

# **VACATION AGREEMENT**

**OF DECEMBER 17, 1941**

**BETWEEN CERTAIN EASTERN, WESTERN  
AND SOUTHEASTERN CARRIERS AND  
THEIR EMPLOYEES REPRESENTED BY  
THE FOURTEEN COOPERATING RAIL-  
ROAD LABOR ORGANIZATIONS;**

**INTERPRETATIONS THEREON;**

**AWARD OF REFEREE IN CONNECTION  
THEREWITH.**

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## VACATION AGREEMENT

### PREAMBLE

This agreement is entered into between each of the carriers listed and defined in Appendices "A", "B", and "C", attached hereto and made a part hereof, represented respectively by their duly authorized Conference Committees, signatory hereto, as parties of the first part, and the employees of said carriers, represented by the organizations, signatory hereto, by their respective duly authorized executives, on behalf of which employees requests for vacations have been made, as listed in the Appendices, above identified, as parties of the second part, and is to be construed as a separate agreement by and between and in behalf of each of said carriers and its said employees for whom such requests have been made.

This agreement is executed as a result of the recommendations of the Emergency Board appointed by the President of the United States, September 10, 1941, and its report dated November 5, 1941, respecting the vacation with pay dispute, mediation proceedings between the parties with the participation and assistance of the Emergency Board and its supplementary report of December 5, 1941.

### ARTICLES OF AGREEMENT

1. Effective with the calendar year 1942, an annual vacation of six (6) 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 sixty (160) days during the preceding calendar year.

2. Subject to the provisions of Section 1 as to qualifications for each year, effective with the calendar year 1942 annual vacations with pay of nine and twelve consecutive work days will be granted to the following employees, after two and three years of continuous service respectively:

(a) The following described employees if represented by the Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employees:

(1) Clerks (clerical workers and machine operators) which classification for the purposes of this agreement shall be construed to also include the occupations hereafter named—Agents and assistant agents; traveling auditors, traveling freight claim agents and adjustors, traveling time adjustors or traveling checkers, traveling accountants and traveling car agents; storekeepers, assistant storekeepers and supply car storekeepers, station masters and

assistant station masters; supervisors and assistant supervisors; baggage agents and assistant baggage agents; general foremen and assistant general foremen, foremen and assistant foremen; fuel, lumber, tie, loss and damage, store and material, transportation, icing and refrigeration, freight and perishable, scale and material inspectors; car distributors; crew dispatchers; ticket sellers; checkers, tallymen, receivingmen and deliverymen, defined as clerks in existing agreements; stockmen, stockkeepers, countermen, stationers and counter checkmen in stores department; weighmasters; toll collectors; caboose supply checkers; teletype operators.

(2) Other office and station employees which classification shall include the occupations hereafter named by whatever payroll title designated, but no others; Gang foremen other than those paid on differential hourly or tonnage basis; office boys, messengers and chore boys; train announcers; gatemen; train and engine crew callers; telephone switchboard operators; elevator operators; matrons and watchmen in office buildings; operators of office or station equipment devices or appliances such as those for duplicating letters and statements, perforating papers, adjusting dictating machine cylinders, numbering claims and other papers; employees engaged in assorting, checking or filing tickets, waybills, claims, pay and time checks, car movements, per diem or other checks, freight claims, dray tickets, requisitions, tickets or waybills against reports; employees engaged exclusively in gathering and distributing or delivering mail.

(b) Employees represented by the Order of Railroad Telegraphers, except custodians, caretakers, and small non-telegraph agents.

3. The terms of this agreement shall not be construed to deprive any employee of such additional vacation days as he may be entitled to receive under any existing rule, understanding or custom, which additional vacation days shall be accorded under and in accordance with the terms of such existing rule, understanding or custom.

4. (a) Vacations may be taken from January 1st to December 31st and due regard consistent with requirements of service shall be given to the desires and preferences of the employees in seniority order when fixing the dates for their vacations.

The local committee of each organization signatory hereto and the representatives of the Carrier will cooperate in assigning vacation dates.

(b) The Management may upon reasonable notice (of thirty (30) days or more, if possible, but in no event less than fifteen (15) days) require all or any number of employees

in any plant, operation, or facility, who are entitled to vacations to take vacations at the same time.

The local committee of each organization affected signatory hereto and the proper representative of the carrier will cooperate in the assignment of remaining forces.

5. Each employee who is entitled to vacation shall take same at the time assigned, and, while it is intended that the vacation date designated will be adhered to so far as practicable, the management shall have the right to defer same provided the employee so affected is given as much advance notice as possible; not less than ten (10) days' notice shall be given except when emergency conditions prevent. If it becomes necessary to advance the designated date, at least thirty (30) days' notice will be given affected employee.

If a carrier finds that it cannot release an employee for a vacation during the calendar year because of the requirements of the service, then such employee shall be paid in lieu of the vacation the allowance hereinafter provided.

6. The carriers will provide vacation relief workers but the vacation system shall not be used as a device to make unnecessary jobs for other workers. Where a vacation relief worker is not needed in a given instance and if failure to provide a vacation relief worker does not burden those employees remaining on the job, or burden the employee after his return from vacation, the carrier shall not be required to provide such relief worker.

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

(a) An employee having a regular assignment will be paid while on vacation the daily compensation paid by the carrier for such assignment.

(b) An employee 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 employee 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 employee 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 employee worked on as many as sixteen (16) different days.

(e) An employee 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. No vacation with pay or payment in lieu thereof will be due an employee whose employment relation with a Carrier has terminated prior to the taking of his vacation, except that employees retiring under the provisions of the Railroad Retirement Act shall receive payment for vacation due.

9. Vacations shall not be accumulated or carried over from one vacation year to another.

10. (a) An employee designated to fill an assignment of another employee on vacation will be paid the rate of such assignment or the rate of his own assignment, whichever is the greater; provided that if the assignment is filled by a regularly assigned vacation relief employee, such employee shall receive the rate of the relief position. If an employee receiving graded rates, based upon length of service and experience, is designated to fill an assignment of another employee in the same occupational classification receiving such graded rates who is on vacation, the rate of the relieving employee will be paid.

(b) Where work of vacationing employees is distributed among two or more employees, such employees will be paid their own respective rates. However, not more than the equivalent of twenty-five per cent of the work load of a given vacationing employee can be distributed among fellow employees without the hiring of a relief worker unless a larger distribution of the work load is agreed to by the proper local union committee or official.

(c) No employee shall be paid less than his own normal compensation for the hours of his own assignment because of vacations to other employees.

11. While the intention of this agreement is that the vacation period will be continuous, the vacation may, at the request of an employee, be given in installments if the management consents thereto.

12. (a) Except as otherwise provided in this agreement a carrier shall not be required to assume greater expense because of granting a vacation than would be incurred if an employee were not granted a vacation and was paid in lieu thereof under the provision hereof. However, if a relief worker necessarily is put to substantial extra expense over and above that which the regular employee on vacation would incur if he had remained on the job, the relief worker shall be compensated in accordance with existing regular relief rules.

(b) As employees exercising their vacation privileges will be compensated under this agreement during their absence on vacation, retaining their other rights as if they had remained at work, such absences from duty will not constitute "vacancies" in their positions under any agreement. When the position of a vacationing employee is to be filled and regular relief employee is not utilized, effort will be made to observe the principle of seniority.

(c) A person other than a regularly assigned relief employee temporarily hired solely for vacation relief purposes will not establish seniority rights unless so used more than 60 days in a calendar year. If a person so hired under the terms hereof acquires seniority rights, such rights will date from the day of original entry into service unless otherwise provided in existing agreements.

13. The parties hereto having in mind conditions which exist or may arise on individual carriers in making provisions for vacations with pay agree that the duly authorized representatives of the employees, who are parties to one agreement, and the proper officer of the carrier may make changes in the working rules or enter into additional written understandings to implement the purposes of this agreement, provided that such changes or understandings shall not be inconsistent with this agreement.

14. Any dispute or controversy arising out of the interpretation or application of any of the provisions of this agreement shall be referred for decision to a committee, the carrier members of which shall be the Carriers' Conference Committees signatory hereto, or their successors; and the employee members of which shall be the Chief Executives of the Fourteen Organizations, or their representatives, or their successors. Interpretations or applications agreed upon by the carrier members and employee members of such committee shall be final and binding upon the parties to such dispute or controversy.

This section is not intended by the parties as a waiver of any of their rights provided in the Railway Labor Act as amended, in the event committee provided in this section fails to dispose of any dispute or controversy.

15. Subject to confirmation as may be required by the labor organizations, signatory hereto, and when so confirmed, this agreement shall be effective January 1, 1942, and shall be incorporated in existing agreements as a supplement thereto, and be in full force and effect for a period of two (2) years from that date and continue in effect thereafter subject to not less than six (6) months' notice (which notice may be served in 1943 or in any subsequent year) by any carrier or organization party hereto, of desire to change this agreement as of the end of the year in which the notice is served.

When such notice is served, the proceedings shall be under the provisions of the Railway Labor Act, amended.

16. This agreement is subject to approval of court with respect to carriers in hands of receivers or trustees.

17. The counter request of the Western Carriers made in May, 1940, for a ten per cent reduction in the existing rates of pay of certain employees, as such carriers and employees

are designated in Appendix "B" attached hereto, is hereby withdrawn.

SIGNED AT CHICAGO, ILLINOIS, This 17th Day of December, 1941.

For the participating carriers listed in Appendix (a):

JNO. G. WALBER, *Chairman*  
H. D. BARBER  
J. W. SMITH  
E. B. PERRY  
C. W. VAN HORN

For the participating carriers listed in Appendix (B):

J. H. AYDELOTT, *Chairman*  
C. R. YOUNG  
M. J. BYRNES

For the participating carriers listed in Appendix (C):

C. D. MACKAY, *Chairman*  
L. L. MORTON  
J. B. PARRISH  
C. G. SIBLEY

For the employees represented by the participating labor organizations:

The Order of Railroad Telegraphers  
V. O. GARDNER, *President*

International Association of Machinists  
H. J. CARR, *General Vice-President*

International Brotherhood of Boilermakers,  
Iron Ship Builders and Helpers of America  
CHAS. J. MACGOWAN,  
*International Vice-President*

International Brotherhood of Blacksmiths,  
Drop Forgers and Helpers  
JOHN PELKOFER, *General Vice-President*

Sheet Metal Workers' International  
Association  
L. M. WICKLEIN, *General Vice-President*

International Brotherhood of Electrical  
Workers

J. J. DUFFY, *Vice-President*

Brotherhood Railway Carmen of America  
FELIX H. KNIGHT, *General President*

International Brotherhood of Firemen, Oilers,  
Roundhouse and Railway Shop Laborers  
GEORGE WRIGHT, *Vice-President*

Brotherhood of Railway & Steamship Clerks,  
Freight Handlers, Express and Station Em-  
ployees

GEO. M. HARRISON, *Grand President*

Brotherhood of Maintenance of Way  
Employees

E. E. MILLIMAN, *President*

Brotherhood of Railroad Signalmen  
of America

A. E. LYON, *Grand President*

National Organization Masters, Mates & Pilots  
of America

JAMES J. DELANEY, *National President*

National Marine Engineers' Beneficial  
Association

S. J. HOGAN, *National President*

International Longshoremen's Association  
J. P. RYAN, *International President*

B. M. JEWELL, *Chairman*  
Fourteen Participating Labor Organizations.

(The appendices attached to the original  
agreement are not here reproduced.)

## **INTERPRETATIONS**

**DATED JUNE 10, 1942.**

In connection with the Vacation Agreement dated Chicago, Illinois, December 17, 1941, the following interpretations have been agreed to:

### **GENERAL**

After the basic interpretations have been disposed of, it may be necessary to agree upon some questions and answers in order to make clear to those, other than members of the respective committees, the proper application of this Vacation Agreement. Whether or not this shall be done is a matter for determination in the light of developments.

Inasmuch as there are so many matters about which we disagree, in the interest of agreement, the parties have agreed to present to the referee agreements herein evidenced. In so presenting them, it is agreed that the referee is requested not to use such agreements for the purpose of interpreting any article or section of the Vacation Agreement which may be in dispute, as these agreements are made without prejudice.

### **PREAMBLE**

The Vacation Agreement is a separate agreement by and between, and in behalf of each carrier and each group of its employees, as shown by the appendices attached thereto, for whom a request was made.

### **Article 1**

The days referred to in the term "not less than 160 days" must be—

(a) days under one rules agreement with one organization, or one rules agreement with two or more federated organizations parties to the Vacation Agreement which were parties to such rules agreement on a particular carrier, which carrier and employees were both listed in appendices to the Vacation Agreement, or

(b) days under two or more rules agreements with one organization, or one federation of organizations, party to the Vacation Agreement which was party to such rules agreements on a particular carrier, which carrier and employees were both listed in appendices to the Vacation Agreement.

(c) Where employees of a joint facility or operation periodically become subject to agreements with different carriers, the change from an agreement with one carrier to an agreement with the same organization with another carrier shall not affect the vacation status of employees of such joint facility or operation.

(d) Except as above provided, an employee cannot combine days under more than one rules agreement.

### Article 2

If necessary, individual managements and individual committees may meet for the purpose of disposing, if possible, of the question of what constitutes "small non-telegraph agents" under the terms and for the purposes of the Vacation Agreement alone.

### Article 3

This article is a saving clause; it provides that an employee entitled, under existing rule, understanding, or custom, to a certain number of days vacation each year, in addition to those specified in Articles 1 and 2 of the Vacation Agreement, shall not be deprived thereof, but such additional vacation days are to be accorded under the existing rule, understanding, or custom in effect on the particular carrier, and not under this Vacation Agreement.

If an employee is entitled to a certain number of days vacation under an existing rule, understanding, or custom on a particular carrier, and to no vacation under this Vacation Agreement, such vacation as the employee is entitled to under such rule, understanding, or custom shall be accorded under the terms thereof.

### Article 5

As the vacation year runs from January 1 to December 31, payment in lieu of vacation may be made prior to or on the last payroll period of the vacation year; if not so paid, shall be paid on the payroll for the first payroll period in the January following, or if paid by special roll, such payment shall be made not later than during the month of January following the vacation year.

### Article 7

Article 7(a) provides:

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

This contemplates that an employee having a regular assignment will not be any better or worse off, while on vacation, as

to the daily compensation paid by the carrier than if he had remained at work on such assignment, this not to include casual or unassigned overtime or amounts received from others than the employing carrier.

### Article 8

Within the application of Article 8:

(1) An employee's employment relation is not terminated when (a) laid off or cut off on account of force reduction if he maintains rights to be recalled; or (b) on furlough or leave of absence; or (c) absent on account of sickness or disability.

(2) An employee, who loses his seniority because of moving from one seniority roster or seniority district to another established under one rules agreement made with one organization or with two or more federated organizations or under two or more rules agreements made with one organization or federation of organizations parties to the Vacation Agreement, shall not be deemed to have terminated his "employment relation" under this article.

Signed at Chicago, Illinois, this 10th day of June, 1942.

For the participating carriers listed in  
Appendix (A):

H. D. BARBER, *Chairman*

Conference Committee—Eastern Railroads

For the participating carriers listed in  
Appendix (B):

M. J. BYRNES, *Chairman*

Conference Committee Western Railways

For the participating carriers listed in  
Appendix (C):

C. D. MACKAY, *Chairman*

Conference Committee of Southeastern  
Railroads

For the employees represented by the participating labor organizations:

B. M. JEWELL, *Chairman*

Fourteen Participating Labor  
Organizations

## **INTERPRETATIONS**

**DATED JULY 20, 1942.**

In connection with the Vacation Agreement dated Chicago, Illinois, December 17, 1941, the following interpretations, in addition to the interpretations evidenced by the agreement as to interpretations dated June 10, 1942, have been agreed to subject to the understanding as expressed under the heading "GENERAL" of the interpretations of June 10, 1942, which is herewith included by reference.

### **ARTICLE 4**

**Question 1:** Meaning and intent of the second paragraph of Article 4(a)?

**Answer:** The second paragraph of Article 4(a) requires cooperation between local committees of each signatory organization and representatives of carriers in assigning vacation dates. To carry out this cooperative assignment of vacation dates, a list will be prepared showing the date assigned to each employee entitled to a vacation, and this list will be made available to the local committee of the signatory organizations; such portion of any list as may be necessary for the information of particular employees will be made available to them in the customary manner.

### **ARTICLE 5**

**Question 1:** May an employee at his option forego the taking of a vacation, remain at work and accept pay in lieu thereof?

**Answer:** No.

### **ARTICLE 8**

**Question 1:** Is an employee, who has qualified for a vacation and who enters the armed service of the United Nations prior to taking his vacation, retaining his seniority, entitled to payment in lieu thereof?

**Answer:** Yes.

### **ARTICLES 7 AND 8**

**Question 1:** Is an employee who is qualified for vacation and who, before his vacation is taken, either while on furlough,



on leave of absence, or through understanding with management, accepts another position with the same carrier, which position is not covered by the rules agreement applying to his former assignment, but who retains his seniority in his former class, entitled to the vacation as qualified for or payment in lieu thereof?

**Answer:** It is agreed that such an employee would be entitled to vacation or payment in lieu thereof, such payment to be made under the provisions of Article 7(e). This means that such employee would receive no more vacation pay than he would have received had he taken vacation while on the position last held by him which was covered by the Vacation Agreement.

The foregoing will not apply, however, should such employee be granted a vacation or payment in lieu thereof in his new occupation on a basis as favorable as to pay as though granted under the provisions of this agreement.

#### ARTICLES 10 AND 13

**Question 1:** The words "regularly assigned vacation relief employee" are used in Article 10(a). The words "regular relief employee" are used in Article 12(b). The words "regularly assigned relief employee" are used in Article 12(c). Do these terms refer to different types of employees than are referred to by the terms "vacation relief workers" as used in Article 6, and "relief worker" as used in Articles 10(b) and 12(a)?

**Answer:** It is agreed that the terms "vacation relief workers," as used in Article 6, and "relief workers" as used in Articles 10(b) and 12(a), describe in general terms all persons who fill the positions of vacationing employees. The terms used in Articles 10(a), 12(b), and 12(c) are more restrictive and describe only those persons described generally in Articles 6, 10(b), and 12(a) who are assigned to regularly fill positions of absent employees. It is agreed that under Article 13 of the Vacation Agreement it may be desirable to negotiate special arrangements and rates for the establishment of regular relief positions to relieve certain employees while on vacation.

#### ARTICLE 10(b)

**Question 1:** Does the word "hiring" in Article 10(b) contemplate that the relief worker referred to must be a newly hired employee?

**Answer:** No. This word may be interpreted and should be applied as though it read "providing" or "furnishing" a relief

worker. It does not require that a relief worker necessarily be a newly hired employee.

Signed at Chicago, Illinois, this 20th day of July, 1942.

For the participating carriers listed in  
Appendix (A):

H. D. BARBER, *Chairman*

Conference Committee—Eastern Railroads

For the participating carriers listed in  
Appendix (B):

M. J. BYRNES, *Chairman*

Conference Committee Western Railways

For the participating carriers listed in  
Appendix (C):

C. D. MACKAY, *Chairman*

Conference Committee of Southeastern  
Railroads

For the employees represented by the partici-  
pating labor organizations:

B. M. JEWELL, *Chairman*

Fourteen Participating Labor  
Organizations

**AWARD OF REFEREE  
IN THE MATTER OF A CONTROVERSY**

Between the

**FOURTEEN COOPERATING RAILROAD  
LABOR ORGANIZATIONS**

and

**THE CARRIERS**

**INVOLVING INTERPRETATION AND APPLI-  
CATION OF THE VACATION AGREEMENT  
OF DECEMBER 17, 1941**

Referee—Wayne L. Morse

Washington, D. C.

November 12, 1942

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**I. INTRODUCTION**

The parties to this dispute signed an agreement on December 17, 1941, providing for the terms and conditions governing and regulating vacations of the employees. The execution of the vacation agreement of December 17, 1941, was the culmination of several months of collective-bargaining negotiations, hearings before an Emergency Board, mediation proceedings, and, finally, decision by a referee.

All of the proceedings which led up to the vacation agreement of December 17, 1941, bear a very direct relationship to the problems presented to the referee in the instant case because they circumscribe the surrounding facts and circumstances out of which the vacation agreement was evolved.

On May 20, 1940, employee representatives served notice in writing on each of the carriers of a collective-bargaining demand for the adoption of a specific vacation plan set forth in

the notice. The carriers were unwilling to grant the vacation request, and mediation under the auspices of the National Mediation Board followed.

The parties were unable to settle the vacation dispute in mediation, and the issue, along with several others, was finally submitted to an Emergency Board appointed by the President on September 10, 1941. This Board in its report to the President on November 5, 1941, recommended a vacation plan providing a six days' vacation with pay to all employees in the fourteen cooperating organizations who work substantially throughout the year.<sup>1</sup>

The organizations of railway employees refused to accept the recommendations of the Emergency Board as a basis for settling their disputes with the carriers. The President thereupon reconvened the Emergency Board for the purpose of hearing any new evidence which the parties might wish to offer and for the additional purpose of serving as a special board of mediation if the parties so desired. The Board's offer to serve as a special mediation board was accepted by the parties, with the result that on December 1, 1941, they reached a mediation settlement of their differences. This settlement has become known in the industry as the "Washington Mediation Settlement."

The provisions of the settlement were set forth in a report of the Emergency Board to the President under date of December 5, 1941. Although the Washington mediation agreement did not finally determine the vacation issue, it did provide a basis for a final settlement. Thus the Emergency Board's December 5, 1941 report to the President sets forth the following mediation agreement between the parties on vacations:

"That the recommendation in the report of November 5, 1941, that there shall be a vacation of 6 consecutive work-days with pay for all employees in the fourteen cooperating organizations who work substantially throughout the year, or who are attached to the industry as a result of reasonably continuous employment, shall be approved, with the additional provision that employees in the clerk and telegrapher classifications who have given 2 years of service shall receive a 9-day vacation with pay, and those who have a record of 3 years of service or more shall receive an annual vacation of 12 days with pay. The parties shall agree that the details covering the rules, conditions, and arrangements which shall govern the granting of vacations shall be worked out by the parties in negotiations immediately following the acceptance of the mediation settlement.

