Award No. 2240

Docket No. 2049

2-CB&Q-CM-'56

NATIONAL RAILROAD ADJUSTMENT BOARD

SECOND DIVISION

The Second Division consisted of the regular members and in addition Referee Adolph E. Wenke when the award was rendered.

PARTIES TO DISPUTE:

SYSTEM FEDERATION NO. 95, RAILWAY EMPLOYES' DEPARTMENT, A. F. of L. (Carmen)

CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY

DISPUTE: CLAIM OF EMPLOYES: That in accordance with the applicable agreements the Carrier be ordered to compensate John P. Moberg, retired Carman, five (5) additional days' vacation pay.

EMPLOYES' STATEMENT OF FACTS: John P. Moberg, hereinafter referred to as the claimant, was employed by the Chicago, Burlington & Quincy Railroad, hereinafter referred to as the carrier, as a carman at Galesburg, Illinois. Claimant has been in the continuous employment of the carrier from January 26, 1923 until he retired on November 1, 1953, in accordance with the provisions of the Railroad Retirement Act.

Prior to retiring on November 1, 1953, the claimant had qualified for a vacation in the year 1954 by rendering compensated service of not less than one hundred thirty-three (133) days during the preceding calendar year of 1953.

Upon retiring claimant was paid by the carrier in an amount of money equivalent to ten (10) days' vacation.

This dispute has been handled with the carrier up to and including the highest officer so designated by the company, with the result that he had declined to adjust it.

The agreement effective October 1, 1953, as it has been subsequently amended, is controlling.

POSITION OF EMPLOYES: The employes submit and contend that Article 8 of the Vacation Agreement of December 17, 1941, is controlling, which for ready reference reads:

> "No vacation with pay or payment in lieu thereof will be due an employe whose employment relation with a Carrier has terminated prior to the taking of his vacation, **except that employes retiring under the provisions of the Railroad Retirement Act shall receive payment for vacation due.**" (Emphasis supplied.)

The claimant having qualified by his years of service, for a vacation of fifteen (15) days in accordance with Article I, Section 1 (c) of the Agreement of August 21, 1954, reading:

> "Effective with the calendar year 1954, an annual vacation of fifteen (15) consecutive work days with pay will be granted to each employe covered by this Agreement who renders compensated service on not less than 133 days during the preceding calendar year and who has fifteen or more years of continuous service and who during such period of continuous service renders compensated service on not less than 133 days (151 days in 1949 and 160 days in each of such years prior to 1949) in each of fifteen (15) of such years not necessarily consecutive."

is entitled to an additional five (5) days' vacation in accordance with Article 8 quoted above.

Based on the employes' statement of facts and position, the Honorable Members of this Division are justified in sustaining the claim of the employes in its entirety.

CARRIER'S STATEMENT OF FACTS: The claimant, a former carman, applied for and was granted an annuity under the provisions of the Railroad Retirement Act, effective as of November 1, 1953. In other words, he severed his employment relation with the carrier on November 1, 1953. At the time of his retirement, he was allowed payment in lieu of two weeks vacation in conformity with the provisions of the vacation agreement in effect on the date of his retirement. The instant claim is premised upon the allegation of petitioner that claimant is subject to an agreement which became effective after claimant severed his employment relation with carrier.

The schedule of rules agreement between the parties, effective October 1, 1953, the vacation agreement of December 17, 1941, supplemental agreement of February 23, 1945 and subsequent agreements of March 19, 1949 and August 21, 1954, are by this reference made a part of this submission.

