Award No. 8276
Docket No. MW-7438

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Edward A. Lynch, Referee

PARTIES TO DISPUTE:

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES

CHICAGO, MILWAUKEE, ST. PAUL AND PACIFIC RAILROAD COMPANY

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

(1) The Carrier violated the Agreement and the supplements thereto when it directed and required Section Foreman F. P. Kuklinski to assume the duties, responsibilities, and work load of two positions during the vacation absence of Section Foreman L. D. Gruen from July 1 to 14, 1953, both dates inclusive:

(2) Section Foreman Kuklinski be allowed an additional eight (8) hours' pay at the straight-time rate of Section Foreman Gruen's position for each of the ten (10) work days involved in the violation referred to in part (1) of this claim.

EMPLOYES' STATEMENT OF FACTS: The Claimant is employed as a Section Foreman and is assigned to the Carrier's Tomah Section (No. 23), and is responsible for the maintenance and upkeep of the tracks and right-of-way on such assigned territory.

Mr. L. D. Gruen is employed as a Section Foreman and is assigned to the Carrier's Tunnel City Section (No. 24), and is responsible for the maintenance and upkeep of the tracks and right-of-way on such assigned territory.

Section 23 (Tomah) extends six (6) miles each and one (1) mile west of Tomah for a total running length of seven (7) miles. Section 24 (Tunnel City) starts at one (1) mile west of Tomah at Mile Post 240 and extends westward to Mile Post 250, a running length of ten (10) miles.

Section Foreman Gruen's annual vacation for 1953 was scheduled to begin on July 1, 1953, and to continue through July 14, 1953, and he was permitted to take his vacation as per the Vacation Schedule assignment.

In lieu of providing a vacation relief employe to fulfill the duties and responsibilities of foreman on Section 24 during Foreman Gruen's vacation absence, the Carrier required Section Foreman Kuklinski to assume those duties and responsibilities in addition to the duties and responsibilities of his own position as foreman on Section 23.

We, therefore, submit that this claim is entirely without merit, and we respectfully request that it be denied.

All data contained herein has been presented to the Employes.

OPINION OF BOARD: It is the claim of the Organization here that Carrier violated "the Agreement and the supplements thereto" when it required F. P. Kuklinski, Section Foreman on Section 23, "to assume the duties, responsibilities, and work load" of L. D. Gruen, Section Foreman, Section 24, while the latter took his vacation July 1 to 14, inclusive, 1953.

The pertinent sections of the Vacation Agreement here involved are these:

> "6. The carriers will provide vacation relief workers but the vacation system shall not be used as a device to make unnnecessary 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 employes remaining on the job, or burden the employe after his return from vacation, the carrier shall not be required to provide such relief worker."

> "10. (b) Where work of vacationing employes is distributed among two or more employes, such employes 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 employe can be distributed among fellow employes 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."

There is before us the "Award of Referee" (Wayne L. Morse) involving interpretation and application of the Vacation Agreement of December 17, 1941. It is dated November 12, 1942.

Organization maintains that as a consequence of Carrier's action,

> "the Claimant supervised and directed, and was required to assume responsibility * * * for both Section 23 and Section 24; to make and submit necessary reports covering time worked by both crews and on either or both sections; to report materials used on either or both sections; to be directly responsibile for injuries sustained by employes of either or both crews and for accidents that might occur on either or both sections and other similar duties and/or responsibilities."

In short, it is argued on behalf of the Organziation that "there was an assignment of 100 per cent of the work load, duties and responsibilities of the vacationing foreman to the claimant.

The interpretation of Referee Morse noted, in part:

> "* * * 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 accomplished that end. The 25 per cent figures 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. * * *
>
> "* * * 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 employes; 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 EMPLOYE'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 employe's work could not go unattended during his absence. However, in those instances in which all or a substantial amount of an employe'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 employe and save the expense of hiring relife workers."

The following, from Referee Morse's interpretation, is likewise pertinent.

"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 employes being allocated to one employe and his own rate paid where the volume is insufficient to require the designation of another employe to fill the place of the vacationing employe.'

"He (Referee Morse) believes that the statement falls within the meaning of Article 10 (b) and he rejects the technical objections which the employes 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 employe to whom it is distributed."

In summary, Carrier's position generally, is that when Foreman L. D. Gruen went on vacation his section crew, consisting of 3 section laborers was assigned to work with the 3 section laborers comprising the section crew of Section 24 under the supervision of Claimant Kuklinski; it is necessary for Claimant to show a violation of the "burden provision" when his claim alleges a violation of Articles 6 and 10 (b); the 25 per cent rule of Article 10 (b) is not violated unless the claimant had to perform at least that amount of the vacationing employe's work in addition to his own; claimant could not be in two different places at the same time, (thus) it is obvious he was not performing (vacationing foreman's) work in addition to full time work on his own section; during the 16 hours he was supervising the six section men while they were replacing ties on Section 24 and during the time that he was allegedly patrolling Foreman Gruen's section, the Claimant was not doing the work on his own section.

