pay will be calculated on the following basis...." Sub-paragraphs (a) through (d) of Article 7 all deal with pay for employes in active service. Sub-paragraph (e), therefore, appears to control:
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> > "An employe not covered by paragraph (a), (b), (c) or (d) of this Section will be paid on the basis of the average daily straight time compensation earned in the last pay period preceding the vacation during which he performed service."
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> This conslusion is supported by the findings in Award 6742, a related case, where the issue concerned vacation pay for men on military leave of absence.

We concur with the result in Award 3-11734 and deem it dispositive of the present case. In oral argument the Organization appeared again to concede that Section 7E should govern, but argued notwithstanding that Claimant still was entitled thereunder to the same vacation pay he would have received under Section 7A. That assertion is contrary to the express language of Section 7E regarding "average daily straight time earnings" (emphasis added). Additional arguments regarding "casual" as compared to "regular" overtime essentially are irrelevant to the present case.

FINDINGS:

Public Law Board No. 2206, upon the whole record and all of the evidence, finds and holds as follows:

1. that the Carrier and Employee involved in this dispute are, respectively, Carrier and Employee within the meaning of the Railway Labor Act;

2. that the Board has jurisdiction over the dispute involved herein; and

3. that the Agreement was not violated.

AWARD

Claim denied.

Dana E. Eischen, Chairman

L. K. Hall, Carrier Member

F. H. Funk, Employee Member

Date: July 15, 1980

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