POSITION OF CARRIER: Before introducing any argument and evidence in support of the carrier's position with respect to the merits of the dispute herein under discussion, the carrier wishes to point out the fact that the initial and only filing of this claim was contained in a letter dated January 28, 1955 from General Chairman E. P. Cottrill of the organization to Staff Officer W. E. Angier at Chicago. This letter fails completely to satisfy the time limits and procedural requirements of Rule 30(a) of the agreement effective October 1, 1953 as amended by Article V of the August 21, 1954 agreement. Rule 30(a) of the agreement effective October 1, 1953 reads as follows:

"Claims and Grievances

> Rule 30. (a) An employe subject to this agreement who believes he has been unjustly dealt with or that any of the provisions of this agreement have been violated **shall present the same to his foreman** through the duly authorized local representative **providing it is done within fifteen (15) days of the occurrence.** If the grievance is not satisfactorily adjusted, the local committeeman, or his representative, **may appeal in writing to the General Foreman; then to the Master Mechanic,** Shop Superintendent (District Storekeeper for carmen in the Stores Department at Havelock), which appeal must be made within fifteen (15) days after the decision of the General Foreman. If **further appeal** is desired it **shall be handled** in the first instance by the General Committee, or its representative, with the **General Superintendent of Motive Power** involving Mechanical Department claims and grievances arising in territory east of the Missouri River, the Assistant General Superintendent of Motive Power for territory west of the Missouri River, and General Storekeeper for the Reclamation Plant and Havelock Stores, within

thirty (30) days. **Further appeal shall be in writing to the next succeeding higher officer** to whom appeals are to be made and such appeals shall be made within thirty (30) days after decision is rendered by each officer to whom appeal is taken." (Emphasis added.)

(Under Article V of the August 21, 1954 Agreement the time limit for the initial filing of claims was extended from fifteen (15) to sixty (60) days and the time limit on appeals was extended from thirty (30) to sixty (60) days.)

For ready reference Article V is quoted below:

1. All claims or grievances arising on or after January 1, 1955 shall be handled as follows:

(a) All claims or grievances must be presented in writing by or on behalf of the employe involved, to the officer of the carrier authorized to receive same, within 60 days from the date of the occurrence on which the claim or grievance is based. Should any such claim or grievance be disallowed, the carrier shall, within 60 days from the date same is filed, notify whoever filed the claim or grievance (the employe or his representative) in writing of the reasons for such disallowance. If not so notified, the claim or grievance shall be allowed as presented, but this shall not be considered as a precedent or waiver of the contentions of the Carrier as to other similar claims or grievances.

(b) If a disallowed claim or grievance is to be appealed, such appeal must be in writing and must be taken within 60 days from receipt of notice of disallowance, and the representative of the Carrier shall be notified in writing within that time of the rejection of his decision. Failing to comply with this provision, the matter shall be considered closed, but this shall not be considered as a precedent or waiver of the contentions of the employes as to other similar claims or grievances. It is understood, however, that the parties may, by agreement, at any stage of the handling of a claim or grievance on the property, extend the 60-day period for either a decision or appeal, up to and including the highest officer of the Carrier designated for that purpose.

(c) The requirements outlined in paragraphs (a) and (b) pertaining to appeal by the employe and decision by the Carrier, shall govern in appeals taken to such succeeding officer, except in cases of appeal from the decision of the highest officer designated by the Carrier to handle such disputes. All claims or grievances involved in a decision by the highest designated officer shall be barred unless within 9 months from the date of said officer's decision proceedings are instituted by the employe or his duly authorized representative before the appropriate division of the National Railroad Adjustment Board or a system, group or regional board of adjustment that has been agreed to by the parties hereto as provided in Section 3 Second of the Railway Labor Act. It is understood, however, that the parties may by agreement in any particular case extend the 9 months' period herein referred to.

2. With respect to all claims or grievances which arose or arise out of occurrences prior to the effective date of this rule, and which have not been filed by that date, such claims or grievances must be filed in writing within 60 days after the effective

date of this rule in the manner provided for in paragraph (a) of Section 1 hereof, and shall be handled in accordance with the requirements of said paragraphs (a), (b) and (c) of Section 1 hereof. With respect to claims or grievances filed prior to the effective date of this rule the claims or grievances must be ruled on or appealed, as the case may be, within 60 days after the effective date of this rule and if not thereafter handled pursuant to paragraphs (b) and (c) of Section 1 of this rule the claims or grievances shall be barred or allowed as presented, as the case may be, except that in the case of all claims or grievances on which the highest designated officer of the Carrier has ruled prior to the effective date of this rule, a period of 12 months will be allowed after the effective date of this rule for an appeal to be taken to the appropriate board of adjustment as provided in paragraph (c) of Section 1 hereof before the claim or grievance is barred.