We must first determine from the record whether Claimant was given 25 percent of the work load" of the vacationing foreman.

While Carrier uses the word "allegedly" with reference to Organization's claim as to what work Claimant performed, it offered no contradicting evidence that, as Organization asserts:

1. Claimant worked two days (16 hours) in directing the work of the combined section crews on the territory of the vacationing foreman.

2. Claimant patrolled the territory of the vacationing foreman to the extent of 12 hours during the 2 week period.

3. Claimant filled out time cards for laborers of the vacationing foreman's crew to the extent of 30 minutes per day, or a total of five hours. Its comments on this will be dealt with later.

The Carrier notes, however, throughout its submissions that Claimant

"* * * performed service only to the extent of eight hours per day and the duties he performed during that period were exactly the same as those which he had performed prior and subsequent thereto with the exception that he directed the work of six laborers rather than three: * * *"

"* * * Section crews are often consolidated for various purposes and it is not at all uncommon for a foreman to supervise a crew numbering far in excess of six men, but the most important thing to be considered we think is the fact that all the work which Section Foreman Kuklinski performed during the period in question was performed within his regular assigned hours and during each day he performed no more work than he normally performed."

But Organization asserts that Claimant had to devote a total of 33 hours of the 80 in the vacation period to the vacationer's work. Even allowing Carrier's argument that it was unnecessary for Claimant to make out separate time slips for the 3 men in each of the two gangs, we would still have 28 of the 80 hours of the vacationing Foreman's job performed by Claimant—or 35 per cent.

It is quite clear from the interpretations of Referee Morse that the first requirement of Article 10 (b) is proof that "not more than the equivalent of twenty five per cent of the work load of a given vacationing employe can be distributed, * * * unless a larger distribution of the work load is agreed to by the proper local union committee or official." The later was not done.

The second, from the interpretation previously quoted, is that the "distribution of the work will not burden any employe to whom it is distributed."

Another section of the Morse interpretations heavily relied upon by Carrier concerns a hypothetical interrogatory addressed by Carrier Representatives to the Referee. The illustration and the Referee's comment follow:

"A section gang is given vacation as a unit. Employes 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 carrier's 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 employes, on pages 467 and 468 of the transcript, insists that relief workers should be hired under the conditions of carriers' illustra-

tion (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 employes in regard to which they admitted that relief workers would not have to be hired."

It is charged in this Docket by the Organization that "* * * Carrier knew long before July 1, 1953 that Foreman Gruen's vacation assignment for 1953 was scheduled to begin on July 1, 1953 * * *. It seems reasonable to therefore charge the Carrier with the responsibility to make advance arrangements for proper relief * * * if the supply of qualified relief employes were limited, the Carrier would have taken cognizance thereof * * * could have availed itself of * * * Article 5 * * *" and deferred Foreman Gruen's vacation.

Carrier's position, simply stated, is that at the time Foreman Gruen was scheduled to go on vacation, "there were no section laborers qualified to fill his position * * * (and) Gruen was very anxious to take his vacation at the scheduled time. * * *"

Organization points also to this portion of a letter dated July 28, 1953 from Carrier's Superintendent to Organization's general chairman:

"* * *

"Of course, the Roadmaster could have declined to let him go as he had no one to relieve him but he chose to work it out with the Section Foreman at Tomah rather than disrupt all of the (vacationing) Section Foreman's plans."

"While we will make every possible effort to provide Relief Foremen for Section Foremen going on vacation, when this is not possible there is nothing else for us to do but to refuse to let the man go.

"I hope that you can see that Roadmaster Wohlert was trying to be a good fellow and help him and will withdraw your protest and claim in connection with this case."

Organization claims the above to be "implied recognition that the double work assignment was improper and in violation of the Agreement * * *."

While Carrier submits that "the facts in this dispute are such that Article 10 (b) of the Vacation Agreement has no application whatsoever * * *" argument offered in behalf of Carrier maintains that "Obviously, the 25 per cent rule of Article 10 (b) of the National Agreement is not violated unless the Claimant had to perform at least that amount of the vacationing employe's work **in addition to all of his own.**" (Emphasis theirs.)

We believe there is a distinction between the positions of foreman and laborer.

A laborer is responsible for the performance of such work as is assigned to him by the foreman. He works solely under direction, and is responsible to his foreman for the proper performance of the assigned work.

