Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD
SECOND DIVISION

Award No. 14038
Docket No. 13891
10-2-NRAB-00002-090003

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

PARTIES TO DISPUTE: (International Brotherhood of Electrical Workers
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(BNSF Railway Company

STATEMENT OF CLAIM:

"1. That in violation of the governing Agreement, Appendix Number 9 in particular, the BNSF Railway Company assigned Vacation Relief Electrician Jeffrey Van Dam to concurrently running vacation relief assignments without affording him the rest days of those vacation relief assignments.

2. That accordingly, the BNSF Railway Company be ordered to make whole Electrician Jeffrey Van Dam for any lost wages, rights, benefits or privileges which were adversely affected by the Carrier's violation of the Agreement.

3. That, accordingly, the BNSF Railway Company be ordered to assign Electrician Jeffrey Van Dam the rest days of those vacationing employees whose positions he is assigned to fill."

FINDINGS:

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

The carrier or carriers and the employee or employees involved in this dispute are respectively carrier and employee within the meaning of the Railway Labor Act, as approved June 21, 1934.

This Division of the Adjustment Board has jurisdiction over the dispute involved herein.

Parties to said dispute were given due notice of hearing thereon.

The Claimant, who was assigned to a job bulletined as a Vacation Relief Electrician at the Carrier's Argentine LMIT Facility in Kansas City, Kansas, was designated to fill back-to-back vacation absences for two different employees, each for a period of five days, from April 16-20 and April 21-25, 2007, without being afforded rest days.

The Organization asserts that because he worked a total of ten consecutive days he was entitled to the rest days of the positions filled and should now be compensated at the time and one-half rate for those days.[1]

The Carrier opposes the claim on several grounds, including an established practice at Argentine, asserting that for many years it has been common for Vacation Relief Electricians to move from filling one vacancy to another and thus, since the inception of the use of such positions, employees covering single week and/or single day vacations have been assigned to work more than five consecutive days without a day off at straight time. It further urges that the Organization's demands would create significant additional unwarranted expense.

According to the Carrier, because Claimant J. Van Dam worked two separate five-day vacation periods covering two different employees, the first from April 16 through April 20, 2007, and the second from April 21 through April 25, 2007, he was moving between assignments, and was thereby exempted from the normal time and one-half penalty pay provisions and was properly compensated for ten days at the straight time rate.

Specifically, the Carrier contends that when an employee working a vacation relief position fills a multiple (two or more) week vacation assignment for the same person, he/she assumes the rest days of that employee in the middle of the vacation weeks, but not at the start or end of the vacation block. But, it asserts, historically

[1] The Carrier summarizes the demand as seeking punitive pay for the rest days of the first position.

when occupants of these positions work two separate relief assignments they work up to ten consecutive days at straight time without assuming the rest days of either vacation period. Rules 9(g) and 9(h) the Carrier argues, both contain an exception providing that the time and one-half payment is not required when an employee is moving for one assignment to another.

The Agreement provides, in part:

> "Rule 9(g) - . . . Work in excess of forty (40) straight-time hours in any work week shall be paid at 1-1/2 times the basic straight-time rate except where such work is performed by an employee due to moving from one assignment to another . . ." (Emphasis added)
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> "Rule 9(h) - Employees worked more than five days in a work week shall be paid under the provisions of Rule 6, except where such work is performed by an employee due to moving from one assignment to another . . ." (Emphasis added)

The Carrier further states, without objection, that employees who inquire about vacation relief positions are told in advance that they may be working more than five days straight without a rest day and will be paid at the straight time rate of pay. In sum, the Carrier posits that the Claimant is not entitled to pay at the time and one half rate for missed rest days when he was assigned to different consecutive assignments.

The Organization argues that when the vacation relief assignments provided by the Agreement are filled, the employee accepting the assignment abandons his/her own regularly assigned rests days and assumes the hours of service, rate of pay and rest days of the employee being relieved upon reassignment to the vacation relief position. In support it cites a number of prior Awards, including Second Division Award 7900 involving different parties in which the Board denied a claim on grounds that, inter alia, vacation periods cover both work days and rest days, citing Second Division Award 5808 (". . . a vacation period includes both work and rest days and a vacation relief assignment covers the entire vacation period . . . the parties agree - and many Board decisions make it abundantly clear - that a relief employe must accept the relief days of his temporary assignment.")

While it is apparent that the Claimant here did not receive the rest days of either vacationing Electrician during concurrently running vacation relief assignments, and while there appears to be some tension between the arbitral authority relied upon by the parties, the Carrier's heavy reliance on one recent on-property decision forces itself on our attention. In Second Division Award 13844, an on-property Award involving the Carrier and the International Association of Machinists and Aerospace Workers, a Rule identical to that before the Board was construed in the manner consistent with that urged by the Carrier in this instance. In denying the claim, the Board there concluded, in part, as follows:

> "First, the Claimant holds a Vacation Relief position and, in that capacity, filled in for another employee, which caused the Claimant to work seven consecutive days. Rules 9(g) and (h) appear to provide for overtime for the employee who works seven days as the Claimant did in this case. However, both rules provide for an exception - "except where such work is performed by an employee due to moving from one assignment to another." That is what happened here. The Claimant was moved 'from one assignment to another.'"