3. A claim may be filed at any time for an alleged continuing violation of any agreement and all rights of the claimant or claimants involved thereby shall, under this rule, be fully protected by the filing of one claim or grievance based thereon as long as such alleged violation if found to be such, continues. However, no monetary claim shall be allowed retroactively for more than 60 days prior to the filing thereof. With respect to claims and grievances involving an employe held out of service in discipline cases, the original notice of request for reinstatement with pay for time lost shall be sufficient.

4. This rule recognizes the right of representatives of the Organizations, parties hereto, to file and prosecute claims and grievances for and on behalf of the employes they represent.

5. This agreement is not intended to deny the right of the employes to use any other lawful action for the settlement of claims or grievances provided such action is instituted within 9 months of the date of the decision of the highest designated officer of the Carrier.

6. This rule shall not apply to requests for leniency.

The provisions of the rule are clear and unambiguous; the rule is not susceptible to interpretation or construction; it specifically and definitely provides how claims or grievances are to be presented to the various officers of the carrier authorized to receive same.

Under the provisions of Article V, Section 2 of the August 21, 1954 Agreement amending Rule 30(a) of the October 1, 1953 Agreement, since the basis of this dispute occurred prior to January 1, 1954, claim should have been filed in writing to the first officer of the carrier authorized to receive same, prior to March 1, 1955 and if disallowed then appealed to the next higher officer up to and including the highest officer designated by the carrier to handle such disputes. Since claim was not so handled, the amendment to Rule 30(a) by Article V of the August 21, 1954 agreement provides the matter shall be considered closed.

The initial and only filing of this claim is contained in General Chairman E. P. Cottrill's letter of January 28, 1955. The validity of procedural handling of claims and grievances and time limits imposed by pertinent rules of schedule agreements negotiated through the process of collective bargaining has been upheld on numerous occasions by the various Divisions of the Adjustment Board. The following quotation is merely an example of a principle consistently adhered to:

Second Division Award 514 (Gooch vs. OUR&D Co. Referee McAllister)

"But the only way in which disputes may be referred by petition to this Board is upon showing that they were handled with the Car-

rier in the manner provided for by contract, or in the usual manner adopted by the Carrier and its employes."

and again in Second Division Award 515 (Walter Everly, et al, vs. Erie, Referee McAllister) as follows:

"In the instant case the usual manner of handling such disputes as that in question is according to the provisions of the contract. These requirements have not been complied with. Failure to follow the procedure required in the statute, and defined in the agreement, leaves this board without jurisdiction to entertain the petition."

The opinion of the Board in Third Division Award 2765 recognizes the fact that its jurisdiction springs from Section 3(i) of the Railway Labor Act, and can only be exercised if authority to accept jurisdiction can be found within the four corners of the current agreement, by the following statement:

"Our jurisdiction springs from the Section of the Labor Act to which we have referred and can only be exercised if within the four corners of the current agreement authority to accept it can be found."

Since the Board has recognized that its authority to accept jurisdiction must be found within the four corners of the current agreement, and since the record is clear that the alleged claim here considered was not properly initiated under the provisions of Rule 30(a) of the current agreement between the parties, it is perfectly obvious that the conditions precedent to consideration by the Board have not been fully met; and the Board is without jurisdiction to pass upon the merits of the alleged claim. Through the medium of previous awards, notably Second Division Awards 514 and 515, Third Division Awards 2222, 2224, 2574, 2765, 3605, 6361, 6396 and 6247, and Fourth Division Awards 410, 535, 649 and others, the Board had consistently taken the position that failure to handle claims in accordance with the procedural provisions of the agreement precludes the Board from assuming jurisdiction.

Without receding in the slightest degree from the position hereinbefore set forth, the carrier wishes to present the following argument and evidence that would have relevance were it not for the procedural defect which effectively bars consideration of the case on its merits.