"The parties shall agree with the Emergency Board that if they are unable to reach an agreement within a reasonable time upon all the details of the vacation proposal, they will

<sup>1</sup>Details of the vacation plan recommended by President's Emergency Board are set forth on pages 56 to 61 of its report.

submit all disagreements to a member of the Board selected by them, or to some other third party agreed to by them, for final settlement. They shall agree that the decision of any such referee shall be binding upon them as to vacation arrangements and as to the formula which shall determine what particular employees shall receive vacations."

Following the Washington mediation settlement, the representatives of the parties proceeded to Chicago, where they held further conferences and negotiations on the vacation problem. However, they were unable to settle their differences in negotiations between themselves, and hence on December 10, 1941, in accordance with the Washington mediation settlement, they selected the writer to serve as referee of the dispute and render a decision which would be binding upon both parties. Hearings were held before the referee, and on December 17, 1941, he issued an award containing the terms of the vacation agreement which, in his opinion, should be accepted by the parties in settlement of the vacation dispute.

It is to be noted that at the December, 1941, hearings before the referee the parties submitted an exhibit setting forth in parallel columns their respective proposals on the several sections of a vacation contract. The exhibit showed that they had reached complete agreement on many of the sections of a vacation contract, and hence the referee approved and adopted each section which the exhibit showed the parties had agreed to in substance. As to those sections in regard to which the parties had been unable to reach an agreement, the referee either adopted the proposal of one of the parties or rewrote such a section in accordance with what he thought the section should contain in light of the record submitted to him.

Article 14 of the vacation agreement was written and approved by the parties themselves, and reads as follows:

"14. Any dispute or controversy arising out of the interpretation or application of any of the provisions of this agreement shall be referred for decision to a committee, the carrier members of which shall be the Carriers' Conference Committees signatory hereto, or their successors; and the employee members of which shall be the Chief Executives of the Fourteen Organizations, or their representatives, or their successors. Interpretations or applications agreed upon by the carrier members and employee members of such committee shall be final and binding upon the parties to such dispute or controversy.

"This section is not intended by the parties as a waiver of any of their rights provided in the Railway Labor Act as amended, in the event committee provided in this section fails to dispose of any dispute or controversy."

The parties accepted the referee's award of December 17, 1941, and on the same date signed the vacation agreement con-

tained therein. However, following the signing of the vacation agreement of December 17, 1941, the Joint Carrier-Employee Committee, which was charged under Article 14 of the agreement with the responsibility of interpreting and applying it, became deadlocked over a series of questions concerning the meaning of the contract. Thereupon on June 10, 1942, the Committee requested the National Mediation Board to nominate a referee to conduct hearings and issue an award in settlement of the disputed questions.

On June 17, 1942, the National Mediation Board nominated the writer to serve as referee in the dispute, and the representatives of the disputants notified the writer shortly thereafter that they had accepted him as referee. On July 20, 1942, the parties filed with the referee a jointly signed letter setting forth the agreement of submission and the terms of reference which were to govern the hearings before the referee. The letter reads as follows:

"Chicago, Illinois  
July 20, 1942

"Honorable Wayne L. Morse  
c/o War Labor Board  
U. S. Department of Labor Bldg.,  
Washington, D. C.

"Dear Sir:

"Pursuant to the understanding heretofore arrived at, as expressed in Mr. Robert F. Cole's letter to the undersigned dated June 16, 1942, a copy of which you have, the parties to the Vacation Agreement have prepared for submission the questions upon which they are in dispute, together with the statement of their positions. A copy of this document is attached hereto.

"The parties have agreed that your decision upon the issues herewith submitted shall be final and binding.

"The following documents will be filed with the referee at the time of hearing:

"(1) The original report of the President's Emergency Board dated November 5, 1941.

"(2) The Supplemental Report of the Emergency Board, dated December 5, 1941.

"(3) The submission to you as referee of the terms of the Vacation Agreement on December 10, 1941.

"(4) Your award as referee in the matter of the Vacation controversy dated December 17, 1941.

"(5) The Vacation Agreement dated December 17, 1941.

"(6) The interpretations, dated June 10, 1942, and July 20, 1942, by the parties hereto, of the Vacation Agreement,

both of which are subject to the understanding as expressed in the second paragraph under the heading 'General' of Interpretations of June 10, 1942.

"(7) Letter of the parties to Honorable Robert F. Cole, Secretary, National Mediation Board, dated June 10, 1942.

"(8) Mr. Cole's reply of June 16, 1942, advising that you had accepted the appointment as referee in the present dispute.

"In addition to the foregoing documents, which as stated will be filed at the time of the hearing, the parties agree that they may, if desired, refer in argument to the following documents:

"(a) The record on the issue of the Vacation case before the President's Emergency Board appointed September 10, 1941.

"(b) The briefs filed by the parties in that case with respect to the Vacation issue.

"(c) The record on the vacation issue made on the rehearing and reargument before the Emergency Board at Washington, D. C.

"(d) The report of the Chairman of the Emergency Board at the executive session held at the conclusion of the Mediation Proceedings in the Raleigh Hotel at Washington, D. C.

"In addition to all the foregoing, the parties reserve the right at the hearings to file additional illustrations under any of the issues, to introduce any evidence which they may deem desirable, and to argue the case. Any briefs to be filed will be filed at the beginning of the hearing.

"In the submission of the case the parties will conform to the wishes of the referee as indicated in the conference on June 20, 1942, with respect to the procedure to be followed; namely, that the record will be made on each issue separately.

"It is agreed that the presentation of evidence and argument will be opened as to each of the issues (not Articles) alternately by the parties; the carriers will open as to the first issue; the employees as to the second, etc.

"The parties request that the referee will afford to them an opportunity, after the award has been prepared and before it is officially released, to take up with him questions or objections involving the language or terminology of the award, for the purpose of clarification, with the understanding that further discussions or exceptions will be limited to matters of terminology and not to substantive matters decided.

"We understand that it is agreeable to you that the hearings will be held in the Roosevelt Room of the Morrison Hotel, Chicago, Illinois, beginning 10 a.m., July 28th, 1942.

The parties have arranged for the services of a court reporter, who will supply the referee with daily transcripts of the proceedings.

"Respectfully,

"For the Employees represented by the  
Participating Labor Organizations:

(Signed) B. M. Jewell,  
*Chairman,*  
Fourteen Participating Labor  
Organizations.

"For the Participating Carriers:

(Signed) H. D. Barber,  
*Chairman,*  
Conference Committee—  
Eastern Railroads

(Signed) M. J. Byrnes,  
*Chairman,*  
Conference Committee—  
Western Railways

(Signed) C. D. Mackay,  
*Chairman,*  
Conference Committee—  
Southeastern Railroads."

Hearings were held at the Morrison Hotel, Chicago, Illinois, from July 30, to August 2, 1942, following which the parties were given time in which to file supplementary memoranda, exhibits, and briefs, the last of which reached the referee on August 21, 1942. The parties submitted a very extensive record in this case, consisting of 949 pages of transcript plus several hundred pages of material in the form of briefs and exhibits. This award is based upon the record made by the parties.

In view of the fact that most of the questions presented to the referee involved disagreements as to what the parties intended or meant when they used certain language in the agreement of December 17, 1941, it became necessary for the referee in many instances to determine the meaning and intention of the parties by examining the surrounding facts and circumstances of the vacation dispute from its inception in May, 1941, as shown by the record. In doing so he applied the well-recognized rule of contract construction; namely, when the terms of a contract are ambiguous or their meaning uncertain, it is permissible to examine the surrounding facts and circumstances which led up to the execution of the contract in determining the intent of the parties.

Furthermore, it is to be remembered by the parties to this dispute that in preparing this award, the referee drew upon his

knowledge of the background of this dispute because it was made clear to him by the parties that one of the primary reasons for his being selected as referee was the fact that, as Chairman of the President's 1941 Emergency Board, he wrote the vacation section of the Board's report of November 5, 1941, mediated the Washington settlement of December 1, 1941, and wrote those sections of the vacation agreement of December 17, 1941, which the parties had previously failed to settle for themselves in negotiations. Thus, to the extent that any of the questions presented in the instant case involved disagreements over the meaning of sections written into the December 17, 1941 vacation agreement by the referee, the task of the referee in this award simply became one of telling the parties what he meant and intended by the language which he used in the December 17 agreement. To that extent, this award is one of clarification as to the referee's meaning as well as one applying the doctrines of contract construction to the language of the parties.

In addition, the referee wishes to point out that this award is not based upon any strict or literal interpretation of any section of the agreement when in the opinion of the referee such an interpretation would have done violence to the purpose of the agreement or would have produced an unfair, inequitable, and unreasonable result. The referee has adopted the same general point of view in this case which he has enunciated in many previous cases insofar as the interpretation of collective-bargaining contracts is concerned.

Thus, he has stated:

"It is well recognized that in interpreting and applying collective-bargaining contracts, boards of arbitration should endeavor to avoid inflicting unreasonable hardship upon either party to the contract. Harmonious industrial relations are not promoted by insisting upon a literal interpretation of a contract when such an interpretation will result in unfairness or unreasonable hardships. An insistence upon applying 'the pound-of-flesh philosophy' simply does not promote sound industrial relations or result in maximum production."

To the same effect in another decision this referee has stated:

"Labor disputes can seldom be settled on a fair and equitable basis, productive of harmonious labor relationships and conducive to maximum production by resorting to the legalisms and technicalities of contract law . . . Arbitration boards and courts are not prone, and rightly so, to apply the strict rules of contract construction to such collective-bargaining agreements when it is clear from the record of a given dispute that the application of technical legal rules of construction would do violence to the intention of the parties and defeat the very purpose of the collective-bargaining agreement; namely, the promotion of harmonious labor relations."

The referee is frank to say that as he listened to the presentation of the case by the parties and studied the written record he formed the impression that both sides to this dispute seemed to have lost sight of the primary purpose of the vacation agreement; namely, to give a vacation with pay each year to the employees involved in the dispute. It certainly was not the intention of the parties originally to make it as difficult as possible for employees to get a vacation, nor was it their intention to make the vacation grant as great a burden upon the carriers as possible. Yet it appeared to the referee that as the parties became more and more involved in their prolonged negotiations over the application of the vacation agreement, they became more formalistic in their demands upon each other and more insistent upon what they considered were their technical and literal rights insofar as interpreting and applying the agreement was concerned. Thus, by the time the dispute reached this referee for determination, the parties seemed to be firmly convinced that each of the sections of the agreement in dispute was subject to one—and only one—interpretation; namely, the one each partisan insisted upon.

As is common to all such disputes, the interpretations insisted upon by the partisans to the dispute were motivated primarily by their selfish, or at least biased, interests. It is not to be expected, under such circumstances, that even an interpretation by a non-partisan referee will be much more convincing than the interpretation advanced by an opposing partisan. However, in this instance the referee's findings will at least have the advantage of non-partisanship based upon the impartial viewpoint of an outsider who is convinced that labor disputes should be settled on the basis of principles of ordinary common sense and well-recognized doctrines of equity. The referee believes that the following decisions on the several questions submitted by the parties constitute a fair, reasonable, and equitable settlement of this dispute.

## II. DECISION

### A. Referee's Answers to Questions

#### Raised Under Article 1 of the Vacation Agreement

Article 1 of the vacation agreement reads:

"1. Effective with the calendar year 1942, an annual vacation of six (6) 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 sixty (160) days during the preceding calendar year."

**Question No. 1:** Meaning and intent of the words "consecutive work days."

The parties disagree as to the meaning and intent of the words in the article "consecutive work days."

### Carriers' Contention:

It is the contention of the carriers that the disputed words should be interpreted to mean:

"any consecutive days covered by an employee's assignment upon which he would have worked had he not been on vacation, and this regardless of whether his assignment is for a full eight hour day or less. In other words, the carriers' position is the consecutive work days mean days covered in the employee's regular assignment as distinguished from days upon which he may be called or notified to work when there is no regular assignment to work."

### Labor's Contention:

The labor organizations, on the other hand, contend that:

"The words 'work days' should be interpreted and applied in accordance with the respective rules agreements, or recognized practice thereunder. For example; the rules agreements generally provide that eight consecutive hours, exclusive of the meal period, shall constitute a day's work. In such cases it is clear that a 'work day' is a day of eight hours. Likewise where less than eight hours is a recognized day's work, as in certain offices, this would be a work day. The 'work day' does not include Sundays (or assigned rest days), or holidays on which an employee is assigned to work less than a full work day—such as an hour or two—and is paid only for such service and not for a full day, but does include Sundays (or assigned rest days), or holidays on which an employee is regularly assigned to work a full day.

"The word 'consecutive' should be interpreted as requiring that the 'work days' should be continuous and uninterrupted, except for Sundays (or assigned rest days) or holidays on which an employee is not regularly assigned to work a full day."

### Referee's Decision:

It is the opinion of the referee that the words "consecutive work days" refer to days on which a full day's work is performed and not a partial day's work. However, it is to be distinctly understood that in overruling the carriers' position on this question, the referee does not adopt the employees' contention that the phrase "work days" should be interpreted and applied in accordance with the respective rules agreements or recognized practice thereunder. It is the view of the referee that the rules agreements are entitled to some consideration in determining what the parties intended by the words "work days," but they certainly are not controlling.

When one reads the entire vacation agreement, keeping in mind its primary purpose of providing the employees with a vacation with pay from their work, it becomes clear that it

was contemplated by the parties that the vacation days should be measured and paid for in terms of a full day's work of eight hours, except in those instances in which less than eight hours is recognized in the industry as a full day's work. It would not be fair or reasonable to include Sundays (or assigned rest days) or holidays on which an employee is assigned to work less than a full work day and is paid for less than a full day, when figuring the six consecutive work days under Article 1.

The carriers asked the referee for a ruling on the following illustration:

"An employee entitled to a six day vacation is assigned to work eight hours per day, six days per week, and by assignment to work three hours on Sunday; vacation of such employee commenced on Wednesday. Under the carriers' contention, such employee's vacation would extend from Wednesday to Monday, inclusive. His six consecutive days would include the Sunday, even though assigned for less than a full day."

It is the referee's ruling that under the foregoing carriers' illustration the Sunday should not be included within the six-consecutive-work-days formula of Article 1 because the employee does not work a full work day on Sunday. Hence, under the illustration, the employee's vacation should extend from Wednesday to Tuesday, inclusive; but of course the employee would receive only six days' pay, although he would be away seven days.

In view of the language of Article 7 of the vacation agreement, it would be grossly unfair to subject Article 1 to any other interpretation, because if the Sunday under the carriers' illustration were counted within the six-consecutive-day formula, the employee would not receive a six-day vacation with pay but only approximately a five and one-half day vacation with pay.

This referee is satisfied that it was not contemplated by the parties when they signed the agreement of December 17, 1941, that the parties intended or meant anything else by the phrase "six consecutive work days" than six consecutive full work days, and he hereby rules accordingly.

**Question No. 2:** Meaning and intent of the words "renders compensated service."

**Carriers' Contention:**

The carriers interpret these words to mean:

"that to be considered as a day upon which compensated service is rendered, an employee must both work and receive compensation, and that the term would not embrace days for which the employee was compensated but upon which he performed no service."

"Illustration: An employee performs 150 days of compensated service in a given year. During the year he was sick and was allowed compensation for twelve days. The carriers contend that, as this employee rendered compensated service on only 150 days, he is entitled to no vacation in the succeeding year."

**Labor's Contention:**

It is the contention of the labor organizations that:

"The words 'renders compensated service' should be interpreted and applied as to include all and any compensation received from the employing carrier for time paid for. The application of the language is not confined to work actually performed.

"For example; compensation paid for any of the following is included:

"(a) Time paid for on account of standby or subject to call service where the employee does not actually work, but holds himself subject to call.

"(b) Time for which an employee is paid while off duty account of illness.

"(c) Time for which an employee is paid while off account of injury.

"(d) Time for which an employee is paid when excused from duty.

"(e) Time paid for while employee is on vacation with pay.

"(f) Time paid for while employee is absent from regular duty attending court, investigations or hearings on instructions of the carrier.

"(g) Time paid for because of suspension or dismissal.

"(h) Time paid for in settlements made because of improper application of rules agreements.

"(i) Time for which an employee is paid on Sundays (or assigned rest days) or holidays, but does not actually work."

**Referee's Decision:**

It is the decision of the referee that the interpretation of the words "renders compensated service" as advanced by the labor organizations cannot be sustained. The meaning of the words themselves does not support the employees' position. Furthermore, the surrounding facts and circumstances which led up to the adoption of Article 1 on December 17, 1941, by the referee do not support the employees' interpretation of the disputed words. The November 5, 1941, report of the Emergency Board provided that "any employee who works, sickness and injury excepted, not less than 60 percent of the total work hours per

year calculated on the basis of a 48-hour week, shall be entitled to a six-day vacation with pay."

At the Washington mediation hearings in December, 1941, representatives of the employees objected strenuously to the 60-percent-of-the-total-work-hours-per-year formula as a method of determining eligibility for vacations. They pointed out that the formula when figured in terms of 8-hour days would require approximately 187 days of work and that such a requirement would exclude a very large number of employees from the vacation privilege.

This referee recalls distinctly that representatives of the employees expressed the view many times at the Washington mediation sessions that the vacation-eligibility yardstick should be expressed in terms of days and that the maximum days of service required should be 160.

At the Chicago hearings on December 10, 1941, the referee decided in favor of the 160-days-of-service yardstick for determining vacation eligibility, and he approved and adopted the language proposed by the employees as set out in Article 1 of the vacation agreement of December 17, 1941.

It is true that the language proposed by the employees and approved by the referee contained the words "*renders compensated service*" on not less than 160 days during the calendar year." But it certainly was not made clear to the referee that the employees were using the words "renders compensated service" in any technical sense or with the intent of making the test of vacation eligibility the days for which the employees received compensation rather than the days on which they rendered service or worked. If the representatives of the employees had advanced any such contention on December 10, 1941, it would have been rejected then just as it is rejected now, because the referee never intended to adopt any such formula as is now argued for by the employees.

When he approved the language "renders compensated service on not less than 160 days" he gave to that language its ordinary and literal meaning; namely, the performance of service or work on not less than 160 days for which compensation is paid. The interpretation now advanced by the employees would make the modifier "compensated" the controlling word in the clause, whereas, in accordance with all rules of grammatical construction, it is obvious that the word "service" is the controlling word. Thus the test is whether or not the employee renders service on not less than 160 days for which he is compensated.

It is not fair or reasonable to assume that the parties contemplated that an employee's eligibility for a vacation was to be measured in terms of the compensation which he received from the carrier figured on the basis of days, but

rather that his eligibility for a vacation was to be determined on the basis of the number of days of service which he rendered the carrier during the preceding calendar year, and for which days of service he received compensation. Hence, if he performed a minimum of 160 days of service for which he was compensated, he became eligible for a vacation.

It should be kept in mind that one of the main arguments for granting vacations at all is that American workmen who work a large share of the work days of the year deserve for themselves and their families the many benefits which flow from a vacation. Vacation plans generally adopt the principle of either a percentage of work hours per year or a minimum number of work days per year as the test for determining vacation eligibility.

Viewed from the standpoint of the general practice in determining vacation eligibility, it is a very novel theory which is advanced by the employees in this case that the counting of days on which no actual service is rendered but for which compensation, for some reason or another, is paid by the carriers should be included as part of the total days required for the granting of a vacation. Certainly the burden of supporting any such theory rested upon the employees and the responsibility for the ambiguity in Article 1 must be assumed by the employees, because the language was proposed by them and not by the carriers or by the referee.

It is a well-recognized doctrine of contract construction that when such an ambiguity arises, the words in dispute are to be used in light of their ordinary and common-usage meaning, and not in any technical or trade sense unless the surrounding facts and circumstances make clear that the parties intended the words to be applied in a technical or trade-usage sense. In this instance the common and ordinary meaning of the words "renders compensated service" permits of only one interpretation; namely, that it was intended that an employee should be required to perform or render service or work for which he was compensated on not less than 160 days during the preceding calendar year before he would become eligible for a vacation subject to the exemptions discussed later.

Although this referee rejects the interpretation which the employees place upon the words "renders compensated service," he does not accept in full the interpretations placed upon the words by the carriers. It is his opinion that the interpretations of the carriers are too strict and literal and do violence to the intentions of the parties as they existed on December 17, 1941, when the vacation agreement was signed. The referee recalls that at the hearings before him on December 10, 1941, the parties were in agreement on the



point that the application of the vacation agreement to the various properties represented by the carriers would not be successful if either or both of the parties thereto insisted upon a strict and literal application of the language of the contract, irrespective of unfair hardships which might result therefrom.

The parties agreed with the referee that the success or failure of the vacation agreement would depend upon the good faith of the parties in their future endeavors to apply the language of the contract, in a just and reasonable manner, to individual cases. Thus, this referee is satisfied that the spirit and intent which prevailed in the minds of the parties at the time the contract was signed supports a finding that the parties understood and intended that the contract should be interpreted and applied on the basis of such flexible and equitable rules of construction as would do justice in individual cases. In fact, it might be said that one of the implied conditions of this vacation agreement is that it was the intention of the parties that the vacation agreement should be broadly interpreted so as to avoid unfair results in individual cases. Obviously, the vacation agreement would be of doubtful value to the industry if it were interpreted and applied in a manner which was productive of disputes and industrial discord.

On December 17, 1941, the parties seemed to recognize that the problem of putting the vacation agreement into effect was such a complicated one, because of the many differences in practice on the various railroads, that no language which they or the referee could devise could be so clear and all-inclusive as to eliminate the possibilities of differences of opinion, when it came to applying the contract in exceptional cases. However, they seemed to be agreed that they could work out, in negotiations, any differences which might arise and to that end they provided in Article 14 for a Joint Committee to interpret and apply the agreement. As is so often the case, the good intentions of the parties on December 17, 1941, to apply the contract to individual cases in a fair and equitable manner gave way to insistence upon strict and narrow interpretations as more and more disagreements developed between them concerning the meaning of the contract.

Hence, the referee feels, in regard to this second question which has arisen under Article 1, that both parties are insisting upon interpretations of the words "renders compensated service" which they would not have insisted upon if the question had been raised on December 17, 1941. He believes that the carriers, in some cases, have resorted to a very strict and narrow interpretation of the words in opposition to the very novel interpretation of the employees, and that by doing so they have lost sight of the unfair re-

sults which their interpretations would produce in certain exceptional cases. The referee does not propose to approve an interpretation of the words "renders compensated service" which will produce unfair results in individual cases not intended by the parties when they signed the agreement.