See also, Second Division Award 13550 (Employee working a vacation relief assignment worked a second consecutive such assignment commencing on what would have been his sixth and seventh days of the vacation absence he had just completed. Citing both the carrier's past practice and a string of Second and Third Division Awards, the Board concluded that although such employees may and often do work ten consecutive days when commencing a new vacation relief assignment - and may have off more than two consecutive days as well - it is well established that "vacation relief employees are not entitled to premium pay for services rendered on what would have been the sixth work day of the position just completed. . . .")

In the judgment of the Board, although the argument that the exemption language relating to employees moving between assignments has no application in this context, but governs only employees bidding between positions, we conclude we are bound by the preemptive force of the Awards cited by the Carrier. Taken together with the absence of any contrary or inconsistent application of the disputed

terms by the Carrier, the Board concludes the claim is without merit and must be denied.

AWARD

Claim denied.

ORDER

This Board, after consideration of the dispute identified above, hereby orders that an Award favorable to the Claimant(s) not be made.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Second Division

Dated at Chicago, Illinois, this 28th day of December 2010.

LABOR MEMBERS' DISSENT
To
AWARD NO. 14038 DOCKET 13891
REFEREE JAMES E. CONWAY

After a full review of the Award as well as the entire record it would appear that the Referee in rendering this decision had but one submission to read and only one position to consider, and that being the Carrier's.

A workweek consists of seven days. Included therewith are five days of work and two rest days. This was firmly and clearly identified by the Organization citing Neutral Herbert Marx's decision in Second Division Award 7900. Neutral Marx sided with the Carrier's position in that Award enumerating that vacation periods extended ". . .for a one-week period (not simply five working days). . ." Neutral Marx's decision was also based and affirmed on previous decisions rendered by Referee Stark (Award Number 5808) and Referee Norris (Award Number 7073). Neutral Marx concluded his decision in Second Division Award Number 7900 by saying:

> " **The Organization makes two other arguments which are equally unpersuasive. ... The second argument is that the vacation agreement under which the parties are governed refers to periods of five days. This relates to work days for which an employee shall receive vacation pay. It does not set vacation period, or such period's beginning and end, which, as noted above, has been mutually understood and accepted as a fixed time interval inclusive of both work days and related rest days."**

Notwithstanding the aforementioned, and while the Carrier may have made an allegation of past practice, that statement is an affirmative defense and must be supported with some fact. It is the Carrier's responsibility to prove such an allegation and not for the Organization to disprove it. Bald face allegations do not take the place of fact.

The threshold issue was the Carrier's ability to force a Vacation Relief employee to work an unlimited amount of workdays by moving him from one vacationing employee's assignment to another vacationing employee's assignment and not affording the Vacation Relief employee the rest days of that initial assignment. The Arbitrator has completely ignored and further utterly failed to recognize the prima facia case presented on the property by the Organization. This fact should have been abundantly clear to anyone who even gave a cursory review of the Organization's submission.

On pages 11 and 12 of our submission, we stated:

> " **There is no additional cost to the Carrier in assigning the Claimant to the rest days of those employees who are on vacation. This issue was**

also addressed by the General Chairman in his letter dated January 31, 2008 reading in part: (Employees Exhibit J)

'This dispute does not require the Carrier assume the burden of any additional cost. This dispute would require that the Carrier assign to the vacation relief employee the rest days as well as the workdays of the vacationing employee. There would be no additional cost incurred in that.

While this may require the Carrier's assignment of more employees to the Vacation Relief roster that is exactly what is provided for and the intent of the National Vacation Agreement. Second Division Award Number 5808 is directly on point here, as are a number of other Second and Third Division Awards."

The Neutral here has done harm to the intent of the parties National Vacation Agreement by giving the Carrier carte blanch to work a Vacation Relief Employee an unlimited number of consecutive work days.

In closing I would like to quote one arbitrators comment on this subject which reads in pertinent part:

" For the foregoing reasons, recognizing that under the Carrier's formulation of its rights employees could be assigned to spin indefinitely in a hamster wheel of relief assignments without rest or compensatory overtime while holding a single permanent assignment, the Board will sustain the claim."

The above sound reasoning was completely ignored and abandoned by the Neutral here.

It is submitted for the record and for all to see that this Award has no precedental value either in this forum or any other forum created under the provisions of the Railway Labor Act.

Respectfully Submitted,

James E. Meyer
Labor Member