The issue is whether or not former Carman Moberly was entitled to payment in lieu of two or three weeks vacation upon retirement on November 1, 1953. Petitioner contends claimant should have been allowed payment in lieu of three weeks vacation when he retired, based upon an agreement which became effective on a date subsequent to his retirement, while carrier contends claimant is entitled to only two weeks based upon the agreement which was in effect on the date he retired.

During the handling of this dispute on the property, petitioner cited and relied upon Section 1(c) of Article I-Vacations, of the agreement dated August 21, 1954, effective January 1, 1954. This provision reads as follows:

"Effective with the calendar year 1954, an annual vacation of fifteen (15) consecutive work days with pay will be granted to each employe **covered by this Agreement** who renders compensated service on not less than 133 days during the preceding calendar year and who has fifteen or more years of continuous service and who, during such period of continuous service renders compensated service on not less than 133 days (151 days in 1949 and 160 days in each of such years prior to 1949) in each of fifteen (15) of such years not necessarily consecutive." (Emphasis added).

As stated previously, the above quoted provision became effective January 1, 1954, as did all of the provisions of Article I-Vacations, of the August 21, 1954 Agreement. Since claimant had retired prior to the effective date of

Article 1, Section 1(c) quoted above, he was not subject to the provisions thereof.

Former Carman Moberg's rights must be determined by the provisions of the vacation agreement that was in effect on the date of his retirement. Article 1, Section 2(b) of the agreement in effect on November 1, 1953, reads as follows:

> "Effective with the calendar year 1945 an annual vacation of twelve (12) consecutive work days with pay will be granted to each employe covered by this Supplemental Agreement who renders compensated service on not less than 160 days during the preceding calendar year and who has five or more years of continuous service and who, during such period of continuous service, renders compensated service on not less than 160 days in each of five (5) of such years not necessarily consecutive."

Section 2(b) was further modified, effective September 1, 1949, to give effect to the 40—hour work week by reducing the number of vacation days by one-sixth, or to ten days.

Two weeks, or ten days, pay in lieu of vacation was properly due claimant upon retirement, under the above provision and under Article 8 of the vacation agreement, reading:

> "No vacation with pay or payment in lieu thereof will be due an employe whose employment relation with a Carrier has terminated prior to the taking of his vacation, except that employes retiring under the provisions of the Railroad Retirement Act shall receive payment for **vacation due.**" (Emphasis added.)

The only vacation due claimant upon his retirement November 1, 1953, was the two weeks provided for in Article 1, Section 2(b) of the agreement in effect on that date. There were no provisions in the agreement in effect on that date requiring the carrier to grant claimant more than two weeks or ten days vacation.

It is significant to note that Section 1(c) of Article I of the August 21, 1954 agreement provides for fifteen days vacation to **employes covered by this agreement.** This article became effective January 1, 1954. Claimant was **not** an "employe covered by this agreement" on January 1, 1954, having severed his employment relation on November 1, 1953, prior to the effective date of the agreement relied upon by petitioner. The provisions of this agreement were not made retroactive to November 1, 1953, but only to January 1, 1954, consequently the agreement cannot be applied to individuals who were not in carrier's employe on that date.

A claim similar to the instant dispute was handled by the "Disputes Committee" when the original operating vacation agreement became effective in 1944. The claim is identified as Case 1-E, the dispute involving the ORC and the Boston and Maine Railroad. It is found at page 21 of the printed volume of decisions of the Vacation Disputes Committee, and reads as follows:

> "Boston and Main Railroad will not grant Carl L. Harris one week's vacation with pay. Decision: (2-23-45)
>
> The committee is agreed that since the employe's annuity in this case was effective on November 13, 1943, on which date he severed his employment relation with the Carrier, he is not entitled to a vacation in 1944. **He was not in the service of the Carrier on the effective date of the Vacation Agreement.**" (Emphasis added).

The agreement referred to in the quotation above became effective on January 1, 1944.

In the instant dispute, the agreement became effective January 1, 1954.

Claimant retired on November 1, 1953. He was not in the service of carrier on the effective date of the agreement providing for three weeks vacation. Since he was not in carrier's service on the effective date of that agreement, he is not subject to the provisions thereof, and is not entitled to the benefits thereof.