In the presentation of their case on this question the employees supported their theory of interpretation with a series of examples of "time paid for" by the carriers even though in many of the instances the employee was not actually at work on the railroad during the time for which he received compensation. It was the position of the employees that all such compensated time should be included in calculating the 160-day requirement for vacation eligibility. It is the opinion of this referee that some of the examples cited by the employees do fall within the meaning of the words "renders compensated service" and, hence, he proposes to rule on each of the examples presented by the employees.

"(a) Time paid for on account of standby or subject-to-call service where the employee does not actually work, but holds himself subject to call."

It is the ruling of the referee that all such time as falls within employees' example (a) should be included in calculating the 160-day requirement for vacation eligibility. The ruling is based upon the fact that standby or call-service time does involve the performance of service. As counsel for the carriers states on page 123 of the transcript:

"... we agree that standby service, which is actually paid for by the carrier, may be counted toward qualification and we do that because our understanding of the phrase 'standby service' includes both the element of pay and the element of a definite restriction on the freedom of movement of the employee. He is held for service. And we say that if a man is held for service there are in that such elements of work as to make it a fair interpretation of the vacation agreement that he should have that day counted."

During recent years this referee has been called upon to interpret and apply standby and call-service provisions of collective-bargaining contracts in the maritime industry. In all such cases he has consistently held that standby and call-service time involves the performance of service or work for the employer. Thus, in the case of the Marine Engineers Beneficial Association No. 97, Inc., vs. Alaska Packers Association, decided on December 16, 1939, this referee ruled:

"It is one thing for an assistant engineer to remain on board not subject to call, and quite a different thing for him to be required to remain on board subject to call. The restriction of being subject to call whenever loading or discharging operations are taking place . . . involves in and of itself,

the performance of a service within the meaning of the terms as used in the agreement of May 24, 1939."

The decision makes clear that when the orders of the employer require the employee to stand by subject to call, his freedom of action is restricted and he must be deemed to be in the service of the employer during that period of time. Similarly, in longshore cases this referee has ruled that standby time provided for within the terms of a collective-bargaining agreement constitutes working time. Hence, in this instance standby or call-service time should be credited to the employee when calculating his eligibility for a vacation.

"(b) Time for which an employee is paid while off duty account of illness."

"(c) Time for which an employee is paid while off account of injury."

The foregoing two examples (b) and (c) will be treated together because under the terms of the contract the same principle applies to each. As stated before, the President's Emergency Board in its report of November 5, 1941, recommended that any employee who works, sickness and injury excepted, not less than 60 per cent of the total work hours per year, calculated on the basis of the 48-hour week, shall be entitled to the six-day vacation with pay. It is to be noted that the vacation recommendation of the Emergency Board included the language "sickness and injury excepted."

The practice of giving the employee the benefit of days lost due to sickness and injury when figuring his eligibility for vacation is common to most vacation agreements. However, the referee is satisfied that in this case the representatives of the employees, in their negotiations with the representatives of the carriers, waived the sickness and injury exception clause when they urged the adoption of the 160-day compensated service requirement for vacation eligibility.

Although this referee would like to give the employees the benefit of days lost due to sickness and injury in any calculation of vacation eligibility, he is not at liberty to do so, because he is satisfied that such was not the intention of the parties when the agreement of December 17, 1941, was signed. He believes that as a matter of sound vacation policy, time lost due to sickness and injury should not be counted against the employee when determining his vacation eligibility, irrespective of whether he does or does not receive any compensation during a period of physical incapacitation. It is not the fact that the employee may receive pay while he is ill or injured that should entitle him to credit for such days lost when it comes to determining his vacation

rights, but rather the policy rests upon broad principles of fair dealing and sound industrial-relations ethics.

After all, if an employee becomes ill or injured but nevertheless remains on the employment roster and returns to work after recovery, he should not be discriminated against when it comes to granting vacations. In fact, as a usual thing, such an employee will probably need the benefits of a vacation even more than some of the employees who did not lose any time because of illness. It would appear that denying the employee credit for time lost as a result of illness and injury in determining his vacation rights constitutes a penny-wise and pound-foolish policy when evaluated in terms of labor morale, efficiency, and just ordinary fair treatment.

Nevertheless, the record of this case convinces the referee that the representatives of the employees gave up the sickness and injury exception clause in preference to a reduction in the vacation-eligibility yardstick from 60 per cent total work hours per year, calculated on the basis of the 48-hour week, as recommended by the Emergency Board and as proposed by the carriers at the December 10, 1941, hearings, to the 160-day figure. Hence, on the basis of the present wording of Article 1 of the agreement, the referee must rule that time lost due to illness or injury, even though the employee receives compensation benefits from the carrier, cannot be included in the 160-day vacation-eligibility figure as a matter of contract right.

"(d) Time for which an employee is paid when excused from duty."

It is the ruling of the referee that if an employee is excused from duty and during such off-duty performs no service or work for the carrier, then the time spent while excused from duty cannot be counted toward the 160 days of service required for vacation eligibility. The fact that the carrier may continue the employee's pay during the period of time that he is excused from duty is immaterial as far as this issue is concerned.

It is apparently true, as shown by the record on pages 106, 107, and 108, that certain carriers do include the time for which an employee is paid when excused from duty in their calculations of the 160-day requirement. Nevertheless, the fact that they do so does not create any contract right binding upon other carriers who take the position that such time does not fall within the meaning of Article 1 of the vacation agreement. Thus, when some carriers continue the regular pay of their employees while serving as jurors, or clerks or judges at elections and count the time so spent toward the 160-day vacation requirement, their action does not flow from any obligation under the vacation agreement

of December 17, 1941, but rather from a labor relations policy quite independent of that agreement. Desirable as such a policy may be, this referee has no authority to amend the vacation agreement, even by way of interpretation, so as to provide for such a policy.

However, it is to be distinctly understood that if any employee is required to perform service for the carrier during the period of time when he is "excused from duty with pay," then that time shall be counted toward the 160 days. Thus, if an employee is excused from his regular duties and sent as a representative of the carrier to conferences or sent on a public relations tour or some other such assignment, in the carrying out of which it can be said that the employee is performing service for the carrier, then that time shall be counted toward the 160 days.

"(e) Time paid for while employee is on vacation with pay."

Clearly, vacation time is not to be counted in figuring the 160-day vacation-eligibility requirement for the reason that while the employee is on vacation he is not performing service for the carrier. In fact, it is the opinion of the referee that the request of the employees that time paid for while an employee is on vacation should be counted toward the 160-day requirement, in and of itself rebuts the employees' theory on Question No. 2 under Article 1.

It is a well-recognized doctrine of contract construction that if a certain interpretation of the language of a contract will produce absurd results, then that interpretation should be abandoned in favor of one which does not produce such results. It is submitted that the contention of the employees that the vacation period itself should be subtracted from the 160-day requirement when determining an employee's eligibility for a vacation, amounts in fact to saying that the requirement is not 160 days at all, but only 154 days, and such a result abjures the plain meaning of the article.

"(f) Time paid for while employee is absent from regular duty attending court, investigations, or hearings on instructions of the carrier."

It is the ruling of the referee that when an employee is absent from regular duty attending court, investigations, or hearings on instructions of the carrier, or performing any other service under instructions from the carrier, time so spent should be credited to the employee in figuring the 160 days' vacation requirement. Here, again, the test is whether or not the employee performed service or work for the carrier.

"(g) Time paid for because of suspension or dismissal."

It is the decision of the referee that if an employee is wrongfully suspended or dismissed by the carrier and subse-

quently reinstated, either through the operation of the regular grievance machinery or as the result of an admission by the carrier that it was at fault, the time during which the employee was suspended or dismissed shall be counted toward the 160-day vacation requirement. On the other hand, if the suspension or dismissal of an employee is due to his own fault, and the carrier subsequently, as a matter of leniency, agrees to reinstate the employee, the period of the suspension or dismissal shall not be counted by the employee in figuring the 160-day requirement unless the carrier voluntarily agrees to it as part of the leniency grant.

To hold that the employee should receive the benefit of the time lost during a suspension or a dismissal in calculating his vacation rights, even though the carrier was justified in suspending him or dismissing him but later returned him to work as a matter of leniency, would serve only to discourage carriers from granting leniency in such cases. As was pointed out at the hearing, to so hold would tend to discourage carriers from granting leniency to employees in dismissal cases where the employee is at fault, with the result that such holding would work to the detriment of the employees themselves in such cases.

In the light of the meaning of the language in Article 1 of the agreement, an employee who is reinstated after a justifiable suspension or dismissal can not be said to have performed any service during the time he was suspended or dismissed, even though the carrier does agree to reinstate him with back pay. There are many reasons which may lead a carrier, under such circumstances, to reinstate the employee with back pay, but just because it grants him back pay it does not follow that it *must* also be deemed to have given him vacation credit for the days off duty.

"(h) Time paid for in settlements made because of improper application of rules agreements."

There can be no doubt about the fact that if a carrier applies improperly a provision of the rules agreements, with the result that an employee is denied the right to work and under the grievance machinery the carrier is required to pay him for the time thus lost, such time should be counted toward the 160 days' vacation requirement.

"(i) Time for which an employee is paid on Sundays (or assigned rest days) or holidays, but does not actually work."

It is the ruling of the referee that if an employee does not perform any service on Sundays (or assigned rest days) or holidays and is not required to stand by for service on those days, but is free to do anything he pleases as far as the carrier is concerned, then such days cannot be counted toward the 160 days of service required in qualifying for a vacation, even though the carrier may have paid him for such days. Again the referee wishes to point out that it is not the pay which an employee receives from the carrier

but the days on which he performs service for the carrier that determine whether or not any given day shall be counted toward the 160-day vacation requirement.

**"(j) Time paid for deadheading."**

The record made by the employees also includes an illustration of time paid for deadheading. It is clear that whenever an employee is paid for time spent deadheading, it must be considered that he is still on duty and in the service of the company, and all such time should be counted toward the 160 days of service which, under the contract, an employee must perform before he becomes eligible for a vacation.

Finally, and by way of summary of the referee's position on Question 2 under Article 1 which the parties asked him to decide, it is to be understood by both parties concerned that only those days on which an employee performed some service for the carrier, or was wrongfully deprived by the carrier of his right to perform service under the rules agreements, are to be counted in calculating the 160 days' vacation qualification yardstick provided for under Article 1 of the agreement of December 17, 1941.

**Question No. 3:** Where the words "160 days" are used, what will constitute one such day?

**Carriers' Contention:**

The carriers interpret these words to mean:

"that a day is to be considered as a 24-hour period from the time an employee first began service on any day. All compensated service on such day, regardless of the time or amount of compensation paid, will be considered as one day."

**Labor's Contention:**

The position of the labor organizations on this question is that:

"These days need not be consecutive, but may be any days of the calendar year preceding the year in which the vacation is to be taken. Each calendar day for which an employee is paid by the employing carrier for some time, regardless of the amount of compensation, or the length of time paid for, will be counted as one day, provided, however;

"(1) An employee shall not be given credit for two days if tour of duty or a call extends from one calendar day into another; such an employee will be given credit for one day only on the day such tour of duty or call begins, except;

(a) An employee who has completed his tour of duty on a day and is called again on the same day for further duty extended into the next calendar

day, which is not an assigned work day for him, will be given credit for an additional day, or except;

(b) If overtime continuous with regular hours is required and extends into the next calendar day, which is not an assigned work day for the employee, credit will be given for an additional day, or except;

(c) In cases where relief or extra employees are required to protect more than one shift or tour of duty in a calendar day, they will be given credit for one day for each shift or tour of duty worked, and

"(2) Where by special agreement, custom or recognized practice employees, as a matter of convenience, get in the equivalent of their full weekly assignment of hours during a lesser number of days than the number constituting a week's assignment, they will be credited for the full number of days constituting the week's assignment."

**Referee's Decision:**

It is the decision of the referee that the position of the carriers on this question cannot be sustained. On the other hand, the position of the labor organizations can be sustained only in part.

It is submitted that it would be a very unreasonable and unfair interpretation of Article 1 of the agreement to hold, as contended for by the carriers, that "A day is to be considered as a 24-hour period from the time an employee first began service on any day." The term "day," as used in collective-bargaining agreements, generally means "work day" and not "calendar day." The length of a man's work day generally is measured in terms of the work shift or tour of duty. Hence, it is possible for an employee under some circumstances to complete two or more work days in one calendar day of twenty-four hours if he is assigned to more than one shift or tour of duty in one calendar day. Thus, the referee rejects the contention of the carriers that a day, under Article 1 of the agreement, shall be considered as a 24-hour period from the time an employee first began service on any day and that all compensated service on such day, regardless of the time or the amount of compensation paid, shall be considered as one day.

The referee approves the following proposals of the labor organizations:

"The days need not be consecutive, but may be any days of the calendar year preceding the year in which the vacation is to be taken. Each calendar day for which an employee is

paid by the employing carrier for some time, regardless of the amount of compensation, or the length of time paid for, will be counted as one day, provided, however;

"(1) An employee shall not be given credit for two days if tour of duty or a call extends from one calendar day into another; such an employee will be given credit for one day only on the day such tour of duty or call begins, except;

(a) An employee who has completed his tour of duty on a day and is called again on the same day for further duty extended into the next calendar day, which is not an assigned work day for him, will be given credit for an additional day."

The referee rejects the interpretation of the employees as set forth in paragraph (1) (b) of their contentions that "if overtime continuous with regular hours is required and extends into the next calendar day, which is not an assigned work day for the employee, credit will be given for an additional day."

It is generally recognized that work performed during overtime hours immediately following regular hours and paid for at overtime rates shall not be considered as constituting an extra day of service, even though the overtime hours may extend into the next calendar day. Thus, if an employee's regular shift is from 3:00 p.m. to 11:00 p.m., and on some occasions he is required to work two hours overtime, it cannot be said that he has worked two days, but rather that he has worked a day of ten hours, two hours of which were paid for at the overtime rate.

The interpretation urged by the employees on this point would place a very unreasonable burden upon the carriers and would add an additional penalty for overtime work and this, in the opinion of the referee, was not contemplated by the parties when they signed the agreement.

The referee approves the interpretation of the employees as set forth in paragraph (1) (c) of their position on this point when they stated:

"(c) In cases where relief or extra employees are required to protect more than one shift or tour of duty in a calendar day, they will be given credit for one day for each shift or tour of duty worked."

It would seem to be clear that under such circumstances a relief employee performs more than one day of work within a 24-hour period, when measured in terms of regular work shift or tours of duty, and he should receive credit for the same. The referee believes that the position taken on this point by the spokesman for the employees, as set forth on pages 153 and 154 of the transcript, is a very reasonable one. The statement reads:

"... an extra or relief employee, may fill the tour of two different employees in one calendar day. In such case the regular employees if they had continued work on their own assignment, each would have been credited with one day and these extra or relief employees in such instance should have credited to them one day for each such tour of duty.

"It will be remembered also that these extra employees are *not getting overtime for it*. That is part of their job. That is part of their relief or extra job. They take the work when they can get it and work when they can get it and they take the pay of the man whose job they are filling generally.

"Relief or swing employees filling tour of duty of absent employees may not only work two tours of duty in one calendar day but they fill six tours of duty in less than six calendar days and if they do they should be credited with a day for each tour of duty. That is all they have got an opportunity to work in that week. They are hanging around; they are on the roll and they have to be available for call, for they are generally worked first in and first out, and they are penalized if they do not respond when they are called by being put at the bottom of the list, and if they get in six tours of duty in one week, why shouldn't they have credit for six days for the purpose of a vacation here."

The referee also approves the position of the labor organizations as set out in paragraph (2) of the Joint Submission on this question. The paragraph reads:

"(2) Where by special agreement, custom or recognized practice employees, as a matter of convenience, get in the equivalent of their full weekly assignment of hours during a lesser number of days than the number constituting a week's assignment, they will be credited for the full number of days constituting the week's assignment."

It is to be noted that the cases covered by the paragraph are limited to those where by special agreement, custom, or recognized practice employees are permitted to work a full weekly assignment of hours in a lesser number of days than the usual number of days which would otherwise constitute a week's assignment. In view of the fact that such working arrangements are entered into with the consent of both parties and that the employees under such circumstances do not receive overtime pay when they work, for example, a 12-hour day instead of a regularly scheduled 8-hour day, it would seem to be only fair and reasonable to give them credit for the extra time worked in calculating the 160-day vacation requirement. Thus, if under such an arrangement an employee works four 12-hour days at straight-time rates during the week, instead of six 8-hour days which would under ordinary circumstances be assigned to him, it is only fair to allow him credit for six days toward the 160-day vacation qualification formula.

When such special arrangements are consented to by the parties to a collective-bargaining agreement, the presumption always is that they work to the mutual benefit of both parties to the agreement. Thus, by way of example in this instance, it is to be assumed that the performance of the work of six regular 8-hour days in four days of 12 hours each is a benefit not only to the employees but to the carrier as well. It would not be fair under such circumstances to penalize the employee two days of "vacation credit" when computing his eligibility for a vacation.

On pages 155 to 159 of the transcript the employee spokesman presented a series of examples of arrangements entered into between employees and the carriers which permit men to perform the equivalent of a full week's work assignment during a lesser number of days than it would take the men to perform the work if they worked only the regular shifts. As to such arrangements, the labor representative stated:

"We say further that in certain instances, either as a matter of convenience to the employees or to the carriers, or both, arrangements are made whereby employees get the equivalent of a full week's assignment in during a lesser number of days than is recognized as constituting that week's assignment. This practice is established by agreement, or by arrangement with the carrier and accepted by the employees, and we say that these employees should not be penalized for the purpose of crediting days to qualify for vacation. . . .

"Bridge and building gangs, signal gangs, extra gangs and other maintenance forces who travel from place to place over an operating division or over an entire system are frequently required by the carriers to live in camp cars. This means that these employees are away from home during the entire week. As a result of rules appearing in some agreements, and as a result of established practice on other carriers these employees are permitted to work beyond their regular 8-hour day on Monday, Tuesday, Wednesday, Thursday, and Friday, in order to make up part or all of their Saturday 8-hour shift, and thereby enabling them to get home earlier on Saturday and at times on Friday night. In other words, by working in excess of 8 hours and *setting aside the penalty overtime for such work* they are permitted, at times, to get in a full 6-day week during the first five (5) days of the week, in order that they might have part or all of Saturday at home with their families.

"Under these circumstances we say that these are the equivalent of six days and should be counted as such for the purpose of crediting the vacation agreement."

This referee agrees fully with the interpretation advanced by the representative of the employees on this point. He is satisfied that such an interpretation falls within the spirit, intent,

and meaning of Article 1 of the vacation agreement of December 17, 1941.

#### B. Referee's Answers to Questions

##### Raised Under Article 2 of the Vacation Agreement

Article 2 of the vacation agreement reads in part:

"2. Subject to the provisions of Section 1 as to qualifications for each year, effective with the calendar year 1942 annual vacations with pay of nine and twelve consecutive work days will be granted to the following employees, after two and three years of continuous service respectively:

"(a) The following described employees if represented by the Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employees: . . ."

**Question No. 1:** Meaning and intent of the words "subject to the provisions of Section 1 as to qualifications for each year."

##### Carriers' Contention:

The carriers interpret this phrase:

"to require, as a condition to a vacation of nine or twelve days, that the employees have rendered compensated service on not less than 160 days, not only in the preceding year but in each of some two consecutive years for a nine day vacation, or each of some three consecutive years for a twelve day vacation."

##### Labor's Contention:

According to the position of the labor organizations:

"This language is included in Article 2 solely for the purpose of making it clear that the employees who are to receive nine or twelve days' vacation, as the case may be, must qualify in the calendar year preceding the vacation year in the same manner as the employees who are to receive six days' vacation under Article 1.

"The vacation agreement continues from year to year, and the language in question is intended only to provide that for the first vacation year, and for each vacation year thereafter, employees are to receive vacations only if they have rendered compensated service on not less than 160 days in the calendar year preceding that in which the vacation is to be taken."

##### Referee's Decision:

It is the decision of the referee that the interpretation which the labor organizations seek to place on the words "subject to the provisions of Section 1 as to qualifications for each year" cannot be sustained.

It is to be remembered that the disputed language involved in this question was agreed to by the parties themselves and set forth in a joint submission of proposals on December 10, 1941. The referee adopted the language in his draft of Article 2 and set it forth in the vacation agreement of December 17, 1941. The language specifically relates to Section 1 (Article 1) of the agreement and, hence, it must be read and interpreted in connection with the provisions of Article 1 of the agreement.

The words "qualifications for each year" very definitely refer to the 160-day vacation eligibility formula. It is well recognized in contract law that words of an agreement shall not be ignored and treated as surplusage if they are susceptible of being given a meaning consistent with the other language in the section in which they occur. There can be no doubt about the fact that the parties intended the words "subject to the provisions of Section 1 as to qualifications for each year" to be read in connection with Article 1 of the agreement and not treated as surplusage.

It is impossible to escape the conclusion that the parties intended the words to constitute a rule that a nine or twelve days' vacation would be granted only after the employees concerned rendered compensated service on not less than 160 days during each of two or three calendar years (not necessarily consecutive) in one or more occupations embraced in paragraph (a) or paragraph (b), respectively, of Article 2.

The referee concurs in the following statement on the problem taken from the carriers' brief, pages 14 and 15:

"The opening phrase of this Article was agreed upon by the parties before the submission to the Referee in December, when the parties were still in dispute as to the basic formula for qualification to be stated in Article 1. It was agreed, however, that the basic formula for a vacation which would be inserted in Article 1 would be based upon some minimum amount of service during the preceding calendar year, and it was also agreed that the additional vacation days allowed under Article 2 would be conditioned upon service in two or three years. Obviously, therefore, the opening clause of Article 2 was written to require as to these additional qualifying years whatever minimum standard of service was finally prescribed in Article 1. The parties were agreed that whatever requirement was finally determined to be a reasonable minimum period of service under Article 1 would likewise be a reasonable requirement under Article 2. If this were not so, the word 'each' could not have been intelligently inserted, as it would have been necessary only to repeat the language of Article 1 as to service, using the words 'during the preceding year.' The employees' assertion that the requirement of 160 days' service applies only to the preceding year can be supported, therefore, only by eliminating from the sentence the word 'each.'"

In connection with this question the carriers submitted two illustrations of problems for decision, but after receiving the referee's tentative award the parties agreed to withdraw one of the illustrations.

