Award No. 7772
Docket No. MW-7497

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Livingston Smith, Referee

PARTIES TO DISPUTE:

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES

FORT WORTH AND DENVER RAILWAY COMPANY

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood that:

(1) The Carrier violated the effective Agreement when they compensated Relief Section Foreman R. A. Blackwell at the section laborers rate of pay, while on vacation, during the period September 3 to 15th, 1952, both dates inclusive;

(2) Relief Section Foreman R. A. Blackwell now be reimbursed for the difference between what he received at the section laborer's rate of pay and what he should have received of the Section Foreman's rate of pay during the period referred to in part (1) of this claim.

EMPLOYES' STATEMENT OF FACTS: During 1952, the claimant, Mr. R. A. Blackwell, was employed as a Relief Section Foreman, to relieve section foremen who were absent account of vacations, illness, or other reasons. When not serving in this capacity, the claimant was employed as a section laborer at Amarillo, Texas.

In August of 1952, the claimant was assigned to relieve the regularly assigned section foreman at Claude Texas and at Cliffside, Texas as follows:

At Claude August 4 to 15 both dates inclusive Rate $291.66 per mo.

At Cliffside August 18 to 29 both dates inclusive Rate 291.66 per mo.

Upon termination of this relief section foreman's service on August 29, 1952, the claimant was accorded his paid vacation (ten consecutive work days) beginning on September 2 and extending through September 15, 1952. Upon his return from vacation he relieved the section foreman at Boden from September 16 through Sept. 19, 1952. While on vacation, the Carrier compensated the claimant for one day (September 2) at the section foreman's rate of pay and for the remaining nine days at the section laborer's rate of pay.

Claim was filed in behalf of the claimant requesting that he be reimbursed for the difference between what he received at the section laborer's rate of pay and what he should have received at the section foreman's rate of

is susceptible of but one construction. Therefore we are impelled to hold it means that an employe who is filling a temporary position at the time his vacation begins is not entitled to its rate of pay, where, in order to bring himself within the scope of the twenty day proviso, it is necessary for him to pyramid days worked on a different and independent position. In our opinion, to construe the interpretation otherwise has the effect of reading something into it that is not there.

"* * *

". . . Under the confronting facts we are convinced it was performed on two separate, distinct, and independent positions. The results, since it is conceded less than twenty days was worked on the position at Brinkley, Arkansas, is that Claimant was not entitled to the rate of pay of the position he was actually working at the time his vacation commenced, and the Carrier's action in paying him the rate of his regularly assigned position was not in violation of the Vacation Agreement."

The records show that Claimant Blackwell, who held a regular assignment as a section laborer on Section No. 8 at Amarillo and was assigned a vacation as a section laborer, was not temporarily working as a section foreman at the time he began his vacation on September 2, 1952, and that he had been relieved as section foreman, to which he had been temporarily assigned, by the regularly assigned section foreman prior to starting his vacation. There existed no section foreman's vacancy at Cliffside, where he last worked before starting his vacation, to be filled by an extra section foreman.

The records further show that prior to starting his vacation Claimant Blackwell had worked 10 days as section foreman at Claude and 10 days as section foreman at Cliffside; therefore, he had not worked "twenty days or more" at the **same** position for he had worked at two separate and distinct locations having different headquarters. As stated in the "Opinion of Board" in Award 5422, ". . . it is apparent the only question remaining for decision is whether work . . ." at ". . . two entirely different locations . . ., and each requiring bulletining in the event of permanent vacancies thereon, can be regarded as work 'of the position' and 'on such position,' within the meaning of those two terms as used in the interpretation. We do not believe that it can." The work performed at Claude and Cliffside certainly must be viewed in the same light as that in Award 5422.

It is not a matter of dispute that Claimant Blackwell had not worked "twenty days or more" on "the position" on the last work day before starting his vacation.

It is obvious that Employes' position is not supported by any rules of the agreement, by the Vacation Agreement, Interpretation thereon, or Award of Referee Wayne L. Morse, therefore the claim should be denied.