There is no merit to the instant claim, and it must be denied in its entirety.

FINDINGS: The Second Division of the Adjustment Board, upon the whole record and all the evidence, finds that:

The carrier or carriers and the employe or employes involved in this dispute are respectively carrier and employe 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.

The parties to said dispute were given due notice of hearing thereon.

This claim is made in behalf of retired Carman John P. Moberg. Claimant was continuously employed by carrier as a carman at Galesburg, Illinois, from January 26, 1923 until he retired under the provisions of the Railroad Retirement Act on November 1, 1953. Prior to his retirement claimant had rendered not less than one hundred and thirty-three (133) days of compensated service in the calendar year of 1953. In view thereof carrier paid claimant for ten (10) days in lieu of the two (2) weeks vacation he had earned for 1954. However, claimant contends that by reason of Article 8 of the National Vacation Agreement he was entitled to three (3) weeks vacation for 1954 under the provisions of Article I, Section 1(c) of the National Agreement of August 21, 1954 and should have been paid for fifteen (15) days. Consequently he asks for five (5) additional days of pay which he claims to be entitled to.

Carrier contends the claim has never been handled on the property in accordance with the provisions of the parties' effective agreement, up to and including the chief operating officer of the carrier designated to handle such matters, and, in view thereof, contends the Division is without jurisdiction to consider the claim on its merits. The claim here presented was initially filed on the property with Staff Officer W. E. Angier, highest officer designated by the carrier to handle such disputes, on January 28, 1955. It was handled by him and the appeal to this Division was taken from his decision denying the claim on its merits.

Rule 30(a) of the parties' agreement, effective October 1, 1953, provides such a claim shall be initially presented to the claimant's foreman and, if his decision is unsatisfactory appealed through the several officers therein set forth. Section 1(a) of Article V of the August 21, 1954 agreement did not change this requirement except as to the length of time in which an appeal could be taken in proceeding from one officer to the next and the manner of doing so. It still required the claim to be initially presented "to the Officer of the Carrier authorized to receive same." This, as already stated, was claimant's foreman.

Section 3, First (i) of the Railway Labor Act provides, insofar as here material, that

> "The disputes between an employe or group of employes and a carrier or carriers growing out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions, * * * shall be handled in the usual manner up to and including the chief operating officer of the carrier designated to handle such disputes; but failing to reach an adjustment in this manner, the disputes may be referred by petition of

the parties or by either party to the appropriate division of the Adjustment Board * * *."

It is self-evident this requirement was not complied with and, in the absence thereof, this Division has no jurisdiction of the claim and, because thereof, lacks authority to consider it. In view thereof we find the claim should be dismissed.

AWARD

Claim dismissed.

NATIONAL RAILROAD ADJUSTMENT BOARD

By Order of SECOND DIVISION

ATTEST: Harry J. Sassaman
Executive Secretary

Dated at Chicago, Illinois, this 17th day of September, 1956.

DISSENT OF LABOR MEMBERS TO AWARD NO. 2240

The majority admits that the instant claim was handled on the property with the highest officer designated by the carrier to handle such disputes and that appeal to this Division was taken from that officer's decision denying the claim on its merits, but the majority then finds that the claim should be dismissed because it was not initially handled on the property with the foreman under the provisions of Rule 30(a). The majority ignores the fact that the carrier waived strict compliance with the rule when its highest officer designated to handle such disputes decided the instant dispute on its merits without objecting to the manner of handling. The rule is that when a carrier undertakes to consider and dispose of a claim without objecting to the manner of handling on the property, it will be deemed to have waived its right to object thereafter.

Prior to claimant's retirement under the provisions of the Railroad Retirement Act he rendered the requisite compensated service to qualify him for fifteen days vacation in 1954, therefore the instant findings and award are erroneous as claimant should have been paid for five additional days vacation for the calendar year 1954.

G. W. Wright
R. W. Blake
C. E. Goodlin
T. E. Losey
E. W. Wiesner