

Award No. 7397

Docket No. MS-6717

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Hubert Wyckoff, Referee

PARTIES TO DISPUTE:

THE UNITED RAILROAD WORKERS OF AMERICA, C.I.O.

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY
COMPANY

STATEMENT OF CLAIM: (1). That the Carrier violated the effective agreement when on August 14, 15, 16, 17, 21, 22, 23, 24, 1952 it used employes without seniority in the Shift Foreman classification at the San Bernardino plant, to perform vacation relief work due to the regularly assigned vacation relief employe being on his assigned vacation.

(2). That the Carrier shall now be required to pay E. W. York, incumbent of the regular Shift Foreman position, eight (8) hours at time and one-half for August 14, 15, 21, and 22, 1952 and F. P. Benson, incumbent of a regular Shift Foreman position, eight (8) hours at time and one-half for August 16, 17, 23 and 24, 1952.

EMPLOYES' STATEMENT OF FACTS: There is an agreement in effect between the parties dated September 1, 1947, Amended September 1, 1949, and vacation rules supplements thereto dated March 12, 1942, and April 26, 1945, known as the Ice Plants Agreement, copy of which is on file with the Board, and is by reference made a part of this Statement of Facts.

The dates August 14, 15, 21 and 22, 1952 were the rest days of Mr. E. W. York and August 16, 17, 23, and 24, 1952 were the rest days of Mr. F. P. Benson, hereinafter referred to as the claimants.

The carrier did have a Regular Relief employe with seniority in the Shift Foreman classification assigned to relieve the claimants on their bulletined rest days.

However, on dates of claim herein referred to, such regular relief employe was on his assigned vacation period, the carrier exparte assigned such relief work to Mr. H. H. Smith an employe holding no seniority in the classification in which the vacation vacancy occurred. The employe used on the dates referred to herein held a regular assignment in another seniority group.

POSITION OF EMPLOYES: As indicated in employees statement of facts, the Carrier did on dates referred to in claim assign an employe holding no seniority in the "Shift Foreman" classification to perform vacation relief work on the rest days of claimants who were regularly assigned by bulletin to work five (5) days per week on positions of Shift Foreman.

rights, such rights will date from the day of original entry into service unless otherwise provided in existing agreements.”,

and which contemplates that a person may be employed for the express purpose of affording vacation relief and thereby protect the Carrier against having to assume greater expense because of the vacationing employee taking his vacation rather than working and receiving pay in lieu therefor. In advancing Mr. Smith, Icing Dock Foreman, to the higher classification of Shift Foreman in the Ice Handling Department in order to provide the vacation relief here involved, the same purpose was served as if a person had been hired temporarily to make the relief, as permitted under the terms of Article 10(c) of the Ice Plants Vacation Agreement, above quoted, and in addition an employee already in the service and having seniority (although not in the class of shift foreman) was given the benefit of advancement to a higher classification and rate of pay. In other words, the Carrier went as far as it could in protecting the vacation relief on the basis of seniority without assuming greater expense because of granting a vacation than would be incurred if an employee were not granted a vacation and was paid in lieu therefor.

In consideration of all the foregoing, there is clearly no support for the Employees' claim in the instant dispute in the Agreement rules, nor in the Vacation Rules and Board pronouncements in relation thereto, and it is also wholly without merit.

Moreover, even if the Employees' claim was supported by the rules of the Agreement in effect between the parties hereto, and it is **not**, the claim for eight hours at penalty time and one-half rates in behalf of the claimant employees **for work not performed** on the dates involved in this claim, is improper and contrary to the Board's well established principle that the right to work is not the equivalent of work performed under the overtime and call rules of an Agreement. See Third Division Awards 4815, 5049, 5078, 5580, 5978, 5995, 6157 and many others.

In conclusion, the Carrier respectfully repeats that the claim of the Employees in the instant dispute is wholly without support under the Agreement rules and should, for reasons expressed hereinabove, be either dismissed or denied in its entirety.

The Carrier is uninformed as to the arguments the Organization will advance in its ex parte submission and accordingly reserves the right to submit such additional facts, evidence and argument as it may conclude are necessary in reply to the Organization's ex parte submission or any subsequent oral arguments or briefs submitted by the Organization in this dispute.

All that is contained herein is either known or available to the Employees or their representatives.

(Exhibits not reproduced.)

OPINION OF BOARD: This claim asserts the right of two Shift Foremen to work their rest days. The regular relief employee assigned to relieve Claimants on their rest days went on his assigned vacation.

The Carrier assigned this rest day work to an employee who held a regular assignment in another seniority class and no seniority in the Shift Foreman class.

Claimants were available to work their rest days but were not called. There were no employees holding seniority in the Shift Foreman class and working at the plant in a lower class or off in force reduction and holding rights to recall.

This claim should be denied upon the authority of Award 7192.

FINDINGS: The Third Division of the Adjustment Board, after giving the parties to this dispute due notice of hearing thereon, and upon the whole record and all the evidence, finds and holds:

That the Carrier and the Employees involved in this dispute are respectively carrier and employees within the meaning of the Railway Labor Act, as approved June 21, 1934;

That this Division of the Adjustment Board has jurisdiction over the dispute involved herein; and

That the Agreement was not violated.

AWARD

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of **THIRD DIVISION**

ATTEST: A. Ivan Tummon
Executive Secretary

Dated at Chicago, Illinois, this 27th day of July, 1956.