Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 39869
Docket No. SG-39442
09-3-NRAB-00003-060115
(06-3-115)

The Third Division consisted of the regular members and in addition Referee Ann S. Kenis when award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Railroad Signalmen
(
(BNSF Railway Company

STATEMENT OF CLAIM:

"Claim on behalf of the General Committee of the Brotherhood of Railroad Signalmen on the Burlington Northern Santa Fe (BNSF):

Claim on behalf of D. C. Houk, for payment of 29 hours and 15 minutes at the straight time rate, account Carrier violated the current Signalmen's Agreement, particularly Section 6 and Section 10(b) of the National Vacation Agreement, when it distributed more than 25 percent of the workload of a vacationing employee to the Claimant from July 16 through July 20, 2001 without assigning a relief employee. Carrier's File No. 35 01 0045. General Chairman's File No. 01-078-BNSF-154-TC. BRS File Case No. 12139-BNSF."

FINDINGS:

The Third 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.

During the week of July 16 through July 20, 2001, Signal Maintainer J. J. Rutten took five days of vacation. The instant claim contends that the Claimant was required to perform 29.25 hours of work regularly assigned to Rutten in addition to his regular work load. The Organization contends that when the Claimant performed the work of assisting a surfacing gang on the vacationing employee's territory, the Carrier failed to properly compensate the Claimant in accordance with Sections 6 and 10(b) of the National Vacation Agreement, which provide as follows:

> "6. The Carrier 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 a worker.
>
> 10(b) Where work of vacation 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 (25%) percent 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 be the proper local union committee or official."

The Organization acknowledges that the Carrier is not required under the foregoing provisions to assign a relief employee when a Signal Maintainer takes a vacation, and the Carrier exercised that prerogative in this instance. However, the Organization asserts that the Carrier cannot avoid the assignment of a vacation relief employee by distributing more than 25 percent of the work of the vacationing Signal Maintainer to other employees. In the instant case, the Claimant was required to perform more than 25 percent of the vacationing employee's workload during the week in question. The Organization argues that Board precedent has consistently recognized under these circumstances that the Agreement has been violated when the Carrier exceeds the limit on the amount of work that can be distributed to a fellow employee while an employee is on vacation. See, Third Division Awards 31250, 26063, 20056, and 17843. Therefore, the Claimant is entitled to compensation at the straight time rate for the hours worked off his regular assignment.

The Carrier contends that the Claimant was paid for the 29.25 hours at the overtime rate of pay and there is no contractual basis for payment of additional compensation for those same hours at the straight time rate. The Carrier asserts that the Claimant was properly compensated for all work on and off his own territory in accordance with Rule 45(j) which states:

> "When a signal maintainer or assistant signal maintainer (when assigned to a signal maintainer) is used off his assigned territory during the assigned hours of his work week, when instructed by proper authority will be allowed ½ time his hourly rate in addition to his regular straight time hourly or monthly rate for the time consumed off his assigned territory, time to be continuous from the time he leaves the limits of his assignment until he again re-enters his assigned territory; except, that, in instances such as ice, sleet, and snow storms, tornadoes, hurricanes, fire and earthquakes where the signal system is interrupted at any point which requires the service of additional signal employees, the adjoining signal maintainer may be used without payment of the ½ time penalty referred to herein during the time their services are used in restoring the signal system to safe and proper working order."

The Carrier contends that Rule 45(j) supersedes the National Vacation Agreement provisions relied upon by the Organization and controls the outcome here. The Carrier asserts that Rule 45(j) was negotiated to include all time that Signal Maintainers are used off their territory for any reason, including vacation. This provision has been applied consistently for decades without objection by the Organization. The Carrier further argues that the Organization's attempts to pyramid the compensation under Section 10(b) on top of the pay under Rule 45(j) have been rejected in prior awards on this property based on the recognition that the two provisions have never been interpreted as the Organization now claims. See, Third Division Awards 37563 and 37564.

The Board carefully reviewed the record herein. The burden was on the Organization to establish a claim violation and it has not met that burden. In reaching that conclusion, the Board notes at the outset that the Awards relied upon by the Organization are distinguishable from the matter at hand because they do not address the interplay between Sections 6 and 10(b) of the National Vacation Agreement and Rule 45(j). On that crucial point, the Organization had to establish that the parties

intended for employees to receive payment under both Section 10(b) and Rule 45(j) when working on vacationing employees' territories.

It did not do so. The lack of evidence that the parties have ever applied the Rules in the manner alleged by the Organization compels the conclusion that the past practice was not to make such payments. Moreover, Rule 45(j) clearly addresses and contemplates all circumstances where a Signal Maintainer is working off of his assigned territory. There are several exceptions where overtime compensation is not paid, but working for a vacationing employee is not one of them. Therefore, traditional precepts used for analyzing contract language do not favor the Organization's position.

Equally important, this same issue has come before the Board on two previous occasions. In Third Division Award 37563, the Organization argued, as it did here, that the Carrier failed to appropriately pay the Claimant at the straight time rate of pay when he worked his own position and, in addition, more than 25 percent of the vacationing employee's work load. The Carrier contended, as it did here, that past practice evinced the parties' intent to negotiate Rule 45(j) to encompass this situation. The Board denied the claim and held:

> "Accordingly, on this property, the Board must conclude that the parties negotiated Rule 45 (j) and applied it in the manner argued for a very long time. Such practice by our review of this record is of a very long standing. Considering decades of practice versus arguably unambiguous language in the Agreement the Board must find in these circumstances that no violation occurred."

The issue was addressed a second time in Third Division Award 37564. There, the Board rejected the Organization's position again, stating:

> "The Board notes that the Organization's major argument is that Rule 45(j) has nothing to do with the distribution of 25 percent of a vacationing employee's work load. The Organization's arguments centered on the fact that Rule 45(j) pertains to the use of an employee on adjacent territory irrespective of whether the other employee was working or not. While we appreciate the language of both Rules and studied the Vacation Agreement as contrasted against Rule 45(j),

applicability of even unambiguous language rests upon the explicit record and circumstances that have been developed on the property."

Both of these prior Awards involved the same parties and the same Agreement language. The Organization has not demonstrated that the prior decisions of the Board were palpably erroneous. For the reasons set forth above, we adhere to the prior rulings. The instant claim 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 Third Division

Dated at Chicago, Illinois, this 31st day of July 2009.