"(a) Clerk first entered the service of the carrier January 2, 1938 and performed 80 days of compensated service in that year. In 1939 he performed 100 days of compensated service. In 1940 he performed 110 days of compensated service. In 1941 he performed 160 days of compensated service. According to the carriers' interpretation, the clerk would be entitled to six days' vacation in 1942."

(Illustration (b) was withdrawn by agreement of the parties.)

It is the ruling of the referee that the carriers' claim that the employee under illustration (a) would be entitled to six days' vacation in 1942 is a correct interpretation and illustration of the words "subject to the provisions of Section 1 as to qualifications for each year."

**Question No. 2: Meaning and intent of the words "after two and three years of continuous service."**

The parties have withdrawn the question and agreed upon the following application of the vacation agreement:

An employee who has qualified by rendering compensated service on 160 days in each of two or three calendar years (not necessarily consecutive) in one or more of the occupations embraced in paragraph (a) or paragraph (b), respectively, of Article 2, is entitled to nine (9) or twelve (12) days' vacation, as the case might be, in a subsequent calendar year, provided in the calendar year preceding a vacation year he has rendered compensated service on 160 days in one or more occupations embraced in paragraph (a) or paragraph (b), respectively.

#### Illustrations

"(a) An employee who entered service on May 1, 1941, and rendered compensated service in 1941 on not less than 160 days in one or more occupations embraced in paragraph (a) of Article 2, will be entitled to six days' vacation in 1942 under Article 1. This employee renders compensated service on not less than 160 days in the calendar year 1942 in one or more occupations embraced in paragraph (a) of Article 2, and will be entitled to nine days' vacation in 1943, regardless of when vacation is taken in that year. This employee similarly renders compensated service on not less than 160 days in the calendar year 1943 in one or more occupations embraced in paragraph (a) of Article 2, and will in 1944 be entitled to twelve days' vacation regardless of when vacation is taken in that year."

"(b) An employee who enters service in May, 1941, and renders compensated service in calendar year of 1941 on not less than 160 days in one or more occupations embraced in paragraph (a) of Article 2, will be entitled to six days' vacation in 1942 under Article 1. This employee then renders in 1942 compensated service on 65 days as a clerk and 120 days as a trucker, and will be entitled to six days' vacation in 1943. This employee then renders in 1943 compensated service on 180 days as a clerk, and will be entitled to nine days' vacation in 1944 regardless of when vacation is taken in that year. This employee then renders in 1944 as a clerk compensated service on not less than 160 days, and will be entitled to twelve days' vacation in 1945."

"(c) An employee who has rendered compensated service in each of three calendar years (not necessarily consecutive) on not less than 160 days in one or more of the occupations embraced in paragraph (a) of Article 2, will be entitled to twelve days' vacation in any subsequent year which follows an immediately preceding year in which he rendered compensated service on not less than 160 days in one or more of the occupations embraced in paragraph (a) of Article 2."

These three illustrations are also applicable to employees engaged in occupations embraced in paragraph (b) of Article 2; it being understood that service under paragraphs (a) and (b) of Article 2 cannot be combined; neither can service in positions covered in paragraph (b) of Article 2 be combined with service in positions specifically excepted therein.

(Original illustration under this question was withdrawn by agreement.)

**Question No. 3:** Does the word "years" mean service years or calendar years?

**Referee's Decision:**

It is the decision of the referee that the word "years," as used in Article 2 of the vacation agreement, means any calendar year during which compensated service is rendered in one or more occupations embraced in paragraph (a) or paragraph (b), respectively, of Article 2 on not less than 160 days.

**Question No. 4:** The parties have withdrawn the question and agreed upon the following application of the vacation agreement:

To be entitled to the nine or twelve days' vacation as provided for in Article 2, the two or three years of service must be performed in one or more of the occupations embraced in paragraph (a) or in paragraph (b), respectively, of Article 2, and not in some other classification.

This agreement is reflected in the following illustration:

"An employee entered service in November, 1939, as a trucker; performed 130 days' service as trucker in 1940; 204

days as trucker in 1941; promoted in December, 1941, to a clerical position; rendered 170 days' service in 1942 as a clerk. This man would be entitled to six days' vacation in 1942 earned as a trucker in 1941, and likewise six days' vacation in 1943 because he had only one year's qualifying service in a position enumerated in Article 2."

**Question No. 5:** Assuming qualifications, is the length of vacation to be determined by the occupation to which the employee is assigned at the time of taking vacation?

**Carriers' Contention:**

The carriers' interpretation of Article 2 is:

"... that the length of vacation is to be determined by the occupation in which the employee qualified."

**Labor's Contention:**

Labor took the position that the job classification held by the employee at the time of taking his vacation should be considered as controlling.

**Referee's Decision:**

In the light of the agreement under Question No. 4, a clerk, for example, cannot qualify for a nine or twelve days' vacation unless he has performed service on at least 160 days in one or more occupations embraced in paragraph (a) of Article 2 during the preceding calendar year and service on at least 160 days for the carrier in some capacity embraced in the occupations covered in paragraph (a) of Article 2, during some one or two previous calendar years.

**Illustrations**

"(a) An employee entered service in January, 1938, and worked on at least 160 days as a clerk in each of the calendar years 1938, 1940, and 1941. In January, 1942, he became a trucker and took his vacation in March of that year. Such employee is entitled to twelve days' vacation in 1942."

"(b) An employee entered service as a trucker in January, 1939, and performed service as such on at least 160 days in each of the calendar years 1939, 1940, and 1941. In January, 1942, he took service in an occupation covered by Article 2 (a) and was in such occupation when granted his vacation. This employee is entitled to six days' vacation in 1942."

**C. Referee's Answers to Questions**

**Raised Under Article 4 of the Vacation Agreement**

Article 4 of the vacation agreement reads:

"4 (a) Vacations may be taken from January 1st to December 31st and due regard consistent with requirements of service shall be given to the desires and preferences of the



employees in seniority order when fixing the dates for their vacations.

"The local committee of each organization signatory hereto and the representatives of the carrier will cooperate in assigning vacation dates.

"(b) The management may upon reasonable notice of thirty (30) days or more, if possible, but in no event less than fifteen (15) days require all or any number of employees in any plant, operation, or facility, who are entitled to vacations to take vacations at the same time.

"The local committee of each organization affected signatory hereto and the proper representative of the carrier will cooperate in the assignment of remaining forces."

**Question No. 1:** Meaning and intent of the first paragraph of Article 4 (a).

**Carriers' Contention:**

The carriers' interpretation of Article 4 (a) is that:

"... vacations, if afforded thereunder, may be allowed during the entire calendar year; that the phrase 'and due regard consistent with the requirements of service' shall be given to the desires and preferences of the employees' embraces all elements of the service, including the necessity of continuous operation and maintenance, avoidance of impairment of efficiency in operation and maintenance, economy and efficiency in the conduct of the carrier's business; assuming such due regard, the preferences of the employees in seniority order will be observed when vacations are afforded under this paragraph."

**Labor's Contention:**

The labor organizations contend that:

"Article 4 (a), first paragraph requires that the desires and preferences of the employees, in seniority order, shall be given 'due regard' when fixing vacation dates. In this fixing and assigning of vacation dates, the 'due regard' so given must be 'consistent with the requirements of the service.' Neither management nor employees are given arbitrary or unqualified rights.

"The words 'requirements of the service' mean real and actual service demands, not mere matters of managerial preference. In like manner they do not refer merely to current inconveniences, or operating problems that can be controlled by reasonable adjustment or planning. The service requirements referred to are not to be determined by what in management's opinion is most desirable, but rather by what is actually required for continuing carrier operations.

"The granting of vacations is the primary objective, and actual service demands, not managerial preference or convenience, must be the controlling factor. To the extent that service requirements will permit, senior employees must be permitted to select vacation dates in keeping with their desires and preferences during the vacation year, which extends from January 1, to December 31."

**Referee's Decision:**

At the outset of this discussion of the disputes over Article 4 of the vacation agreement, the referee wishes to point out that on December 10, 1941, each party submitted to him a proposed draft of a vacation agreement. Article 4 in each of these drafts contained identical language, thus showing that the parties were in complete agreement, at least as to the words which should be used in expressing their intentions concerning the subject matter of Article 4. At the hearing before the referee on December 10, 1941, no time was devoted to a discussion of Article 4 because of the fact that the parties informed the referee that they were in agreement as to the contents of that article. Hence, when the referee wrote the vacation agreement of December 17, 1941, he adopted verbatim the language of Article 4 as jointly agreed upon by the parties. The referee was very much surprised to discover that subsequent to the signing of the vacation agreement the parties fell into a serious disagreement as to what they meant and intended by the language of Article 4.

Although it is to be hoped that the referee's interpretations of the language of Article 4 may be helpful to the parties, he is convinced that the problems which have arisen under this article can be solved only by good-faith negotiations between the parties. It is necessary for them to carry out the spirit and intent which controlled their thinking on December 10, 1941, when they set up a cooperative plan for the administering of vacations and incorporated that plan in Article 4 of the proposed agreement, which was later approved by the referee.

A very careful study of the statements of the parties and of the exhibits and briefs filed by them and made a part of the record in this case has left the referee, rightly or wrongly, with the feeling that the parties to date have dealt with each other at "arms' length," insofar as their disagreements over this article are concerned. The record made by the parties has given the referee the impression that each side to the dispute has been too insistent upon an interpretation of the article which would protect its own selfish interests at the expense of the legitimate interests of the other party. It would appear that the carriers have been adamant in their contention that they should maintain final and complete managerial control over the granting of vacations. The employees, on the other hand, seem to have taken the position that their convenience, when it comes

to granting vacations, should be the paramount consideration in applying Article 4. To a certain extent the impression is created by the record that if employees are unable to get their vacations during the summer months they feel that their rights under Article 4 have not been fully protected.

About all the referee can do in an attempt to resolve the disputes which have arisen between the parties in regard to Article 4 of the agreement is to set forth the rights and obligations of the parties which he believes they intended to create when, on December 10, 1941, they agreed upon the language of the article. In determining the meaning and intent of any paragraph of Article 4, it is necessary to relate it to the entire article, and what is more, the entire article must be interpreted and applied in light of the meanings of the agreement when read in its entirety.

The referee must weigh the language of the second paragraph of Article 4 (a) when interpreting the meaning of the first paragraph because, obviously, the two paragraphs are not independent of each other. In fact, it is the opinion of the referee that the four paragraphs of Article 4 must be considered together when interpreting any one paragraph, and that Article 4 itself must be interpreted in light of its relationship to Articles 5 and 6.

Thus in interpreting Article 4 (a) the referee has reached the following general conclusions:

(1) It was the intention of the parties when they agreed upon Article 4 to cooperate in administering the granting of vacations. To that end, they specifically provided in paragraph 2 of Article 4 (a) that the local committee of each organization signatory to the agreement and the representatives of the carriers would *cooperate in assigning vacation dates*. Thus, they restricted the management's control over the administering of the granting of vacations. The adoption of a procedure whereby representatives of the employees and of the carriers shared a joint responsibility in assigning vacation dates necessarily gave to the representatives of the employees the right to a voice in determining whether or not in given instances the desires and the preferences of the employees in seniority order as to vacation dates were consistent with requirements of service. However, it appears that when the employees attempted to exercise a voice in determining whether or not the granting of certain vacations would interfere with requirements of service, some of the carriers took the position that the employees were attempting to interfere with managerial rights.

(2) The record shows that in some instances the carriers prepared vacation lists without consulting with local committees of the employees. In some instances they refused to grant some employees a vacation, and in other instances they fixed vacation dates with no apparent relationship to seniority order but justifi-

fied their action on the basis of what the management considered was "consistent with requirements of service." The spokesman for the employees, beginning on page 268 of the transcript, referred to the problem as follows:

"Our discussions of those words (requirements of service) in relation to the vacation agreement have indicated that the issue is in fact whether under these words the management is given the right solely and arbitrarily to determine (a) whether vacations shall be taken or denied, (b) whether the vacation date preferable to the employees in their seniority order shall be granted if consistent with service requirements or whether the carrier shall be the sole judge and give little or no consideration to the preferences or desires of the employees.

"The assigning dates for vacations to employees on a goodly number of railroads has been made up by the railroad officials without any consultation at all with the employees' representatives and sent out to the general chairmen of the organizations. Sure, they could be heard and they were heard, because they wrote letters, and they discussed them. The answer in many instances was that the requirements of the service would not permit giving any other dates than those listed, that the vacation system did not require the furnishing of vacation relief workers, that vacation relief workers, therefore, were not being furnished and would not be furnished.

"Certain of the men were being denied their vacations and being paid in lieu thereof, so far as there is anything said by the management, because they say the requirements of the service demand that treatment.

"That is the type of arbitrary, ex parte consideration and action that I am talking about. They are moving apparently on the theory that they have got a sole and absolute right to determine what preference shall be given to the employees' desires as to the seniority order, as to vacation dates, and whether or not the requirements of the service will or will not permit the granting of a vacation and do or do not require the pay in lieu thereof."

(3) Whenever the carriers failed to fix vacation dates in consultation with representatives of the employees, they violated the terms of Article 4 of the agreement, because it is clear that the language of the article, when read in its entirety, gave to the employees a voice in assigning vacation dates.

As pointed out by the spokesman for the employees, on page 275 of the transcript:

"The language of the paragraph does not require that vacation dates shall be fixed solely as desired or as requested or as preferred by the employees in seniority order. It does pro-

vide that due regard in this matter shall be given to the desires and preferences of the employees in their seniority order. The due regard here provided for is not solely, wholly and only a managerial prerogative. It is required that the duly authorized representative of the labor organizations involved shall be consulted, shall receive the cooperation of management and shall cooperate with management in assigning vacation desires and preferences of the employees in seniority order as to vacation dates will be recognized."

(4) If in a given case the representatives of the carrier and of the employees are unable to reach an agreement in the assigning of vacation dates under Article 4 (a), the resulting grievance would have to be handled through the grievance machinery established under Article 14. Obviously, in finally determining that grievance it would be necessary to pass judgment upon whether or not the action taken by the carrier was "consistent with requirements of service," in accordance with the meaning of that clause as it appears in Article 4 (a).

(5) It is the opinion of the referee that the interpretation which the carriers seek to place upon the clause "consistent with requirements of service" is a too narrow one. It does not appear from the language of the first paragraph of Article 4 (a) that it was the intention of the parties that the carriers could disregard the desires and preferences of the employees in fixing vacation dates or could deny a vacation altogether just because the granting of a vacation at a particular time might increase operating costs or create problems of efficient operation and maintenance. Obviously, the putting into effect of the vacation plan is bound to increase the problems of management, but, as the employees point out, the carriers cannot be allowed to defeat the purpose of the vacation plan or deny the benefits of it to the employees by a narrow interpretation of the clause "consistent with requirements of service."

It is the opinion of the referee that it was not intended by the parties that the desires and preferences of the employees in seniority order should be ignored in fixing vacation dates unless the service of the carrier would thereby be interfered with to an unreasonable degree. To put it another way, the carrier should oblige the employee in fixing vacation dates in accordance with his desires or preferences, unless by so doing there would result a serious impairment in the efficiency of operations which could not be avoided by the employment of a relief worker at that particular time or by the making of some other reasonable adjustment. The mere fact that the granting of a vacation to a given employee at a particular time may cause some inconvenience or annoyance to the management, or increased costs, or necessitate some reorganization of operations, provides no justification for the carriers refusing to grant the vacation under the terms of Article 4 of the agreement.

As both parties point out in the record, it is impossible for a referee to lay down a blanket interpretation of the clause "consistent with the requirements of service" which can be applied on a rule-of-thumb basis. However, this referee is satisfied that when the parties adopted Article 4 they did not intend that vacation dates should be fixed in an arbitrary manner by the carriers. Rather, they intended that vacation dates should be fixed by joint action of the representatives of the employees and of the carriers. Hence, the referee rules that the parties should proceed to administer the vacation plan in accordance with the principles that he has set forth in his foregoing observations on this question.

Before leaving the question, he desires to caution the employees to remember that Article 4 as well as other articles of the vacation agreement did not give them the right to have their vacation dates fixed for the most part in the summer months. The request of the employees to have the vacation period run from April 1 to September 30 was turned down by the President's Emergency Board in this language:

"The period during which vacations may be taken shall be from January 1 to December 31 each year. Due regard consistent with efficient operations shall be given to the desires and preferences of employees when fixing the dates for their vacations."

In accordance with the recommendation of the Emergency Board the parties themselves agreed in Article 4 of the vacation agreement that the vacation period should be from January 1 to December 31 of each year. It is the opinion of the referee that much less difficulty would arise under Article 4 of the agreement if the employees would be more reasonable in agreeing to scheduling a portion of the vacations during the winter months. Possibly some pro rata formula applied on a twelve months' basis could be worked out. In any event the carriers are not obligated to grant an unreasonable portion of vacations during the summer months.

In connection with their position on the first question raised under Article 4, the carriers asked the referee to rule on the following illustration:

"A seniority district is 1,700 miles long. The units of territory in which each employee works are 15 to 25 miles long. Thus, in the 1,700 mile stretch of territory there are probably 75 or more positions. The senior man works at one extreme end of the territory; the next senior man works at the other extreme end; the third senior man works next to the senior man. The three senior employees desire to take their vacations in consecutive order. This might necessitate relief workers traveling 1,700 miles from the territory of the first worker to the territory of the second worker, and back almost 1,700 miles to the territory of the third worker.

The carriers maintain that in such circumstances they are not required to give vacations in seniority order."

The referee is inclined to agree with the position taken by the employees on this particular illustration; namely, that it is a very extreme illustration and one which presents exceptional circumstances. Nevertheless, it is the view of the referee that if such a situation should arise, the carrier should not be expected to give vacations in seniority order. Article 4 does not require that vacations must under all circumstances be given in seniority order. It requires only that due regard should be given to the desires and preferences of the employees in seniority order when fixing dates for their vacations.

It is to be expected that if such a set of facts as those contained in the illustration should be presented to a representative of the employees, there would be little difficulty in working out an arrangement which would avoid the inefficiencies resulting from granting vacations in seniority order under such circumstances.

The referee notes that the spokesman for the employees, on page 277 of the transcript, expresses a similar point of view in the following language:

"The organizations have not and do not contend that the senior men on a seniority district can designate only one choice for a vacation date and that this date must be accorded to them. In actual practice on a very large number of railroads, the men are designating three or more, sometimes six and twelve, alternate choices and the local committee and local management are making up vacation schedules, taking into consideration the expressed preferences of the men, as thus indicated, the practicable problems in respect to providing relief and other pertinent facts related to the requirements of the service. This is the sensible and fair method of applying the provisions of the vacation agreement."

**Question No. 2:** Meaning and intent of the second paragraph of Article 4 (a).

The parties notified the referee that they had reached an agreement on this dispute, thus making it unnecessary for him to rule on it specifically. However, the referee could not ignore the language of the second paragraph of Article 4 (a) when interpreting other parts of the article.

**Question No. 3:** Meaning and intent of the first paragraph of Article 4 (b).

#### **Carriers' Contention:**

It is the contention of the carrier:

"... that they have the right to give vacations at the same time to all or any number of employees in any plant,

operation or facility who are entitled to vacations, upon the notice prescribed in the article.

"The carriers interpret the meaning and intent of the words, 'all or any number of employees in any plant, operation, or facility' to mean any number of employees in a plant, operation, or facility such as a shop, section, bridge gang, office, station, etc., or a department thereof."

#### **Labor's Contention:**

The labor organizations contend that:

"Article 4 (b) does not permit management to ignore the desires and preferences of employees, and to require all employees on an entire system, or of an entire department, or an entire group, to take vacations at the same time. The language is restricted to a plant, operation or facility, and does not extend to an entire system, department or group.

"This paragraph was discussed during negotiations primarily in the light of requirements encountered in railroad shops where the work of a group of employees of the same and of related crafts or classes is coordinated and interdependent. Where this interdependent plant activity, and this coordinated operation exists, to the extent that the absence of some of the workers occasioned by the taking of vacations in seniority preference order would impair or prevent the proper functioning of the plant, operation or facility, then it was intended that Article 4 (b) may be utilized. The language of the paragraph specifically refers to all or 'any number of' employees in a plant, operation or facility, and thus was clearly intended to apply to instances of interdependent and coordinated operations such as are to be found in all, or portions of a given plant, operation or facility.

"Article 4 (b) supplements and qualifies Article 4 (a) in instances where coordinated and interdependent functions are essential to service requirements, but it does not wipe out the rights accorded in Article 4 (a) to other employees who can be allowed vacations on an individual seniority preference basis.

"Where vacations are necessarily granted under Article 4 (b) the desires and preferences of employees in their seniority order must still be recognized as the fundamental basis for fixing and assigning vacation dates to the full extent that service requirements will permit."

#### **Referee's Decision:**

It is the decision of the referee that the first paragraph of Section (b) of Article 4 does not give to the management the unqualified right to require all or any number of employees in any plant, operation, or facility to take vacations at the same

time. The paragraph must be read in light of the over-all purpose of the entire Article 4, of which it is a part.

After studying the conflicting arguments of the parties as to the meaning of the paragraph and the intention of the parties insofar as the conferring of rights is concerned, the referee has come to the conclusion that it was not the intention of the parties that Section (b) of Article 4 should supersede or nullify Section (a) of Article 4. Rather, Section (b) of Article 4 must be read in light of the general purpose of the vacation agreement; namely, that individual employees who qualify should receive vacations and they should receive them, whenever possible, subject to the requirements of the service, in accordance with their desires and preferences granted in seniority order. To that end, the parties provided in Section (a) of Article 4 for joint machinery to effectuate the granting of vacations on a cooperative basis.

In Section (b) of Article 4 the parties recognized that there are instances in which, in the interests of efficiency, economy, and sound operation practices, group vacations should be granted. However, it would violate one of the obvious purposes of Article 4, when read in its entirety, to hold that the carriers must cooperate with the representatives of the employees when fixing vacation dates for individual employees, but that they can act independently when granting group vacations.

It is the referee's view on this question that under Article 4 representatives of the carriers and of the employees are bound to work out together on a cooperative basis joint plans for the granting of vacations to individuals and to groups. The primary thing that the first paragraph of Section (b) of Article 4 does is to make the granting of group vacations permissible under the agreement, when the granting of such group vacations would be in the interests of the requirements of service. It places the labor organizations in a position in which they cannot object to the granting of group vacations when it can be shown that such vacations are justifiable in the interests of the requirements of service.