A foreman, on the other hand, while responsible to the roadmaster for the condition of his section and such general instructions as the roadmaster might issue, nevertheless is expected to possess sufficient experience and intelligence as will enable him, on his own initiative, to see to it that the men under his supervision are so directed that their section will at all times be maintained in the best possible operating condition.

In addition, he must also be able to move in on any emergency situation, analyze it and promptly determine the measures necessary to correct the situation in the most efficient manner possible, consistent with due safety and Carrier's general policies.

To say, then, as Carrier does in argument in its behalf, that "Claimant worked only his regularly assigned hours performing his usual and normal grade of work for which he received the agreed upon compensation for each day" is to ignore the realities of this situation.

It is hindsight for Carrier to say now that there were no derailments, washouts, accidents and similar emergencies during the period in question which would have required Claimant's supervision. It is most fortunate for Carrier that none occurred.

Had they occurred, Carrier would have had to rely on Claimant here to handle them. He was available and responsible to Carrier for both Sections.

Admittedly, the consolidation of the two crews of laborers into one group during this period enabled Claimant to produce more work on whichever section, within the eight hours, it did not in any sense lesson his responsibility.

A laborer, for example, can perform a certain amount of work within an eight hour period, and no more. The amount of "work" a foreman can perform is limited mainly by his own foremanship capacity. Some foremen possess greater foremanship capacity than others, but their production capacity as foremen is not limited solely by the hours they spend at their job.

For these reasons, much of Carrier's argument in the instant case falls.

We have, for example, Carrier's statement that Claimant could not be in two different places at the same time, (thus) it is obvious he was not performing (vacationer's) work in addition to full time work on his own section; during the 16 hours he was supervising the six section men while they were replacing ties on Section 24, and during the time that he was allegedly patrolling Foreman Gruen's section, the Claimant was not doing the work on his own section.

Yet, nowhere in this record does Carrier claim, much less prove, that Claimant did not properly execute his duties and responsibilities as foreman of Section 23 for the period in question.

We must, therefore. conclude that Claimant did properly discharge his responsibilities as Foreman of Section 23, and to the extent indicated, also performed service as foreman of Section 24.

We will agree with Carrier that Organization's assertion that Claimant spent 5 hours writing out time slips for the laborers from vacationer's

section is unreasonable, but will accept Organization's statement that he spent 16 hours directing the installation of ties on Section 24, and 12 hours patrolling Section 24. Combined, they exceed the "25 per cent of the work load" fixed in Article 10 (b).

With respect to Article 6, and notwithstanding argument in behalf of Carrier, there is no showing here that a vacation relief worker was not needed in this instance, because Carrier's Superintendent (page 24 of record) advised the Organization that "while we will make every possible effort to provide Relief Foremen for Section Foremen going on vacation, when this is not possible there is nothing else for us to do but to refuse to let the man go."

In other words, this was not a case where Carrier's normal work requirements were such that a relief worker was not needed; it was a case where Carrier "had no qualified foreman to release" the vacationing foreman.

Thus, Carrier did not distribute vacationer's work "among two or more employes," but assigned it to Claimant, and at the same time consolidated the laborers of each gang into one group.

It having been shown that more than 25% of vacationer's work load was given to Claimant, and in the complete absence of any evidence that Carrier sought agreement with "the proper local union committee or official," we will sustain part (1) of the claim.

What then, of Referee Morse's answer to Carrier's illustration, previously quoted where "a section gang is given a vacation as a unit"?

We think the circumstances here distinguished our conclusions from Referee Morse's in that instance. Mr. Morse said he "recognizes at the outset that there may be instances in which such an assignment of work would place an undue burden upon the section gang involved."

We think this case is one of those "instances". This case involves a section foreman alone; no laborers are involved. We have already outlined what we believe to be the distinction between a Section Foreman, and a Section Laborer or laborers, and it is such distinction which distinguishes this case from the one cited to Referee Morse.

Having already shown that Claimant was required to perform 35 per cent of vacationer's work load, there is the additional factor pointed out by the Organization, of the responsibility attaching to the assignment of vacationer's section to Claimant Kuklinski.

True, responsibility of itself is an intangible thing, but one cannot truthfully say it imposes no burden.

Respecting part 2 of the claim, we will sustain only that portion of the workload which is tangible here, viz., pay at the straight time rate of vacationer's position for the two days (16) hours he supervised the replacement of ties on Section 24, and the 12 hours spent in patrolling Section 24, for a total of 28 hours.

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 Agreement was violated to the extent indicated in the opinion.

AWARD

Part (1) of claim sustained.

Part (2) of claim sustained only to extent indicated in Opinion of the Board.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: A. Ivan Tummon
Executive Secretary

Dated at Chicago, Illinois, this 20th day of March, 1958.