The Carrier affirmatively states that all data herein and herewith submitted have previously been submitted to the Employes.

OPINION OF BOARD: This claim concerns R. A. Blackwell, for the difference between Section Laborer rate and Section Foreman rate, for 9 days, while on vacation, account of his performance of vacation relief service for Section Foreman for 20 days next preceding the assigned vacation period of claimant.

The Organization asserts that claimant was promoted to the position of Relief Section Foreman on April 26, 1952 and performed Relief for Section

Foreman during the majority of the remaining portion of the year. It was pointed out during the period next preceding claimant's vacation, relief service for the foreman at Claude was performed between August 4 to 15 inclusive, and like service for the Foreman at Cliffside, August 18 to 29, inclusive; said period being equal to or in excess of the 20 consecutive days' service on a higher rated position contemplated by Article 7 of the National Vacation Agreement and the interpretation of Referee Morse pertaining hereto, as well as Award 5390 of this Board.

Article 7 (a) of the National Vacation Agreement and the interpretation referred to read as follows:

> "Article 7. Allowances for each day for which an employe is entitled to a vacation with pay will be calculated on the following basis:
>
> (a) An employe having a regular assignment will be paid while on vacation the daily compensation paid by the Carrier for such assignment."

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

The Respondent counters with the assertion that Claimant did not hold assignment of Relief Section Foreman during the year in question but was classified as a Section Laborer who worked vacation relief on various Section Foreman positions on a temporary basis within the meaning of Rule 25 (g) during which time 113 days of relief service was performed on various different foreman positions at various different locations. It was contended that the interpretation of Article 7 (a) as quoted had specific reference to one position at one location, and finally, the claim here is not valid within the meaning of Award 5422 of this Division which had the effect of over-ruling Award 5390. It was asserted that Claimant held regular assignment as Section Laborer and that neither he (claimant) nor any other employe was employed as a relief section foreman.

This case involves once again the interpretation of the National Vacation Agreement by this Board and once again such agreement must be interpreted and applied in light of the facts and circumstances of this particular case, as was done in both Award 5390 and Award 5422, relied upon by the parties.

Inasmuch as these Awards have been cited as controlling it is advisable to analyze their differences. In the former Award relied upon by the Organization a check clerk filled two positions classified as Inbound Foreman, during the vacation period of the occupants of such Foreman positions for a consecutive period of 27 days, then went on vacation, after which he returned to his own position. The Foreman positions carried the same rate and were both at the same location. In Award 5422, relied upon by the Respondent, a Section Laborer filled vacancies on two Section Foreman positions for a period of more than 20 consecutive days. The said positions were in different sections and were compensated at different monthly rates. Upon the completion of the aforementioned relief service the claimant returned to his position of Section Laborer.

Here the Claimant had performed relief service for section foreman with a marked degree of regularity from the time that he was, by the Respondent's admission, promoted to a relief section foreman on April 26, 1952. During the balance of that year (1952) claimant performed relief

service on Section Foreman positions for a substantial greater period of time than on any other type of service. During the immediate period in question at least 20 consecutive days were worked at two positions classified as Section Foreman carrying identical monthly rates but at different locations. Claimant upon completion of the aforesaid service went upon his vacation at the conclusion of which he resumed performance of section foreman relief service.

We are of the opinion that the facts and circumstances of this particular case come within the interpretation of Referee Morse wherein it was said:

> "* * * 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." (Vacation Agreement, p. 25)

Inasmuch as the very essence of a relief position which claimant admittedly was promoted to, and occupied when required, indicates that service will be performed at different locations we think that the controlling vacation rate for the claimant should be that of the positions occupied during the 20 day period, where as here both bore the same classification and rate, a sustaining award is justified.

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 Employes involved in this dispute are respectively Carrier and Employes 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 Carrier violated the effective Agreement.

AWARD

Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: A. Ivan Tummon
Executive Secretary

Dated at Chicago, Illinois, this 11th day of March, 1957.