Further, when the first paragraph of Section (b) of Article 4 is read in connection with the second paragraph of the section, it becomes clear that there is placed upon the shoulders of the labor organizations the responsibility and duty of cooperating with management in arranging their group vacations. However, the paragraph does not vest arbitrary power in management to grant group vacations as and when it pleases, irrespective of the desires and interests of the employees.

It is true that there is plenty of room for doubt and conflicting opinions as to the meaning of the first paragraph of Section (b) of Article 4, but when it is read in connection with the entire article and in light of the complete record made by

the parties on the issue involved, this referee is satisfied that his ruling is a fair and reasonable interpretation of the purposes which the parties had in mind when they agreed upon the language last December. He is convinced that his interpretation gives unity of meaning to the article and will remove one of the principal sources of friction which has developed between the parties in administering the vacation agreement.

The referee feels that a statement of the spokesman of the employees, appearing on page 383 of the transcript, expresses quite well the view which should prevail in interpreting and applying the paragraph:

"We say the paragraph should be read as though it were written 'where the demands of the service and the desires and preferences of the employees in seniority order in fixing vacation dates and taking vacations in spite of proper planning impair or prevent the proper functioning of a particular plant, operation or facility, then and to that extent Article 4 (b) should be utilized to supplement and to qualify 4 (a).'

"We say that even where group vacations are given under 4 (b) that so far as the service requirements will permit the desires and preferences in seniority order of the employees who are to take their vacations in a group should be given due regard.

"We say the primary obligation under the vacation agreement is to give vacations under 4 (a), therefore, planning with that purpose in mind is required."

The following illustration was submitted by the carriers for a ruling by the referee:

"A bridge gang is assigned to take vacation from July 6th to 11th inclusive, all employees being relieved. It is the carriers' position that this is permissible under Article 4 (b)."

In light of the referee's foregoing interpretation of the first paragraph of Section (b) of Article 4, it is clear that if the requirements of the service make it desirable, a bridge gang—or, for that matter, shop gangs, section gangs, or any other group of employees in any plant, operation, or facility—could be granted their vacations at one and the same time. However, such an arrangement should be worked out in cooperation and consultation with representatives of the employees in accordance with the intent of Article 4 when read in its entirety. When making arrangements for group vacations, the desires and preferences of the group as a whole should be given due regard, subject, of course, to the best interests of the service. Here again, no rule of thumb can be applied in solving such problems as the parties present by this question. The multitude of conflicting factors which are inherent in such problems will make the administering of a vacation plan break down unless the two parties to it cooperate in a spirit of "give and take" and

cast aside demands based upon technicalities and suspicious motives.

The parties should never forget that the primary purpose of the vacation agreement was to provide vacations to those employees who qualified under the vacation plan set up by the agreement. Any attempt on the part of either the carriers or the labor organizations to gain collateral advantages out of the agreement is in violation of the spirit and intent of the agreement.

It must be recognized by the carriers that the vacation plan is bound to cost a considerable sum of money. Although they are certainly entitled to exercise all economies consistent with good and efficient management and to eliminate sources of waste in formulating their plans for administering vacations, nevertheless they cannot be permitted, in the name of economy, to adopt policies and practices which permit them to make savings at the expense of the workers who are not on vacation.

There runs through the entire record of this case evidence that the employees, rightly or wrongly, entertain the suspicion that some of the carriers, at least, seek to interpret and apply the vacation agreement in every way possible which will save money at the expense of the workers. The referee is satisfied that harmony between the parties will never prevail in administering the vacation system, no matter how many referee's decisions the parties obtain on disputed points, as long as such a suspicion exists. It can be removed only by the parties themselves reaching an understanding based upon mutual confidence.

The referee believes that the interpretation of the first paragraph of Section (b) of Article 4, as insisted upon by the carriers, is an example of an interpretation which stirs up fears and suspicions in the minds of the employees.

On the other hand, there is certainly plenty in the record of this case which shows that the representatives of the carriers suspect the representatives of the employees of advancing technical and strained interpretations of the contract in order to seek advantages for the employees not intended when the agreement was adopted. One cannot read the record as submitted by the carriers without recognizing that the carriers suspect the employees of using the vacation agreement to gain additional financial advantages for the employees over and above the paid vacations themselves. The vacation agreement was not designed to foster a "make-work" program or provide hidden wage increases, and it is respectfully suggested that the representatives of the employees should do everything in their power to remove from the minds of the representatives of the carriers the suspicion that any such motives lie back of the employees' proposals for administering the vacation agreement.

The referee hesitates to make such comments, but he believes that he would fail in his obligations to the parties if he did not

do so, because of the fact that he is convinced that the cause of a large share of the differences which have arisen between the parties in interpreting and applying the vacation agreement grows out of their suspicions of the motives of each other. Then, too, such feelings between the parties are important factors which the referee cannot ignore in rendering his decisions of interpretation because of their bearing upon the surrounding facts and circumstances in the dispute.

As he has endeavored to make clear elsewhere in this decision the language of the agreement of December 17, 1941, is for the most part language proposed by the parties themselves. Much of it is not susceptible of an interpretation which will leave no room for doubt as to what the parties intended and meant. Much of it is ambiguous, and understandingly so, when one takes into account the pressure under which the parties labored when they drafted it and, what is more important still, the fact that the parties were initiating a complicated vacation system to be imposed upon a very complex industry. However, this referee has always been impressed, and still is, with the good faith of the parties and with their basic mutual respect for each other. He is satisfied that such differences as have developed between them over vacations are quite superficial, and, to the extent that they may exist after this award, they should be ironed out in negotiations between the parties conducted upon a "give-and-take" basis.

**Question No. 4:** Meaning and intent of the second paragraph of Article 4 (b).

#### **Carriers' Contention:**

The carriers interpret this article:

"... to mean that, in the event employees in a plant, operation, or facility, who are not entitled to a vacation, cannot be efficiently utilized despite cooperative effort, they may be furloughed in accordance with the provisions of the rules of the applicable schedule on a particular carrier."

#### **Labor's Contention:**

On the other hand, labor contends:

"The language of this paragraph is a mandate to both parties to cooperate in assigning any remaining forces in those instances where all or any number of employees in any plant, operation or facility, who are entitled to vacations, are given vacations at the same time. The words 'remaining forces' do not refer exclusively to those employees who have not qualified for vacations, but also may include others. The parties are obligated to cooperate to see that those remaining forces are assigned to work and to avoid creating a condition which will make it impossible for the employees not included in the group vacation to continue at work. The purpose is to pro-

tect the remaining forces while other employees are on group vacations. This principle is also supported by the provisions of Article 10 (c), which read:

'No employee shall be paid less than his normal compensation for the hours of his own assignment because of vacations to other employees.'

There is nothing in the second paragraph of Article 4 (b) that permits the remaining forces to be laid off. The respective rules agreements provide how, when necessary, expenses may be reduced, or how forces may be reduced, or increased, or restored, and the rules of such agreements relating to such matters and the established application thereof, are not in any way changed or modified."

#### Referee's Decision:

It is the opinion of the referee that the carriers' interpretation of the second paragraph of Section (b) of Article 4, if applied as the general rule or practice, would defeat the purpose of the paragraph and the intent of the parties as expressed in Article 4. The referee is unable to find as broad a meaning in the second paragraph of Section (b) as the carriers would give to it. When the paragraph is read in its relation to the entire article, its most reasonable meaning would seem to be that the parties agreed that representatives of the employees and of the carriers would cooperate, in those instances in which group vacations were granted, in assigning to other jobs those employees of a group who were not entitled to a vacation along with the rest of the group. It does not follow that under group vacation situations no employee can be furloughed.

However, the paragraph in question leaves no room for doubt about the fact that the parties agreed that they should cooperate in working out arrangements for the assigning of the remaining men of a group to other jobs during that period of time when most of the members of a group are away on vacation. If it were contemplated that the policy under group vacation situations should be to furlough the members of the group who are not entitled to a vacation, the parties should have said so. However, they did not say so, but rather they did say that they would cooperate "in the assignment of remaining forces." The referee objects to the broad interpretation of the language of the paragraph as advanced by the carriers because, in a sense, it would sanction a practice of discriminating against those employee members of a group who are not entitled to a vacation. It would amount, in one way, to paying for at least part of the cost of the vacations granted to those employees in a group by furloughing the members of the group not entitled to vacations and thereby saving their wages.

Of course, it cannot be denied that if the services of such employees are not needed and cannot be used elsewhere, the

carriers have the right to dispense with such services in accordance with the rules agreement on furloughs. However, it is the opinion of the referee that when the parties agreed upon the language of the second paragraph of Section (b) of Article 4, they recognized that it would not be fair, as a regular practice when granting group vacations, to furlough those employees in the group who were not entitled to a vacation at that time. It is to be assumed that the parties realized that such a practice would be detrimental to labor morale and would be considered by the employees as grossly unfair. The referee believes that the parties agreed to cooperate in assigning such employees to other jobs in order to avoid the ill-feeling which would be bound to result from a policy of furloughing the men. As pointed out by the spokesman for the employees, the problem of taking care of remaining forces in group vacation situations could be solved in a large measure by long-time planning on a cooperative basis between representatives of the carriers and employees.

A statement, beginning on page 403 of the transcript, made by the spokesman for the employees bearing upon the negotiations which led up to the adoption of the language of Section (b) of Article 4, sheds some light upon the problem of what the parties intended by the language:

"In the carriers' first draft proposal after the reports of the Emergency Board of November and December 5, 1941, after dealing with group vacations they said, '... and may lay off without pay other employees who are not entitled to vacation during such time ... local representatives shall cooperate in adjusting forces to the end there may be as little disturbance as possible.'

"We refused to agree to any words which even inferred that the employees not entitled to a vacation could be laid off.

"The last carriers' proposal before agreement was reached on the language now in the agreement was:

"The local committee of each organization signatory hereto and the proper representative of the carrier will, if necessary under these conditions, (giving group vacations) adjust the remaining force.'

"Compare the above, their last proposal, with the agreed-to rule:

"The local committee of each organization affected signatory hereto and the proper representative of the carrier will cooperate in the assignment of the remaining force.'

"There is no 'if' necessary under these conditions. It is a positive statement that they will cooperate. There is no adjustment of the remaining forces, which means furloughing.

"We want to call attention to the fact that in the last proposal of the carriers there are the words 'if necessary under these conditions,' referring to a group vacation.

"There are no such words in the rule that was agreed to, but the words are positive, that is, that they will cooperate.

"Now, the words . . . 'adjust the remaining force' . . . undoubtedly mean and were intended to mean that forces would be laid off, whereas in the rule agreed to the words are 'assignment of the remaining force.' No inference at all that the men will be laid off, but work will be cooperatively found that they can do and they will be given that work to do.

"We have always, all through these negotiations, refused to accept any proposed rule of the management that gave them the right to furlough the remaining forces.

"There are two other matters to be considered in interpreting this sentence.

"The first paragraph of Article 4 (b) does not require that all employees in a plant, operation or facility, shall take their vacation at the same time because it contains the words, 'all or any number.'

"Thus it is clear that with proper planning, it ought to be, and in almost every instance it will be possible by giving part of the employees in a plant, operation or facility, where 4 (b) can properly be utilized, their vacation at one time and another part at another time, and thus obviate any difficulties or at least minimize the difficulties and permit them by co-operation to easily be overcome so that the remaining forces can be assigned to work and can work and not be compelled to lose employment and compensation because other employees are getting their vacations while they are not."

The referee agrees with the employees that the language of the second paragraph of Section (b) of Article 4 places a very definite obligation upon the carriers to work out with representatives of the employees a program of assigning men to other jobs when most of their fellow workers in a group are granted a group vacation. If it becomes absolutely necessary to furlough an employee while his fellow workers are on vacation because there is no place where his service can be utilized, then such furlough should issue under the existing rules agreements and not under Section (b) of Article 4.

#### **D. Referee's Answers to Questions**

##### **Raised Under Article 5 of the Vacation Agreement**

Article 5 of the vacation agreement reads as follows:

"5. Each employee who is entitled to vacation shall take same at the time assigned, and, while it is intended that the vacation date designated will be adhered to so far as practicable, the management shall have the right to defer same

provided the employee so affected is given as much advance notice as possible; not less than ten (10) days' notice shall be given except when emergency conditions prevent. If it becomes necessary to advance the designated date, at least thirty (30) days' notice will be given affected employee.

"If a carrier finds that it cannot release an employee for a vacation during the calendar year because of the requirements of the service, then such employee shall be paid in lieu of the vacation the allowance hereinafter provided."

**Question No. 1:** Meaning and intent of the first paragraph of Article 5 respecting adherence to vacation dates which have been assigned.

##### **Carriers' Contention:**

It is the position of the carriers that this paragraph should be interpreted to mean:

"... that the carrier shall adhere to the vacation dates as far as practical, but has the right to defer the same by giving the notice provided for in the paragraph."

##### **Labor's Contention:**

The position taken by the labor organizations is to the effect that:

"When the vacation date has been assigned it may not be changed by management, either by deferment or advancement, except in cases of real necessity growing out of actual service requirements and demands. Trivial reasons, or matters of managerial preference or convenience are not sufficient grounds for changing an assigned vacation date, as it would be 'practicable' to adhere to the vacation date that has been assigned.

"The provisions permitting deferment or advancement in assigned vacation dates are not to be interpreted or applied, because of managerial preference or convenience, so as to nullify or to be inconsistent with the provisions of Article 4, which permits employees seniority preference in the choice of vacation dates. The nearer the time approaches for an employee to commence his vacation, the more important it becomes to him that the date not be changed, and unless at least a ten day notice of necessary change has been given an employee, the date cannot be deferred except when emergency conditions prevent the giving of such notice. The emergency conditions referred to must be real emergencies; such as wrecks, fires, floods or other conditions that cannot be anticipated and avoided by reasonable planning or adjusting. In like manner, once a vacation date has been designated, it cannot be *advanced* under any circumstances, except by at least thirty days notice to the affected employee."



### Referee's Decision:

It is the opinion of the referee that no disagreement of substance exists in fact between the parties as to the meaning and intent of the first paragraph of Article 5. The language of the paragraph gives to the management the right to defer vacations. As pointed out in the contentions of the employees, the language does not mean that management can defer vacations on the basis of trivial or inconsequential reasons. What the language of the paragraph does do is lay down a statement of policy that when a vacation schedule is agreed to and the employees have received notice of the same and have made their vacation plans accordingly, the schedule shall be adhered to unless the management, for good and sufficient reason, finds it necessary to defer some of the scheduled vacations. When such a situation arises, the management is obligated to give the employee as much advance notice as possible and in any event, not less than ten days' notice, except in case of an emergency. In case it becomes necessary to advance the scheduled vacation date, then the employee is entitled to a thirty days' notice under the language.

Article 5 must be read in connection with Article 4. As this referee pointed out in his discussion of Article 4, the parties have agreed upon a plan of cooperating in the assignment of vacation dates through the action of local employee committees and representatives of the carriers. However, it must be obvious to all concerned that even under such a cooperative plan, someone must take final action on individual problems. The parties undoubtedly recognized that when they provided in Article 5 that the management should have the right to defer the vacation of an employee when that becomes necessary in the interests of the service. However, it does not follow that the language of Article 5 permits the management to exercise arbitrary and capricious judgment in deferring the vacation of an employee. If a management should follow such a course, then it is the opinion of the referee that the employees would have the right to make the matter a subject of grievance.

The referee agrees with the statement of counsel for the carriers, as set forth on page 410 of the transcript. As counsel says, the problem raises a question of good faith. There is no substitute for good faith. A management would not act in good faith towards its employees if it gave notice of a vacation schedule, permitted the employees and their families to make vacation plans accordingly, and then, for no good or substantial reason, arbitrarily deferred the vacations of some of the employees. Such a practice would not promote good labor relations. The important point for the parties to keep in mind is that the primary and controlling meaning of the first paragraph of Article 5 is that employees shall take their vacations as scheduled and that vacations shall not be deferred or ad-

vanced by management except for good and sufficient reason, growing out of essential service requirements and demands.

It is to be implied from the language, when read in connection with Article 4, that any management which acts in bad faith as far as deferring or advancing vacations is concerned, once they are scheduled, should answer to the grievance machinery just as in the case of any other bad-faith conduct which violates legitimate interests of the employees.

It is the view of the referee that his ruling on this question does not restrict unreasonably rights of management. Naturally no claim against the management would be sustained in a given instance if it acted reasonably and in good faith, and if it so acted it should have no fear of any complaint which might be filed against it under Article 5.

**Question No. 2:** Does a carrier have the option of either granting a vacation with pay to an employee or keeping him at work and paying him in lieu thereof?

### Carriers' Contention:

The position taken by the carriers on this question is that:

"... the carrier has this right depending upon the requirements of the service."

### Labor's Contention:

The labor organizations, on the other hand, contend that:

"The answer to this question is, 'No.' The management is not permitted to exercise any such option. The second paragraph of Article 5, specifically provides the only condition under which an employee may not be released for a vacation and paid in lieu thereof.

"This condition is where an employee *cannot be released* because of the requirements of the service. The purpose of the vacation agreement is to grant employees vacations with pay—not deny them vacations, keep them at work and pay them in lieu of vacations.

"The employee is obligated to take his vacation at the properly designated time. The management is obligated to release an employee for a vacation, and nothing short of real service requirements must be permitted to interfere. A carrier does not have the right to decline to release an employee for vacation because some additional payroll cost will accrue, or because of some preference or convenience to the carrier, or because some re-arrangement or adjustment of work will be necessitated."

### Referee's Decision:

It is the view of the referee that when the language of the second paragraph of Article 5 is read in light of the primary

purpose of the vacation agreement; namely, that all employees who can qualify should receive a vacation, the conclusion is inescapable that carriers do not possess the unrestricted right or option to keep an employee at work and grant him extra pay in lieu of a vacation. Here, again, the solution of the problem rests upon the exercise of good faith. As the spokesman for the employees points out, on page 425 of the transcript, the President's Emergency Board, in its report of November 5, 1941, rejected the notion that vacations should be denied in the railroad industry because of "great pressure upon the railroads to maintain constant, rapid, and efficient service." In its report the Emergency Board stated:

"Thus they urge that to accomplish this end it is necessary that there should be no disturbance in the continuity of railway operations. Further, they maintain that the probable dislocations and many adjustments that the adoption of a vacation plan would involve precludes its consideration under present emergency conditions. The Board has considered these arguments and although it appreciates the fact that the emergency has increased the responsibility and the strain upon the railroads of the country, it recognizes, too, that the pressure of the emergency and the more continuous operation of the railroads at near or full capacity has placed greater responsibilities and strain upon the workers in the industry. If a vacation plan is inherently sound under more normal conditions, it is equally sound under emergency conditions that increase the strain upon the physical and mental powers of the employees. . . .

"It is admitted that the adoption of a vacation plan may cause dislocations and make necessary numerous adjustments which may be somewhat more difficult to overcome under the present emergency conditions. Despite this, it is the opinion of the Board that these difficulties are not insurmountable even under present conditions. . . ."

This referee wrote the above-quoted language into the report of the Emergency Board, and he believed then, as he believes now, that all employees who qualify for a vacation should receive a vacation, except in those extraordinary instances in which the granting of a vacation to a given employee would seriously interfere with the requirements of service.

It is impossible to lay down in advance of considering a given set of facts any blanket rule which will determine for a certainty the circumstances which entitle the carrier to grant an employee extra pay in lieu of a vacation. However, one thing is certain and that is that a carrier cannot justify insisting that an employee accept extra pay in lieu of a vacation just because the taking of the vacation would cost the carrier a sum greater than an extra six, nine, or twelve days' pay. It was not the intention of the Emergency Board or this referee, when

vacations were granted to the employees, to make the granting of vacations dependent upon the financial convenience of the carriers. It was recognized that the granting of vacations would cost a considerable sum, and that factor was taken into consideration when the length of vacations which should be granted was determined.

Likewise, the fact that granting a particular employee a vacation may be very inconvenient to the operation of an office and may require a considerable amount of re-arranging of the work of the office, does not justify refusing the vacation and granting extra pay in lieu thereof. There are undoubtedly some instances in which a given employee is the only person available and qualified to do certain work for a carrier, the performance of which cannot be interrupted by a vacation. Under such extraordinary circumstances the carrier would be justified in granting the employee extra pay in lieu of a vacation. It is conceivable that under war conditions there may be such a scarcity of employees in a certain job classification, performing work so vital to the requirements of service, that to interrupt it by the granting of vacations would seriously interfere with the war effort. There can be no doubt about the fact that under such circumstances the carriers have the right to grant extra pay in lieu of vacations. However, the referee is satisfied that the parties realize that such instances are bound to be few and far between in this industry and that as a general practice each employee is to be entitled to actually take his vacation with pay.

If the second paragraph of Article 5 is applied in a manner consonant with the foregoing mentioned general practice, it is difficult to see how any problem of interpretation of the article can arise.

#### **E. Referee's Answers to Questions Raised Under Article 6 of the Vacation Agreement**

Article 6 of the vacation agreement reads as follows:

"The carriers will provide vacation relief workers but the vacation system shall not be used as a device to make unnecessary jobs for other workers. Where a vacation relief worker is not needed in a given instance and if failure to provide a vacation relief worker does not burden those employees remaining on the job, or burden the employee after his return from vacation, the carrier shall not be required to provide such relief worker."

**Question No. 1:** Meaning and intent of the first sentence of Article 6 reading, "The carriers will provide vacation relief workers but the vacation system shall not be used as a device to make unnecessary jobs for other workers."

### Carriers' Contention:

It is the contention of the carriers that this sentence should be interpreted to mean:

"... that a vacation relief worker (not necessarily an assigned vacation relief employee) will be provided by the carrier when such provision does not result in the utilization of workers not required by the needs of the service. Further, that the language 'but the vacation system shall not be used as a device to make unnecessary jobs for other workers' relates to the system as a whole and covers all situations which arise in connection with or grow out of the application of the Vacation Agreement, and that the test laid down in the rule would apply, not only to the position of the vacationing employee, but likewise to any positions the occupants of which are transferred in connection with changes brought about because of vacation."

### Labor's Contention:

On the other hand, the labor organizations contend that:

"The first part of this sentence contains a clear requirement that 'the carriers will provide vacation relief workers.' This requirement is qualified by the remainder of this sentence and by the second sentence of the article. However, these qualifications do not nullify the requirement to provide vacation relief workers, but after vacation relief workers have been provided, it is the number of them and their use which are qualified.

"The last four words 'jobs for other workers' refer to workers other than the 'vacation relief workers' specified in the first sentence. The sentence does not read: '\* \* \* shall not be used as a device to make unnecessary jobs for "relief" workers,' nor does it read: '\* \* \* make unnecessary jobs,' but it does read: '\* \* \* make unnecessary jobs for other workers.'

"Therefore, these four words do not refer to 'vacation relief workers.'

"Elsewhere in the Vacation Agreement (Article 12 (b)) it is provided that the positions of employees absent on vacations will not constitute 'vacancies' under any existing rules agreement, consequently carriers are not required to bulletin such positions for the purpose of filling same from employees making application therefor. However, under the second sentence of the article when the position of a vacationing employee is to be filled and a regular relief employee is not utilized for that purpose, then effort must be made to observe the 'principle of seniority' as 'seniority' is defined and required to be observed in existing rules agreements. Under such circumstances if an employee holding a regular position

is utilized to fill the position of a vacationing employee, the filling of the position made vacant by the utilization of such employee is governed by the provisions of existing rules agreements or recognized practices thereunder; nothing in this article or Vacation Agreement permits the 'blanking' of such position."

### Referee's Decision:

The dispute which has arisen between the parties as to the meaning of Article 6 stems directly from another difference between them; namely, one over the relationship and applicability of existing working rules to the vacation agreement. Therefore, the referee wishes to discuss briefly the relationship between existing working rules and the vacation agreement before he rules specifically upon the disputed questions which the parties have raised under Article 6.

The record shows that Article 6 of the vacation agreement is based upon recommendation No. 5 on vacations, as set forth on page 61 of the November 5, 1941, report of the President's Emergency Board. The recommendation reads:

"That the carriers should hire vacation relief workers and that a vacation system should not be used as a device to make unnecessary jobs for other workers. If a vacation relief worker is not needed in a given instance, and if failure to hire a vacation relief worker does not burden those employees remaining on the job, or burden the employee after his return from his vacation, the carrier should not be expected to replace every employee on vacation with a relief worker."

In discussing this recommendation in the body of the report, the Board stated on page 58:

"The carriers, in addition to their argument that the present time is not appropriate for the institution of a vacation plan, contended that the employees' proposal is so unreasonable, unworkable, and burdensome as not to furnish a proper basis for a vacation plan even in normal times. The provisions of the request, they argue, make the giving of vacations unnecessarily expensive. Moreover, the insistence of the employees that all existing working rules and conditions shall apply to the giving of vacations would interfere with an economic and efficient operation of the railroads.

"The Board is of the opinion that the views of the carriers on these points have merit and the recommendations of the Board give cognizance to them. With particular reference to the rules, as they may apply to the operation of a vacation plan, the Board believes that necessary adjustments need to be made. It should be recognized by all concerned that the present rules were developed for the industry at a time when the parties did not contemplate arranging for vacations with pay. It would appear that some of the existing rules if strictly

applied to the vacation problem would result in excessive vacation costs to the carriers. It is possible that some of the rules would work other types of hardships upon both carriers and employees and hence that they should be adjusted to meet the vacation situation. These adjustments in the rules, because of their technical nature, cannot be determined to the best advantage by this Board; they must of necessity be decided upon by the parties involved. It is the opinion of the Board that any changes in the working rules as they apply to vacations should be the subject of negotiations between the proper officials of the carriers and the employee organizations. It is, furthermore, the view of the Board that the rules should be disturbed as little as is necessary to permit the operation of a vacation plan on a reasonable and workable basis. Negotiation should be entered into immediately and any necessary changes in rules should be agreed upon by January 1, 1942."

Thus it is seen that it was not the intention of the Emergency Board that the vacation plan should be administered independently of existing working rules, but rather, that in those instances in which existing working rules, if strictly applied, would produce unjust results, they should be modified through the process of collective-bargaining negotiations conducted between the parties.

At the mediation sessions which led to the so-called "Washington Settlement of December 1, 1941," this referee held many conversations with representatives of the employees and of the carriers, and as a result of those conversations, he knows it to be a fact that the parties reached the Washington settlement with the understanding that the vacation plan was to be subject to the rules agreements but that the parties would negotiate adjustments of any working rules in any existing agreements which in their application would produce results contrary to the purpose of the vacation plan.

When the parties returned to Chicago and proceeded with their negotiations on vacations, which negotiations culminated in the vacation agreement of December 17, 1941, they well understood that existing rules agreements were applicable to the vacation plan unless modified in negotiations between them. In fact, when they came to write their proposals for a vacation contract, they agreed that Article 13 thereto should contain the following language:

"The parties hereto having in mind conditions which exist or may arise on individual carriers in making provisions for vacations with pay agree that the duly authorized representatives of the employees, who are parties to one agreement, and the proper officer of the carrier may make changes in the working rules or enter into additional written understandings to implement the purposes of this agreement, provided that such changes or understandings shall not be inconsistent with this agreement."

Thus the vacation agreement itself as adopted on December 17, 1941, shows that the parties recognized that existing rules agreements on the various railroad properties are applicable to the vacation agreement but that they may be changed in negotiations between duly authorized representatives of the parties.

At the hearing on August 1, 1942, as shown by the record, a lengthy discussion took place in regard to the way that various working rules in existing rules agreements might affect the administration of the vacation plan if the employees should insist upon a strict enforcement of them. The record shows that all parties concerned in the hearing recognized that existing rules agreements must be taken into account in interpreting and applying the vacation agreement, although there was a marked difference of opinion between the parties as to just how some of the rules should be applied to the vacation agreement.

At several points in the transcript, chiefly on pages 524 and 536, the referee reminded the parties that it was understood by them at the time of their December, 1941, negotiations on vacations "that the working rules would remain in force and that it was not contemplated that they would remain in force either to make work unnecessarily or in order to raise technicalities," which would work injustice and defeat the purpose of the vacation agreement. It is the duty of the referee to interpret and apply the vacation agreement in accordance with the meaning of its language, and if that results in a conflict with some working rule about which the referee was uninformed, then it is up to the parties to adjust the matter through the machinery for negotiations as provided for in Sections 13 and 14 of the agreement. However, the referee has no power to force the parties to make such adjustments in their rules, no matter how fair and reasonable such adjustments would be.

The referee has presented the foregoing review of the discussions and understandings as to the applicability of existing working rules agreements to the vacation contracts, because he considers those understandings of basic importance when it comes to interpreting the vacation agreement, particularly Article 6 thereof. Turning now to the dispute between the parties over the meaning and intent of the first sentence of Article 6, the referee wishes to make the following points:

(1) The sentence obligates the carriers to provide relief workers to perform the work of an employee while he is on vacation if his work is of such a nature that it cannot remain undone without increasing the work burden either of those employees remaining on the job or of the employee when he returns from his vacation. It does not mean that in every instance when an employee goes on a vacation the carrier must assign someone to do the work which the employee would otherwise have done had he not gone on his vacation.

The parties to the dispute made perfectly clear on pages 477 to 491 of the transcript that there are many types of jobs which can await the return of the vacationer without the need of having anyone perform any duties in connection with them while the employee is on his vacation. In the case of such jobs, the parties are agreed that no relief worker need be assigned by the carrier. Thus, on page 491 of the transcript, are to be found the following statements on this point:

"Mr. Davis (for employees): We recognize definitely that there are jobs where the men can be away on vacation and where no relief employee is necessary but, on the other hand, there are numbers of jobs where relief men are necessary to comply with the agreement.

"The Referee: Generally speaking, you point out that where it is so-called production work on the job, then no relief is necessary, but where it is a type of job where somebody else has to assume part of the burden, then you think relief is necessary.

"Mr. Davis: If it is a job that is required to be kept up currently. If it is a job that is a time proposition, it is a routine matter, that has to be done every day, somebody has to do the work."

The representatives of the employees submitted many examples of instances in which relief workers would be unnecessary, such as the taking of a vacation by a member of a maintenance crew. It was pointed out that in the case of a crew of several men doing general rebuilding and reconditioning work, the absence from the crew of one of several men on vacation creates no burden on the remaining men, but simply means that they will accomplish less work while their fellow workmen are absent. Other examples of similar jobs in which the assignment of relief workers would be unnecessary cited by the employees included repairmen, machinists, sectionmen, bridge and building workers, and many types of clerical, office, station, and storehouse workers. Therefore, it is to be remembered that the language in the disputed sentence, "The carriers will provide vacation relief workers," does not lay down any universal requirement that the position of every employee must be filled while he is on vacation.

(2) The term "vacation relief workers" is not used in a technical sense, but includes those special employees or extra employees, called "relief workers," who, in many instances, are hired to fill the positions of employees who are absent from employment because of illness or to attend to business affairs, or to take a vacation, or for any other reason for which the company excuses them from duty. The term also includes those regular employees who may be called upon to move from their job to the vacationer's job for that period of time during which the employee is on vacation.

(3) The language of the sentence, "but the vacation system shall not be used as a device to make unnecessary jobs for other workers," is not subject to the interpretation that the employees place upon it. The last four words of the sentence, "jobs for other workers," do not refer, as contended for by the labor organizations, "to workers other than the vacation relief workers" specified in the first part of the sentence. Although this part of the sentence is rather awkwardly worded, what it means is that the vacation system shall not be used as a device to make unnecessary jobs; or, in other words, the vacation system shall not be used to foster a so-called "make-work" program. It shall not be used to cause economic waste, which would be the result if the carriers were required, under the article, to hire a relief worker to fill the position of an employee on vacation if there in fact is no work to be done on the job while the employee is on vacation. Thus it is seen that the four words, "jobs for other workers," do refer, contrary to the employees' contention, to vacation relief workers in that the sentence, taken as a whole, means that the vacation system shall not be used to make unnecessary jobs for relief workers.

(4) It should be remembered by the parties that when the first sentence of Article 6 was written by this referee into the November 5, 1941, report of the President's Emergency Board, and subsequently approved by the parties themselves on December 10, 1941, when they submitted their proposals for a vacation agreement, this referee was not familiar with the procedures followed in assigning relief workers or with the existing working agreements regulating the assignment of relief workers. It was understood that the parties would work out between themselves such adjustments of their rules as might be necessary in order to carry out the purpose and intent of Article 6.

As stated before, they specifically provided for negotiation procedures in Article 13 of the agreement to accomplish that very purpose. If they have not conducted such negotiations, it is a job which still lies ahead of them. It is not a matter which falls within the powers and jurisdiction of this referee. The submission agreement under which he has served as referee does not empower him to abolish or modify any existing working rules. The spokesman for the employees, on page 449 of the transcript, alleged that little progress has been made by the parties in negotiating working rules for relief workers. And on pages 536 and 537 the same spokesman expressed the view that Article 13 was placed in the vacation agreement for the purpose of negotiating adjustments of working rules to the vacation agreement. His statement is worthy of review at this point because of its bearing upon the relationship between the existing working rules agreements and the vacation agreement:

"Mr. Jewell: Mr. Referee, I do not think we have any quarrel at all with what you have said. I think you have got to have this in mind. We provided a method to deal with

all those problems, and we provided it specifically in this agreement, Article 13.

"The Referee: The information language.

"Mr. Jewell: Yes. The carriers have here and have been, as I understand their position, seeking to strike down these rules by interpretations rather than going back on the properties under Article 13 and saying, 'This rule for this reason does not apply here,' and working it out.

"The Referee: I will pass judgment on that point. I do not intend to abolish Rule 13 of the agreement.

"Mr. Jewell: I think you have that in mind.

"The Referee: Rule 13 of the agreement will remain standing after I get through writing my award.

"Mr. Jewell: Our statements here are on the assumption that the rules are left absolutely as they are, and they do not carry with them the statement or the assumption or the implication that the rules should or must remain as they are.

"The Referee: That is right.

"Mr. Jewell: But if they are to be changed, then the vehicle through which they may be changed and can be changed and should be changed is Article 13.

"The Referee: That is right, and especially that last part of your language,—should be changed, or I would say, must be changed.

"Mr. Jewell: All right, I will say must, for our group.

"The Referee: Must be changed.

"Mr. Jewell: Must be changed, that is right. There are certain things that must be changed, but they have got to be changed under Article 13, and we are not going to be agreeable that they should be changed by interpretation. This is my point, sir."

(5) The carriers submitted the following illustrations in connection with the dispute over the first question in Article 6 and asked for a ruling on them:

"(a) The position of an employee entitled to twelve days vacation is filled during his absence for nine days and is blanked for three days because employment is unnecessary except for nine days. The carriers contend that it is only necessary to fill his position during the days when relief is required."

It is the ruling of the referee that the contention of the carriers as to this illustration is sound, subject to the understanding that there was no need for the performance of any work in connection with this job during the three days that a relief worker was not employed. Or to put it another way: the carrier would not be obligated under the illustration to fill the job during the three days unless its failure to do so would

place a burden, within the meaning of the second sentence of Article 6, upon those employees remaining on the job or upon the regular employee after his return from vacation.

"(b) On a signal section where there is employed a maintainer and an assistant maintainer, the maintainer goes on vacation. The carrier contends that the assistant maintainer may be moved up and paid the maintainer's rate during his absence and the position of assistant maintainer unfilled."

It is the opinion of the referee that under most signal maintenance jobs of the type referred to in the illustration, it would not be possible for the assistant maintainer to maintain the section without placing upon him a burden of work which would be in violation of the "burden provision" of the second sentence of Article 6. Of course, whether or not that provision is violated becomes a question of fact in each instance. The spokesmen for the employees, on pages 454 to 467 of the transcript, argued that a relief worker should be supplied under carriers' illustration (b). The main theory of their argument is that "to have one man attempt to perform the work of two men on a signal maintenance district would obviously leave much of the work undone" and would mean that "the work that remains undone would have to be caught up when the two men are again at work after the vacationing employee returns." Further, they argue that the assigning of only one man to the job formerly performed by two would increase the responsibility of the one man to the point of a burden not contemplated under the rules. The referee is inclined to believe that the objections of the employees to the position of the carriers on this illustration are, for the most part, well taken. However, as indicated before, the employees agree that in any instance in which the "burden provision" in Article 6 would not be violated, a relief worker need not be employed.

"(c) A section gang is given vacation as a unit. Employees from adjoining sections are utilized to patrol the territory during their absence, doing only such work as may be necessary to keep the track in operating condition, all of this work being performed within their regular hours. Most of their time is spent upon their own section work, and inspection and work on the vacationers' section being incidental. It is the carriers' position that such handling is permissible under the Vacation Agreement."

It is the opinion of the referee that the position taken by the carriers on this illustration is sound. He recognizes that there may be instances in which such an assignment of work would place an undue burden upon the section gang involved, but he doubts that such would be the ordinary result. The spokesman for the employees, on pages 467 and 468 of the transcript, insists that relief workers should be hired under the conditions of carriers' illustration (c) on the ground that

the proposal of the carriers would increase the burden of the section gang doing the work, and violate the 25 per cent distribution of work provision of Article 10 (b), and probably violate seniority rights of the men involved. If in a given case it could be shown that any such rights are violated, the relief workers would have to be supplied, at least until the particular rule violated is changed under the procedure of Article 13 or by some other procedure. However, this referee feels that under ordinary circumstances the position taken by the carriers in illustration (c) is a very reasonable one and falls within the meaning and intent of Article 6. A large share of the work of a section gang can be classified as "production work" similar to the many examples cited by the employees in regard to which they admitted that relief workers would not have to be hired.

"(d) In an office clerical employee 'A' goes on vacation. Clerical employee 'B' is moved up and paid 'A's' rate during such absence. Clerical employee 'C' is moved into 'B's' position and paid 'B's' rate. It is unnecessary that 'C's' position be filled. The carriers contend that it is permissible to blank 'C's' position."

The referee believes that the rules agreements as they presently exist would not permit the carriers to blank C's position. He is frank to say that he feels that an adjustment of the rules ought to be made to permit the blanking of C's position under such circumstances, but the referee is without jurisdiction or authority to make such an adjustment in the rules for the parties. It seems to the referee that if, under the illustration, it is proper for the carriers to let A's job go unfilled, and the employees admit that such action would be proper, then there is no really good reason for not allowing them to blank C's job if B is moved up to A's job and C is moved up to B's job and C's job does not need to be filled. The only reason advanced by the employees for their position is that existing working rules prohibit the blanking of C's job. However, the referee cannot escape the conclusion that the application of such a rule to the illustration amounts in fact to a "make-work" proposition, and is therefore contrary to the spirit and intent of Article 6 of the vacation agreement. However, in the absence of a definite adjustment, in accordance with Article 13 of the agreement, of the working rules on blanking jobs, such existing working rules would prevail in keeping with the understanding that the vacation agreement must be administered in a manner consistent with the existing working rules agreements.

**Question No. 2:** Meaning and intent of the second sentence of Article 6 and particularly the word "burden."

#### **Carriers' Contention:**

The carriers interpret the word "burden" as used in this paragraph to mean:

"... an overtaxing of employees, i.e., that it should be interpreted in accordance with the usual meaning of the word as applied in common usage and as found in the standard dictionary."

#### **Labor's Contention:**

It is the contention of the labor organizations that:

"In applying the second sentence of Article 6, consideration must be given to the provisions of other articles of the agreement related to the subject, particularly Article 10 (a) and (b)."

"Under Articles 6 and 10:

"(1) The carrier may use vacation relief workers.

"(2) The carrier is privileged to let the work of a vacationing employee remain undone and not provide vacation relief workers, providing only:

(a) This does not burden other employees during his absence, or

(b) Burden the vacationing employee after his return from vacation.

"(3) The carrier may distribute the work of a vacationing employee to two or more employees with common seniority under a given rules agreement of a particular craft or class, provided such distribution is not in excess of 25% of the work load of a given vacationing employee, unless a larger distribution of this work load is agreed to by representatives of employees.

"Article 10 (b) of the Vacation Agreement does not permit the distribution of a portion of the work load of a vacationing employee to less than two employees. This provision is directly related to Article 6. If it is necessary for more than 25% of the work load of a vacationing employee to be done during his absence, the agreement contemplates the providing of a vacation relief worker.

"If all, or a portion of the work load of a vacationing employee is given to only one employee, then Article 10 (a) contemplates, and it should be considered, that the one employee has been designated to fill the assignment of the vacationing employee.

"The word 'burden' does not, as used in this article, have reference to expenditure of physical effort alone, neither can its meaning and intent be restricted to the number of hours worked. The word 'burden' can only be logically and reasonably interpreted as including the imposition of additional duties or responsibilities. These additional duties or responsibilities need not be such as to 'over-burden' or 'over-tax' the

employees in order for them to be a 'burden'—there is no qualifying word preceding or succeeding 'burden.'"

### Referee's Decision:

The referee agrees in general with the position taken by the carriers on this question. The word "burden" as used in Article 6 is a verb and means to overtax or to oppress. Counsel for the carriers in two different places in the transcript made very clear statements as to the meaning of the word "burden" as used in the second sentence of Article 6.

On page 581 he stated:

"In this case the word 'burden' is used, and I think if the problem is approached in the proper spirit by both sides it will be easy to decide, and without any elaboration on the word, whether in a given instance a fellow employee is burdened or is not burdened. If we could agree on the proposition that a man is not burdened so long as he is reasonably able to do the work, it seems to me that that is a test which satisfies every requirement of the agreement and of an interpretation of an agreement."

The spokesman for the employees objected to the foregoing statement of counsel for the carrier, principally on the ground that it stresses physical burden and does not take into account mental strain and the element of increased responsibility. To this, counsel for the carriers replied on page 586 by saying:

"If I could bring the matter a little closer to at least an attempt to reach an agreement, I would be willing to say that a man is not over-taxed so long as he is reasonably able to do the work or assume the responsibility. I am willing to bring responsibility into it. I did not leave that out by intent."

It should be noted that counsel for the carriers and the spokesman for the employees agreed that the question as to whether or not in a given case arising under Article 6 the failure to provide a relief worker resulted in placing a burden upon the employees remaining on the job or upon the employee after he returned from his vacation was a question of fact which would have to be determined in light of the particular circumstances of the case.

Thus on page 585 of the transcript, the spokesman for the employees stated:

"There is not any question about it but what the question whether there is or is not a burden in a particular case has got to be determined by the facts. There is no other way to determine it. But we can never reach an agreement, and cannot indicate to you, Mr. Referee, that we ought to say the word 'burden' as used here is over-taxing."

And to the same effect, counsel for the carriers stated on page 578 and on page 580:

"Now, the word 'burden' has, I think, a commonly accepted meaning, but whether a burden is imposed in a given instance cannot be determined en masse and by formula. We cannot sit in Chicago and say as to a certain situation existing in Miami, Florida, six months from now that will be a burden. I do not know whether there will be a burden or whether there will not. As to whether an employee is burdened in any particular case depends upon, at least, two factors: the experience, ability and amount of his own work to be done by an employee, and the amount and character of the physical work which he is asked to do while another employee is on a vacation."

\* \* \* \* \*

"So, it is a question of fact in each case. The carriers are entitled to have the word applied in accordance with the commonly accepted meaning. Burden means overtaxed, and if that definition is not acceptable to the organizations, perhaps they would agree with me that a man is not overtaxed so long as he is reasonably able to do the work."

The referee rejects the argument of the employees that the word "burden" as used in Article 6 must not be given its ordinary meaning because of the provisions of Articles 10 (a) and 10 (b) of the agreement. The referee has studied very carefully the arguments which the spokesman for the employees made in that connection, but he is frank to say that he did not find the arguments to be at all convincing or relevant to the problem presented by the second question raised under Article 6.

It is a well-established rule of contract construction that words in an agreement should be given their ordinary and common and usual meaning unless convincing proof is advanced showing that a given word is used in some special, restricted, or technical sense. The referee is convinced from the record that in this instance the word "burden" was used in Article 6 in its ordinary sense and in accordance with the interpretation given to it by counsel for the carriers.

### F. Referee's Answers to Questions Raised Under Article 7 of the Vacation Agreement

Article 7 of the vacation agreement reads as follows:

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

"(a) An employee having a regular assignment will be paid while on vacation the daily compensation paid by the carrier for such assignment.



"(b) An employee 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 employee 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 employee 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 employee worked on as many as sixteen (16) different days.

"(e) An employee 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."

**Question No. 1:** Meaning and intent of that part of Article 7 (a) reading: "An employee having a regular assignment."

#### **Carriers' Contention:**

It is the contention of the carriers that the:

"... interpretation of this phrase is that the words 'regular assignment' means a position which an employee has held with regularity and will continue to hold as distinguished from some position which the employee may be filling casually at the time of going on vacation.

"Illustration: Employee 'A' is assigned to the position of check clerk. This is his regular assignment. Employee 'B,' a manifest clerk, goes on vacation or is sick and employee 'A' is utilized to fill his job during his absence. Upon employee 'B's' return, employee 'A' goes on vacation. It is the carriers' contention that employee 'A' would be paid while on vacation at his check clerk's rate and not the rate of manifest clerk's position."

#### **Labor's Contention:**

The labor organizations contend that:

"Although the parties under date of June 10, 1942, agreed to the following interpretation with respect to Article 7 (a):

"This contemplates that an employee having a regular assignment will not be any better or worse off, while on vacation, as to daily compensation paid by the carrier than if he had remained at work on such assignment, this not to include casual or unassigned overtime or amounts received from others than the employing carrier."

they have been unable to agree upon another issue between them arising out of the phrase 'an employee having a regular assignment.' It is our position that the words 'regular assignment' as used in Article 7 (a) were intended to mean any regular established job or position and, therefore, that the language 'an employee having a regular assignment' means an employee who is filling or occupying any regular established job or position."

#### **Referee's Decision:**

It is the decision of the referee that the preponderance of the evidence in the record clearly supports the position taken by the carriers on this question. The referee has considered carefully the comments and arguments of the parties on this question, as set forth on pages 594 to 636 of the transcript, as well as the statements made by them in their briefs and memoranda. It is his conclusion that the position taken by the employees as set forth in the joint submission document, if adopted, would lead to very unfair and unreasonable results. It is probably true, as contended by the employees, that the illustration of the problem as offered by the carriers presents exceptional facts and circumstances which would rarely occur and which could be avoided by a careful scheduling of vacations. Be that as it may, nevertheless the illustration does serve to point out some of the inherent unfairness of the employees' position on the question. The referee believes that the carriers' contention on the illustration is sound.

The record shows that the parties have made a good-faith attempt to negotiate a settlement of this dispute. Each side submitted to the other a statement of the formula or rule which they desired to have approved as the basis for interpreting and applying the words "regular assignment" as used in Section (a) of Article 7. The employees proposed the following language:

"As to an employee having a regular assignment, but temporarily working on another position at the time his vacation begins, such employee while on vacation will be paid the daily compensation of the position on which actually working at the time his vacation begins, provided it has been bulletined and assigned to such employee, or provided such employee has been working on such position, even though not bulletined and assigned for fifteen or more calendar days."

As pointed out on page 628 of the transcript, the carriers proposed the following rule:

"As to an employee having a regular assignment but is temporarily working on another position at the time his vacation begins, such employee while on vacation will be paid the daily compensation of the position on which actually working at the time the vacation begins provided such em-

ployee had been working on such position for 30 days or more."

During the hearing counsel for the carriers suggested to the employees by way of compromise that they add the following language to their proposal "and which he would have occupied during his vacation period had he not gone on vacation." However, the representatives of the employees rejected the suggestion. The transcript of the record also shows on page 635 that just before the negotiations in which the parties attempted to compromise their differences broke off the carriers offered to reduce the thirty days' period in their proposal to twenty days. The referee is satisfied that the carriers' above-quoted proposal with the thirty days' period changed to twenty days provides a fair and reasonable settlement of the dispute over the interpretation and application of Section (a) of Article 7, and he hereby approves and adopts it. Thus it will read as follows:

"As to an employee having a regular assignment, but temporarily working on another position at the time his vacation begins, such employee while on vacation will be paid the daily compensation of the position on which actually working at the time the vacation begins, provided such employee has been working on such position for twenty days or more."

#### **G. Referee's Answer to Question**

##### **Raised Under Article 8 of the Vacation Agreement**

Article 8 of the vacation agreement reads:

"8. No vacation with pay or payment in lieu thereof will be due an employee whose employment relation with a carrier has terminated prior to the taking of his vacation, except that employees retiring under the provisions of the Railroad Retirement Act shall receive payment for vacation due."

**Question No. 1:** Is an employee who has been suspended or dismissed, and then later reinstated without loss of seniority, to be considered as having terminated his employment relation, within the meaning of Article 8?

##### **Carriers' Contention:**

It is the position of the carriers on this question:

"... that such employee, if he is restored to service with pay for lost time or is paid for time during suspension, would not be deemed to have terminated his employment relation within the meaning of Article 8. To the contrary, if an employee was suspended or dismissed and restored to service with seniority rights unimpaired, but not paid for lost time, he would not be entitled to a vacation unless so understood at the time of his restoration."

##### **Labor's Contention:**

It is the contention of the labor organizations that:

"Such an employee has not terminated his employment relation. The fact that he is reinstated without loss of seniority is controlling. If a suspended or dismissed employee is returned to service without seniority he is in fact re-employed and not reinstated, and takes the status of a newly hired employee."

"It is a common practice in the industry for employees to be suspended or dismissed and later to be reinstated without loss of seniority. In some cases where reinstated without loss of seniority they are also paid for all or part of the time or wage loss. In other cases they are reinstated without loss of seniority but not paid for time or wage loss. In both types of cases the employee is not regarded as having had his employment status or employment relation terminated; neither has his employment status or employment relation been terminated under the terms of the Railroad Retirement Act."

##### **Referee's Decision:**

It is the decision of the referee that the position of the carriers on this question is clearly supported by the preponderance of the evidence. Much of what the referee said in his decision on Question 2 under Article 1, dealing with Item G, "Time Paid for Because of Suspension or Dismissal," is applicable here also. Suffice to say at this point, the referee believes that the position of the labor organizations on this question is not a realistic one, but rather constitutes a very strained interpretation of the following language of Article 8: "whose employment relation with a carrier is terminated prior to the taking of his vacation."

The position taken by the employees in their discussions of this problem, as set forth on pages 636 to 672 of the transcript, appear to the referee to be highly technical, especially their insistence that the criterion which should be considered as controlling in determining whether or not employment has been terminated is loss of seniority. They argue that if an employee is reinstated or returned to work by the carrier following a dismissal without loss of seniority, then his employment status never was terminated. However, the argument entirely overlooks the fact that when a man is dismissed for just cause, it falls within the discretion of the carrier to leave him off the payrolls permanently or, as an act of leniency, to put him back on the payroll with seniority. However, it is such dismissal that constitutes the termination of employment; such an employee's return to service without loss of seniority, and in some instances also with all or part pay for lost time, is in fact an act of leniency by the carrier and in no way modifies or changes the meaning of "termination of employ-

ment relation" as it is referred to in Article 8 of the vacation agreement.

The referee feels that counsel for the carriers put the problem rather effectively when, on page 659 of the transcript, he stated:

"Now, Mr. Referee, I will agree that this is a small thing and the situation with which we are confronted does not occur every day, but I find myself just in this position:

"I think railroad managers are human. I know from my own experience that they listen with care and consideration to leniency pleas. But what Mr. Davis suggests, it seems to me, is simply this: that whenever from now on a plea is made for the reinstatement of a man, the man who gives it has to say to himself, 'Here is a man who is guilty, his guilt was such as to justify discharge; I am asked as a humane matter to put him back. I am willing to put him back, but I don't want to pay out fifty or sixty dollars of the company's money for the privilege of being humane.'

"I would like to suggest this: I want men put back on a leniency basis where conditions justify. I do not want barriers erected towards the exercise of leniency by a railroad company. I do not want barriers put in the way of railroad officers being good to their men. I do not think that a railroad should be required to pay a price for the privilege of being good, and for the sake of the men about whom we are talking I would urge that the position of the organizations is just wrong. I do not believe that their attitude is one which will bring about humane treatment of employees who have been rightfully discharged, but whom the management feels should be put back on a leniency basis."

The referee agrees in general with the foregoing quoted statements of counsel for the carriers, and he is satisfied that it would not be reasonable to give to Article 8 the interpretation and meaning which the employees would place upon it. However, when a suspension is given as discipline (as distinguished from a dismissal), the employee relation shall not be deemed to have been terminated within the terms of Article 8 of the vacation agreement.

#### H. Referee's Answers to Questions

##### Raised Under Article 10 of the Vacation Agreement

Article 10 of the vacation agreement reads:

"10 (a) An employee designated to fill an assignment of another employee on vacation will be paid the rate of such assignment or the rate of his own assignment, whichever is the greater; provided that if the assignment is filled by a regularly assigned vacation relief employee, such employee shall receive the rate of the relief position. If an employee

receiving graded rates, based upon length of service and experience, is designated to fill an assignment of another employee in the same occupational classification receiving such graded rates who is on vacation, the rate of the relieving employee will be paid.

"(b) Where work of vacationing employees is distributed among two or more employees, such employees will be paid their own respective rates. However, not more than the equivalent of twenty-five per cent of the work load of a given vacationing employee can be distributed among fellow employees without the hiring of a relief worker unless a larger distribution of the work load is agreed to by the proper local union committee or official.

"(c) No employee shall be paid less than his own normal compensation for the hours of his own assignment because of vacations to other employees."

#### Question No. 1: Meaning and intent of Article 10 (b).

##### Carriers' Contention:

The carriers' interpretation of this article is:

"... that Article 10 (b) only comes into play when an employee has not been designated to fill the assignment of another employee on vacation, as provided for in Article 10 (a).

"Article 10 (b) is a pay rule, in that it enables the carrier to pay employees at their own respective rates when the work of a vacationing employee is distributed among two or more employees.

"Article 10 (b) permits of the distribution of work of a vacationing employee to two or more employees and the payment to such employees of their own rates subject to the qualifying clause (the 25% clause) in Article 10 (b). This clause, read in connection with the first sentence of Article 10 (b), means that, in the event the vacationing employee's work is distributed among two or more employees and such employees are paid the vacationing employee's rate, or their own rates if higher, then under such conditions there is no prohibition against such distribution any more than there would be if one employee took over 100% of the vacationing employee's work as provided for in Article 10 (a). If, however, more than 25% of a vacationing employee's work is to be distributed to two or more employees who are paid their own rate, if less than the vacationing employee's rate, then the alternative of hiring a relief worker or agreeing on a larger distribution of the work load presents itself."

"Nothing in Article 10 (b) prohibits certain of the work of the vacationing employee being allocated to one employee and his own rate paid where the volume is insufficient to

require the designation of another employee to fill the place of the vacationing employee.

"The carriers do not find in Article 10 (b) any language to support a contention that the distribution under Article 10 (b) must be necessarily among two or more employees with common seniority under one rules agreement.

"The carriers find in the phrase 'unless a larger distribution of the work load is agreed to by the proper local union committee or official' an obligation that such agreements should be entered into when conditions justify."

#### **Labor's Contention:**

It is the contention of the labor organizations that:

"This article permits the work of a vacationing employee while on vacation to be distributed to two or more employees with common seniority under a given rules agreement of a particular craft or class, with payment of their own respective rates to such employees, provided such distribution is not in excess of 25 per cent of the work load of the vacationing employee, unless a larger distribution of this work load is agreed to by the proper local union committee or union official. The article forbids the distribution of the work load of a vacationing employee to less than two employees, and it forbids the distribution of more than 25 per cent of the work load of a vacationing employee among fellow employees without negotiation and agreement. If more than 25 per cent of the work load is to be performed, the article requires the use of a relief worker. This provision is related to Article 6, as we have heretofore pointed out. Where a relief worker is required, the provisions of Article 10 (a) come into play regardless of whether he is a 'regularly assigned vacation relief employee' or whether he is 'an employee designated to fill an assignment of another employee on vacation.'"

#### **Referee's Decision:**

It is the opinion of the referee that both parties to this dispute have attempted to read meanings into Section (b) of Article 10 not intended or contemplated when the parties agreed to the language on December 17, 1941. He feels that they have adopted a highly legalistic and technical interpretative approach to the language, with resulting violence to the objectives and purpose which the parties had in mind last December at the time of their negotiations on the general problem and which the referee attempted to cover when he wrote the language of Section (b) of Article 10.

Irrespective of the problems and difficulties which apparently have arisen in connection with applying Article 10 (h), this referee would not be justified in amending Section (b) of

Article 10 by way of interpretation in order to eliminate some of those problems. Sympathetic as he is with the view that any existing working rule which produces unjust or unreasonable results when applied to the vacation agreement should be waived or set aside insofar as administering the vacation plan is concerned, the fact remains that it does not fall within the referee's prerogatives and jurisdiction under the vacation agreement to change the working rules.

The parties have provided in Article 13 for the procedure which is to be adopted in making any changes in the working rules. Hence, unless the referee can find that the vacation agreement itself constitutes a modification of some given working rule, the parties must be deemed to be bound by existing working rules until they negotiate changes in them by use of the collective-bargaining procedures set out in Article 13.

It seems to the referee that much of the argument of counsel for the carriers in regard to the meaning of Article 10 (b) rests upon an unexpressed premise; namely, that the referee should, by interpretation, amend Article 10 (b) because of the fact that in its present form it is very difficult of application, and because, in some instances, existing working rules produce unjust results. However, the submission agreement which defines and limits the jurisdiction of the referee in this case gives him no power to modify working rules either by express amendment or by way of interpretation. This referee does not propose to exceed his jurisdiction, at least knowingly and intentionally.

Before ruling upon the specific problems raised by the parties in their arguments as to the meaning of Section (b) of Article 10, the referee wishes to call the attention of the parties to the following points:

(1) Section (b) of Article 10 was written into the agreement for the primary purpose of effectuating one of the basic policies of the President's Emergency Board in regard to the vacation issue. The Board was unanimously of the opinion that its grant of vacations to the employees represented by the fourteen participating labor organizations should not rest upon the so-called "keep-up-the-work" principle. The parties to this dispute will recall that at the Chicago hearings before the Emergency Board there was a great deal of discussion in regard to some of the vacation plans which already had been put into operation on some of the roads, especially among office employees. Mr. George Harrison, spokesman for the employees on this issue, pointed out that, by and large, those vacation plans rested upon a "keep-up-the-work" principle. He argued that such a principle is basically unsound because its application amounts, in fact, to a subterfuge method of avoiding the costs of vacations with pay, so far as the carriers are concerned, and places the entire financial burden upon the shoulders of the employees.

The members of the Emergency Board in their deliberations agreed with the thesis of Mr. Harrison's argument. They recognized the fact that in one sense an employee does not receive a vacation with pay if in order to get that vacation he must do not only his regular work but also some of the work of his fellow employees in the office when they are away on their vacation and that they, in turn, must do his work while he is away on vacation.

The record before the Emergency Board showed that, in some instances, railroad employees working under then existing vacation plans were expected to work extra hours without pay in order to keep up the work of fellow employees on vacation. The Emergency Board thoroughly disapproved of that principle, and, in order to prevent its inclusion within the vacation grant of the Board, this referee as a member of the Board was instructed to write language into the Board's report on vacations which would require the employment of vacation relief workers. Although the Board was opposed to applying the "keep-up-the-work" principle to a vacation plan, it also wished to check any attempt on the part of the employees to use a vacation plan as an instrumentality for a "make-work" program. Recommendation No. 5 of the Board's report on the vacation issue contained language which, in the opinion of the Board, would prevent the application of a "keep-up-the-work" principle and also would prevent the use of the vacation grant as a means of fostering a "make-work" program. It may be that the Board's language in Recommendation No. 5 is not as clear as it might be, but this referee has no doubt as to what the Board intended by the language.

(2) Last December the parties to this dispute submitted proposals for a vacation agreement to this referee. It is significant to note that they were not in disagreement as to the language which should be contained in Article 6 of their proposed drafts. That language was almost identical with the language of Recommendation No. 5 of the Emergency Board's report on the vacation issue. In view of the fact that the parties were in agreement on the language, this referee approved and adopted it as Article 6 of the vacation agreement of December 17, 1941. It is also significant to note that during the negotiations between the parties held in Chicago in December, 1941, and at the hearings before the referee on December 10, 1941, there was much discussion of the employees' fears of and objections to the "keep-up-the-work" principle and to the carriers' fears of and objections to the "make-work" program. Mr. George Harrison, speaking for the employees, stressed the point that the employees would rather have no vacation plan at all than have one which rested on the "keep-up-the-work" principle. Mr. Mackay and Mr. Johnston, as well as other carrier spokesmen, urged the referee to keep in mind the danger of imposing upon the carriers excessive vacation

costs if the language of the vacation agreement failed to protect the carriers from the creation of unnecessary jobs.

As a result of a careful weighing of the arguments presented by spokesmen for the employees and for the carriers, and in order to protect the employees from the abuses of the "keep-up-the-work" principle and the carriers from the wastes of a "make-work" program, the referee adopted the language which now constitutes Article 6 and Article 10 (b) of the vacation agreement of December 17, 1941.

(3) In an earlier part of this award, the referee has discussed the meaning of Article 6. He has pointed out that the article "obligates the carriers to provide relief workers to perform the work of an employee while he is on vacation, if his work is of such a nature that *it cannot remain undone* without increasing the work burden either of those employees remaining on the job or of the employee when he returns from his vacation. It does not mean that in every instance when an employee goes on vacation the carrier must assign someone to do the work which the employee would otherwise have done had he not gone on his vacation."

The referee wishes to stress the point that the language of Article 6 does not give, nor was it intended to give, any right to the carriers to distribute the work of employees on vacation among the employees remaining on the job. The primary purpose of the article in this connection was to protect the carriers against any demands on the part of the employees that the job of every employee who receives a vacation must be filled by a relief worker, irrespective of whether or not the regular work of the vacationing employee is of such a nature that it need not be performed at all during the short time that he is away on vacation.

To put it another way, Article 6 was intended to accomplish two purposes: first, to guarantee to the employees that when a worker takes his vacation the other workers in his group will not have to take on the burdens of his job as well as their own and, on the basis of the "keep-up-the-work" principle, perform the work of the vacationing employee; second, to guarantee to the carriers that if the work of any employee does not need to be performed while he is away on vacation, and if its remaining undone does not increase the work burdens of other employees remaining on the job or the work burden of the employee after his return from the vacation, then they need not fill that job with a vacation relief worker, thus protecting them from the danger of a "make-work" program.

If the language of Article 6 is susceptible of other meanings, it was not so intended by this referee when he wrote it into the report of the President's Emergency Board and when, upon joint submission by the parties, he approved it and made it a part of the vacation agreement of December 17, 1941.

(4) Now, what about the purpose and meaning of the language of Section (b) of Article 10? At the hearings before the referee on December 10, 1941, spokesmen for the carriers convinced this referee that it would be unreasonable and unfair absolutely to prohibit the distribution of any of the work of vacationing employees among the employees remaining on the job. They pointed out that such a rule of absolute prohibition would impair efficiency, result in excessive costs, produce many maladjustments of operations, and that it would, in fact, result in the creation of unnecessary jobs. The referee became convinced that a flexible rule was needed which would permit of some distribution of work but which, at the same time, would prevent the carriers from putting into effect a "keep-up-the-work" system of vacations.

The language of Section (b) of Article 10 was intended to accomplish that end. The 25 per cent figure contained in the section was not intended as any exact mathematical yardstick which the parties could apply with precision in measuring the distribution of work. Rather, it was an arbitrary figure which the referee selected for the purpose of describing and marking out in a general way the restricted limits to which the carriers might go in distributing the work. The referee is satisfied that if the section is applied in accordance with the spirit and intent of the purpose for which it was devised, it will protect the carriers from a "make-work" program, and it will protect the employees from the dangers of a "keep-up-the-work" vacation principle.

Of course, there is unlimited opportunity for arguments and bickerings over the application of Article 10 (b) to the vacation plan, especially if the parties seek to squeeze out of it unintended advantages by applying the language in a narrow and strict manner to exceptional fact situations. If the parties approach the application of the article in that spirit, the referee doubts if there is any language that can be used which will prevent disputes and disagreements over its application. However, there is one thing that is perfectly clear, and that is: If the application of Section (b) of Article 10 in its present form produces unreasonable results, then the parties should proceed under Article 13 or Article 14 to negotiate a modification of it; but they should not expect this referee to modify it by way of interpretation.

The referee believes, however, that the section is workable in its present form, if the parties will keep in mind the purposes for which it was devised. He is frank to say that he believes that most of the difficulties which have arisen under Section (b) of Article 10 would be eliminated if some of the carriers made clear to the employees that they were not attempting to use the section as a means of keeping down the costs of the vacation plan below that amount which in all fairness it ought to cost them.

The referee hopes he will not be misunderstood on this point of costs of the vacation plan. He believes that the officials of the carriers should and are duty bound to their principals to administer the vacation plan economically. However, Article 10 (b) was not devised for the purpose of enabling the carriers to save a lot of money by distributing work among the employees; but rather, as far as the cost figure is concerned, its purpose was to protect the carriers from the economic waste which would result if they were forced to hire relief workers in those cases in which only a small portion of the employee's work needed to be done while he was away on vacation.

The language "25 per cent of the work load" was used to describe in a general way the upper limit to which the carriers could go in making work distribution adjustments in those instances in which a portion of a vacationing employee's work could not go unattended during his absence. However, in those instances in which all or a substantial amount of an employee's work would have to be done while he was away on vacation, it was clearly contemplated that the carriers should provide relief workers to do his job and not attempt to stretch the meaning of the language of the agreement in a manner which would permit them to distribute the work of the employee and save the expense of hiring relief workers.

As stated before in this decision, the cost of vacations was taken into account by the Emergency Board when it considered the length of the vacations which should be granted. One reason why the longer vacations as requested by the employees were not granted was that the Board believed that they would be too costly at this time, especially in view of the Board's conclusion that the vacation plan should not include the "keep-up-the-work" principle, but that it should include the cost incidental to providing vacation relief workers.

With equal frankness, the referee wishes to call the employees' attention to the fact that the language of Article 10 (b) was not devised to make it possible for them to secure unintended economic benefits by resort to very narrow and technical applications of the section to exceptional fact situations. The wording of the section was broadly stated for the very purpose of permitting flexibility in the administering of the vacation plan. The successful application of any flexible plan is dependent upon a cooperative effort on the part of those responsible for its administration. In such situations as this one, in which the very problem involved is characterized by many intangible factors, there is little that the referee can do towards solving the disputes which have arisen between the parties other than to lay down a statement as to the general purposes and meanings which were intended in the use of the language as it is found in Article 10 (b). He has attempted to do that very thing in the foregoing remarks.

(5) On the basis of the premises set forth in the referee's foregoing remarks on this question, he wishes now to make a few comments on some of the specific arguments and illustrations set forth in the contentions of the parties on the question as to the meaning of Article 10 (b).

(a) The statement of the carriers that, "Article 10 (b) only comes into play when an employee has not been designated to fill the assignment of another employee on vacation, as provided for in Article 10 (a)," is correct.

(b) The second contention of the carriers that, "Article 10 (b) is a pay rule, in that it enables the carrier to pay employees at their own respective rates when the work of a vacationing employee is distributed among two or more employees," is misleading. The language of the words, "when the work of a vacationing employee is distributed among two or more employees," seems to imply that all the work of a vacationing employee can be distributed among two or more employees. If such an implication were intended, it does not accord with the meaning of the article. Further, the description of the article as a "pay rule" is not an accurate description of the article, when viewed from the standpoint of its primary purposes as above discussed. The reference in the article to pay rates must be considered secondary to the primary meaning of the article.

(c) The third paragraph in the statement of the position of the carriers on this question is rejected by the referee primarily because it seems to be subject to the interpretation that the carriers believe that 100 per cent of the work load of a vacationing employee can be distributed among two or more employees, provided that they receive either the vacationer's pay rate or their own rates if higher. Such a distribution of work is not permissible under Article 10 (b). Under such circumstances the rules applicable to the hiring of a relief worker apply.

(d) The referee is satisfied that there is a great deal of merit in the following contention of the carriers:

"Nothing in Article 10 (b) prohibits certain of the work of the vacationing employee being allocated to one employee and his own rate paid where the volume is insufficient to require the designation of another employee to fill the place of the vacationing employee."

He believes that the statement falls within the meaning of Article 10 (b) and he rejects the technical objections which the employees raised against it. Of course, it is to be understood that the 25 per cent protection applies and the distribution of the work will not burden any employee to whom it is distributed.

In approving the carriers' position, the referee has in mind the type of situation in which employee A in an office has very

little to do and employee B goes on his vacation. If a small portion of B's work must be done while he is away on his vacation, it should be deemed permissible, under Article 10 (b), for the carrier to ask A to do it. Such an application of Article 10 (b) is consonant with ordinary common sense. If, on the other hand, A's regular duties leave him no time to do any of B's work, then he cannot be burdened with it unless he is relieved of doing some of his other work. It is to be understood that the distributor-of-work right granted to the carriers in Article 10 (b) cannot be used as a speed-up device.

(e) The referee agrees with the carriers that the distribution of work under Article 10 (b) need not necessarily be among employees with common seniority, but it is to be definitely understood that the agreement cannot be applied in a manner which will cross craft or class lines. As to this point, the referee approves of the view expressed by the spokesman for the employees when he said, on pages 727 and 728 of the transcript:

"Now, I think, Mr. Chairman, if there is no intention and if there is no right to cross craft or class lines here that probably our statement with respect to seniority rosters in this regard is a little too tight, a little too restrictive because it is a fact that there are some groups where the rosters are divided, where the rosters do divide men that do naturally flow back and forth, but what maybe we should have said is that the general principle of seniority should be observed. We should not have said 'common seniority' because it is correct to say that when we said 'common seniority' we mean seniority among the men on one roster. We do not mean the seniority among the men on another roster. We do not mean to include the seniority as between the two rosters.

"That is a little too stringent, I think and I hope that the Referee will get from what I suggested,—find some words when there is time to deliberate, which is not available to me right now, better words than we have used on that particular point because all we desire is that in so far as applying 10 (b) is concerned there shall not be first and foremost and more important, more important to the group I represent and I say it without reservation, the shopmen, and then the agreement itself that there shall not be crossing of craft lines; and secondly, that the principle of seniority shall be regarded to the end that the men under normal circumstances will be entitled to promotion to jobs paying better rates of pay, temporarily or otherwise, and will not be denied in wholesale fashion that because Article 10 (b) deals primarily with the preservation of rates."

The referee believes that the above-quoted comments of Mr. Jewell constitute a very clear statement of the policy which should prevail in regard to the seniority problem.

(f) The last contention in the carriers' statement of their position on this question reads:

"The carriers find in the phrase 'unless a larger distribution of the work load is agreed to by the proper local union committee or official' an obligation that such agreements should be entered into when conditions justify."

The referee agrees that a moral obligation rests upon both parties to settle by collective-bargaining negotiations under Articles 13 and 14 of the agreement, any differences that may arise over the request of the carriers for a larger distribution of the work load when in their opinion conditions justify it. However, the question as to whether or not in a given case conditions justify a greater distribution of work is a question of fact, and if the parties cannot reach an agreement in good-faith negotiations over the problem, then a greater distribution cannot be made by the carriers under the present wording of Article 10 (b). Much can be said for a modification of Articles 13 and 14 which would permit of the breaking of a deadlock in negotiations by reference to a third party on the request of either side to a dispute, but that is a matter which falls beyond the jurisdiction of this referee.

The referee believes that he has answered in the foregoing discussion of this question all of the contentions made by the labor organizations in their formal statement of their position on the meaning and intent of Article 10 (b).

**Question No. 2:** Meaning and intent of the words "equivalent of twenty-five per cent of the work load" as used in Article 10 (b).

**Carriers' Contention:**

The carriers' interpretation of the words "equivalent of twenty-five per cent of the work load" is:

"... the equivalent of 25 per cent of the requirements of the position."

**Labor's Contention:**

It is the contention of the labor organizations that:

"The reference to 'work load' in Article 10 (b) means the work requirements, the duties, the responsibilities or the regular and normal functions attached to the position of the vacationing employee. When more than the equivalent of twenty-five per cent of the foregoing factors are imposed upon fellow employees, except by negotiation and agreement, then the provisions of Article 10 (b) are violated."

**Referee's Decision:**

The term "work load" as used in Article 10 (b) is synonymous with work, duties, tasks, quantity job assignments. Once

again the referee wishes to call the attention of the parties to the fact that it was not the purpose of Section (b) of Article 10 to provide and define for the parties an exact yardstick or measurement which could be used by them in distributing the work of the employees. The referee took it for granted that the parties wanted him to lay down a broad outline of policy which should govern the application of the vacation agreement to specific cases. The term "work load" was used in a broad sense—and necessarily so—because of the complex and highly variable nature of the many different types of jobs which exist in the railroad industry. The word is not one of exact meaning—and desirably so—because it must be applied to the variable and flexible problems arising under Section (b) of Article 10.

**I. Referee's Answers to Questions**

**Raised Under Article 12 of the Vacation Agreement**

Article 12 of the vacation agreement reads:

"12. (a) Except as otherwise provided in this agreement a carrier shall not be required to assume greater expense because of granting a vacation than would be incurred if an employee were not granted a vacation and was paid in lieu thereof under the provision hereof. However, if a relief worker necessarily is put to substantial extra expense over and above that which the regular employee on vacation would incur if he had remained on the job, the relief worker shall be compensated in accordance with existing regular relief rules."

"(b) As employees exercising their vacation privileges will be compensated under this agreement during their absence on vacation, retaining their other rights as if they had remained at work, such absences from duty will not constitute 'vacancies' in their positions under any agreement. When the position of a vacationing employee is to be filled and regular relief employee is not utilized, effort will be made to observe the principle of seniority."

"(c) A person other than a regularly assigned relief employee temporarily hired solely for vacation relief purposes will not establish seniority rights unless so used more than 60 days in a calendar year. If a person so hired under the terms hereof acquires seniority rights, such rights will date from the day of original entry into service unless otherwise provided in existing agreements."

**Question No. 1:** Meaning and intent of Article 12 (a).

**Carriers' Contention:**

It is the position of the carriers that they:

"... interpret the first sentence of Article 12 (a), and particularly the words 'except as otherwise provided in this



agreement,' to refer to the provisions of the Vacation Agreement, and that except as they may be required by the mandatory provisions of that agreement they are not required to incur expense greater than would be incurred by paying an employee in lieu of a vacation, and that the vacation system shall not be used to impose any unnecessary or additional expense. The carriers further contend that the prohibition as contained in the Vacation Agreement against the use of the vacation system to create unnecessary expense takes precedence over any schedule rule which would create such expense. To state the matter differently, the carriers contend that the language in the first sentence of Article 12 (a) makes it clear that the intention of the agreement is that a carrier in ordinary circumstances, and except as otherwise provided by the Vacation Agreement, would not be penalized because of the granting of vacations, and that the exception to this is made clear by the next sentence beginning 'However,' in which is specified exactly the additional expense which the carrier may be required to pay."

#### **Labor's Contention:**

The labor organizations contend that:

"To properly interpret the first sentence requires a breaking down and interpretation of certain words contained therein. The words 'this agreement' as used in this Article and elsewhere in the Vacation Agreement refer to the Vacation Agreement and must be interpreted as tho they read 'this Vacation Agreement.' The phrase 'except as otherwise provided in this agreement' means that where it is otherwise provided in the Vacation Agreement, the remainder of the first sentence of Article 12 (a) is not applicable. The words 'a carrier shall not be required to assume greater expense because of granting a vacation than would be incurred if an employee were not granted a vacation and paid in lieu thereof under the provision hereof' when coupled with the phrase 'except as otherwise provided in this agreement' mean that if a carrier is required to assume greater expense or cost because of application of other provisions of the agreement, the carrier is not privileged to utilize this provision of the article to deny an employee a vacation earned and pay him in lieu thereof, merely because greater expense would be incurred.

"Nothing in the language used in the first sentence of Article 12 (a) is intended to nullify the remainder of the Vacation Agreement by giving a carrier the option of paying employees a bonus in lieu of vacations, and thus defeat the primary purpose of the Vacation Agreement. Some additional expense must be assumed in giving vacations to individual employees if the vacation program is to remain such, instead of being converted to a wage bonus plan.

"If an employee has earned a vacation he must be permitted to take it unless service requirements prevent; the carrier must assign a vacation date and, if in applying provisions of the Vacation Agreement it is necessary to fill the position of the vacationing employee, then such additional cost in connection with the filling of such position as is required by the application of Articles 4, 6, 10 (a), 10 (b), and other provisions of the Vacation Agreement must be assumed by the carrier.

"The word 'expense' as used in the second sentence of the article refers to the out-of-pocket, or away-from-home expenses, such as for meals, lodging or traveling, which a relief worker must incur because of performing the relief work.

"The second sentence of the article provides that a relief worker shall be compensated in accordance with 'existing regular relief rules' if he is necessarily put to 'substantial' extra expense over and above that which the regular employee would incur if he had remained on the job. In actual practice the 'regular employee,' in most instances, incurs no expense for which he is reimbursed by the carrier. A few regular employees incur and are reimbursed for away-from-home expenses when their work or assignment requires that they incur such expenses away from home station or headquarters point; the rules agreements provide for such reimbursement. However, a regular employee whose work is confined to his home station or headquarters point incurs only incidental expenses, such as local transportation fares or the cost of noonday lunches. Under this part of Article 12 (a), it is not intended that a relief worker would be reimbursed for such incidental expenses while relieving such regular employee at the home station of the relief worker; however, if the relief worker must incur expense for meals or lodging because of being sent from his home station or headquarters point to relieve a vacationing employee at another station or point, it is intended that he be reimbursed for such expense. Further, a relief worker who relieves a regular employee on vacation whose position requires road service and where away-from-home expense is normally paid to the regular employee, is to receive the allowances that go with the job.

"The words 'existing regular relief rules' are not to be narrowly construed as meaning only the existing rules that govern established regular relief positions; that is, positions created and used only for the purpose of furnishing relief to other employees. The words are intended to include all existing rules that have to do with one employee being designated or required to temporarily take the place of another employee who is absent for any reason. Relatively few of the rules agreements contain rules covering positions created and used only for the purpose of furnishing relief to other employees. Practically all, however, contain rules covering the

designation of one employee to temporarily fill the place of another."

#### Referee's Decision:

It is the opinion of the referee that the carriers' interpretation of the language of Article 12 (a) conforms very closely to the strict literal meaning of the words of the article, but the referee is unable to agree with the carriers that such an interpretation is consistent with the spirit, intent, and meaning of the vacation agreement when read in its entirety and from its four corners.

It is a well-established rule of contract construction that if a literal interpretation of the words of a certain part of a contract will produce a result inconsistent with the controlling intention of the parties and the primary purpose of the contract, such a literal interpretation must give way to the doctrines of equitable construction. As the referee has stated elsewhere in this decision, throughout the negotiations which led up to the vacation agreement, it was definitely understood by the parties that the vacation plan should not be administered independently of existing working rules, but rather, that in those instances in which existing working rules, if strictly applied, would produce unjust results, they should be modified through the processes of collective-bargaining negotiations conducted between the parties or, if necessary, through those procedures of the Railway Labor Act which provide for the settlement of disputes.

Articles 13 and 14 of the vacation agreement were proposed by the parties themselves, and it is to be assumed that the parties intended to use those articles in attempting to negotiate adjustments or settlements of differences arising between them over the application of existing working rules to the vacation agreement. At least the referee is satisfied, from the preponderance of the evidence in the record in this case, that the parties did not intend any blanket waiver or setting aside of existing rules agreements when they adopted the vacation agreement. The only part of the agreement which raises any reasonable doubt as to just what the parties did intend in regard to the relationship of existing working rules agreements to the vacation agreement is the language of Article 12 (a). This referee is satisfied, however, that if he were to adopt the interpretation which the carriers seek to place on Article 12 (a), he would do violence to the basic meanings and purposes of the vacation agreement when considered in its totality. What is more, he feels that the adoption of such an interpretation would constitute in effect his amending the agreement by way of interpretation. To do that would amount to exceeding his jurisdiction, and it would cast a cloud on the validity of the award itself. Nevertheless, it must be recognized that Article 12 (a) cannot be treated as surplusage. The parties agreed to it, and when they agreed to it, they must have intended it to have

a meaning consistent with and reconcilable to the other portions of the agreement.

It is the opinion of the referee that the following points set forth fair, reasonable, and equitable rulings as to what the parties must be deemed to have intended and meant by Article 12 (a):

(1) That in administering the vacation agreement and in interpreting and applying its various provisions, the parties would be guided by a ruling principle that existing working rules should not be applied in a manner which would result in unnecessary expense to the carriers.

(2) That it was understood that requests for adjustments of specific working rules, the strict application of which would result in unnecessary expense, should be made through the procedure provided for in Article 13.

(3) That the parties, in considering and weighing requests under Article 13 for changes in working rules in those instances in which it is alleged that special conditions on a given road would make the application of a specific working rule unnecessarily costly, should conform to the objective of keeping the costs of granting vacations practically the same as they would be if the carriers granted an employee extra pay in lieu of a vacation.

(4) That the parties well knew that there would be some additional costs necessarily incident to the applications of existing regular relief rules of the various working rules agreements.

(5) That the provisions of existing working rules agreements as to relief workers are by implication a part of the vacation agreement, binding upon the parties except insofar as they are modified, changed, or waived as the result of negotiations conducted under Article 13.

(6) That any substantial extra expense which a relief worker might have to incur, over and above the expense which a regular employee would incur, should be compensated for in accordance with the relief rules.

The referee is frank to admit that the foregoing rulings constitute a very liberal construction of Article 12 (a), but he is convinced that a narrow or literal construction such as that proposed by the carriers would do violence to the purposes of the vacation agreement and in the long run would prove to be a disservice to the parties. Furthermore, he feels that the interpretation proposed by the carriers loses sight of the rights and equities of the vacation relief worker as guaranteed by the working rules in that it discriminates against him unfairly to the financial advantage of the carrier.

As pointed out by the spokesman for the employees on page 803 of the transcript, the position of the carriers would result

in penalizing and imposing upon the vacation relief worker in order to provide another employee with the benefits of a vacation. It, obviously, would not be fair to apply the benefits of a relief rule in the case where an employee relieves a fellow employee who is ill or is off duty for some reason other than the taking of a vacation, but to deny him the benefits of the same rule if he happens to relieve an employee who is on vacation.

On page 804 of the transcript, the spokesman for the employees puts the point very well in these words:

"If the carriers were right here in the illustration they used, they would be unjustly imposing and penalizing, in fact, reducing, the compensation of these extra relief telegraphers solely because another man was being given a vacation. We say that certainly the vacation agreement does not intend any such thing, and cannot be properly interpreted in that way."

Furthermore, the referee rejects the literal interpretation of Article 12 (a) as proposed by the carriers because its adoption would mean in effect that the carriers would have the sole right of determining the application or the non-application of any given working rule to the vacation agreement under the guise of determining its cost effects.

However, as the referee has pointed out elsewhere in this decision, the parties specifically provided in Articles 13 and 14 for a joint and cooperative determination of such matters through the machinery of collective-bargaining. The referee is satisfied that the parties should proceed to make much greater use of the machinery of Articles 13 and 14 than they have to date. It is only through the use of such machinery and the bringing of it to bear upon the facts of specific cases that reasonable and necessary adjustments of some of the working rules can be made in a manner which will meet some of the special needs and problems arising under the vacation agreement. At least it is certain that such a desirable result will not be accomplished by the adoption of the literal interpretation of Article 12 (a) which the carriers propose. The referee is convinced that the adoption of such an interpretation not only would be contrary to the over-all meaning of the agreement but would create many more problems than it would solve.

Although the carriers' interpretation is rejected, it is only fair to say that the referee does not believe that some of the contentions of the employees as to the application of existing working rules to vacation relief are either fair or reasonable. In fact, he feels that the position of the employees as set forth in the record on this point is too technical, and, in many respects, is justifiably subject to the criticism that the employees tend to apply the rules in ways which increase costs unnecessarily and unfairly. Throughout their arguments in the record the employees state that the procedures of negotiation for making

any adjustments in the working rules that may be necessary in light of the special conditions created by the vacation agreement are open to the carriers. They imply—in fact, definitely state—that the carriers have not pressed for such negotiations. This referee believes that it is probably true that there have been few negotiations under Article 13, but at the same time he entertains some doubts as to what would be accomplished by such negotiations, if the representatives of the employees held out for the same technical and strict application of the working rules to vacation problems as they contended for in the record of this case.

He respectfully suggests that in all fairness there undoubtedly are adjustments and modifications of the working rules which should be made when applying them to vacation problems. Negotiations over the same should proceed on a "give-and-take" basis, and not on the basis that no exception to a full application of a rule can be made because to do so would weaken the rule when its modification is demanded in other situations not involving vacations.

In the statement of their position on Article 12 (a) the carriers submitted the following illustrations:

"(a) A telegrapher located at a certain station is allowed a 12 day vacation. It is necessary to send a relief telegrapher from division headquarters to take his place. Such relief telegrapher claims deadhead pay and transfer allowance under schedule rules. It is carriers' position that deadhead pay and transfer allowances are not due."

It is the ruling of the referee that if the existing rules agreement provides for deadhead pay and transfer allowances for relief work, such pay and allowances must be paid in connection with vacation reliefs.

"(b) A shop craft employee on the third shift is allowed a 6 day vacation. It is necessary to fill his position and an employee is transferred from the second shift. The transferred employee claims that schedule rules with respect to changing shifts and doubling over apply to filling vacation vacancies and claims time and one-half for the first shift he works in filling the vacationing employee's position, and time and one-half for the first shift he works upon return to his position. It is the carriers' position that these punitive payments are not required."

It is the referee's opinion that the carriers' position on this illustration is absolutely sound and within the meaning and intent of the vacation agreement. It is his view that under Article 12 (b) the vacancy created by an employee going on vacation does not constitute such a vacancy as to entitle a relief worker to punitive payments. The referee submits that the employees' position on this illustration is a good example of a strained and highly technical interpretation of existing working

rules. He is convinced that it was not the intent of the parties, nor is it reasonable to assume that they could have intended, that when a carrier grants an employee a vacation and his job is such that it must be filled with a relief worker, an additional cost of overtime pay must be incurred for the first shift.

"(c) At a certain station there was employed a chauffeur who was granted a vacation under the Vacation Agreement. A trucker was used to fill the chauffeur's position and the trucker's position was blanked. This has resulted in a claim. It is carriers' position that there is nothing in Article 12 which prevents the blanking of the trucker's position, and that to the contrary under Article 6 and the mandate that the vacation system will not be used to create unnecessary jobs, they are within their rights to blank the trucker's job during his occupancy of the chauffeur's position."

As the referee has previously ruled in the discussion of Article 6, some carriers are bound by existing rules agreements regulating blanking of jobs, and in the absence of an adjustment of such rules through the procedures of Article 13, the trucker's job could not be blanked.

The referee feels that in light of the foregoing discussion of the meaning of Article 12 (a), a specific comment on the contentions of the labor organizations as set forth in their statement of position on the article is unnecessary.

#### **Question No. 2: Meaning and intent of Article 12 (b).**

##### **Carriers' Contention:**

It is the position of the carriers that:

"... there is nothing in Article 12 (b) requiring the filling of positions of employees who are moved up to fill the positions of vacationing employees, or, if filled, to bulletin them. Any interpretation of Article 12 (b) which would require the filling, or, if filled, the bulletining and filling, of these positions according to strict application of schedule rules, or subjecting the carriers to the application of these rules, would be contrary to the provisions of Articles 6 and 12 (a) and the plain intent of Article 12 (b)."

##### **Labor's Contention:**

The labor organizations contend that:

"That portion of the first sentence in the article reading:

'Such absences from duty will not constitute "vacancies" in *their* positions under any agreement.'

means that the positions of employees absent on vacations will not constitute 'vacancies' under any existing rules agreement; consequently carriers are not required to bulletin such

positions for the purpose of filling same from employees making application therefor. However, under the second sentence of the article when the position of a vacationing employee is to be filled and a regular relief employee is not utilized for that purpose, then effort must be made to observe the 'principle of seniority' as 'seniority' is defined and required to be observed in existing rules agreements. Under such circumstances if an employee holding a regular position is utilized to fill the position of a vacationing employee, the filling of the position made vacant by the utilization of such employee is governed by the provisions of existing rules agreements or recognized practices thereunder; nothing in this article or the Vacation Agreement permits the 'blanking' of such position."

##### **Referee's Decision:**

On the basis of the theories of interpretation which the referee has applied to other articles of the agreement in the foregoing portions of this award, it is clear that the carriers' position on this question cannot be sustained. However, the referee believes that the parties should proceed without delay, in accordance with Article 13 of the agreement, to negotiate fair and reasonable adjustments of the blanking rules so far as their application to the vacation agreement is concerned.

Respectfully submitted,

WAYNE L. MORSE,

Referee.