Award No. 9038
Docket No. SG-8805

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Francis B. Murphy, Referee

PARTIES TO DISPUTE:

BROTHERHOOD OF RAILROAD SIGNALMEN OF AMERICA

THE CHESAPEAKE AND OHIO RAILWAY COMPANY
(Pere Marquette District)

STATEMENT OF CLAIM: Claim of the General Committee of the Brotherhood of Railroad Signalmen of America on the Chesapeake and Ohio Railway Company (Pere Marquete District) for:

> Time and one-half for eight (8) hours work performed by Mr. Arnold A. Kaser, Signal Maintainer, on Monday, July 25, 1955, which should have been a vacation day due Mr. Kaser according to his vacation request.
>
> This claim is in addition to his straight-time pay for time worked on Monday, July 25, 1955, according to the Vacation Agreement.

EMPLOYES' STATEMENT OF FACTS: The vacation schedule for Signal Department employes for the year 1955, issued by Signal Supervisor F. J. Smith, assigned a vacation period of fifteen (15) days to Signal Maintainer Arnold A. Kaser, commencing July 4, through July 22, 1955.

Claimant A. A. Kaser had requested such vacation period to start on July 5, through July 25, 1955, but request was refused by the Carrier, and claimant started his vacation on July 4, 1955.

On August 5, 1955, Local Chairman Wilbur L. Manglitz filed a claim with Supervisor of Signals F. J. Smith. (See Brotherhood's Exhibit No. 1.)

The claim was denied by Supervisor of Signals F. J. Smith, under date of August 15, 1955. (See Brotherhood's Exhibit No. 2.)

The claim was then handled and appealed in the usual manner up to and including the highest officer of the Carrier, without securing a satisfactory settlement. (See Brotherhood's Exhibits Nos. 3 to 8.)

There is an agreement between the parties to this dispute, bearing an effective date of September 1, 1949, and amendments thereto; also Vacation

OPINION OF BOARD: The claim presented in this case is for one day's pay at punitive rate representing time alleged to have been worked during vacation period bid for or Monday, July 25, 1955. Mr. Arnold A. Kaser, Signal Maintainer, bid for three consecutive weeks' vacation period starting Tuesday, July 5, and extending through Monday, July 25, while holding assignment to work Monday through Friday, with Saturday and Sunday rest days.

The Organization contends that Article II, Section 1, of the August 21, 1954 Agreement and Article IV of the National Vacation Agreement support their contention.

It is admitted in the evidence that the Claimant's purpose in requesting his vacation begin on the second day of his work week was to exclude July 4, one of the seven recognized paid holidays, from being counted as a vacation day.

Article I, Section 3, gives the Carrier the right to include July 4 as part of the vacation period when it "falls on what would be a work day of an employe's regularly assigned work week, such day shall be considered as a work day of the period for which the employe is entitled to vacation." In this instance Monday (July 4) was the first day of the work week for Mr. Kaser.

Further, the Presidential Emergency Board No. 106 specifically rejected the proposal that employes be allowed an additional vacation day when a holiday fell within a vacation period when it said:

> "* * * The Board proposes that when, during the vacation of any employe, a holiday falls on what would have been a work day of his regularly assigned work week, he shall not be entitled to an additional vacation day because thereof, but such holiday shall be considered as a work day of the period for which he is entitled to vacation. * * *"

Under Article II, Holidays, of the 1954 Agreement the Employes gained 7 paid holidays but the Carrier was given the right, as quoted above, to include such holidays as part of the vacation period. Claimant was not required to work Monday, July 4, and under Article II he was paid a pro rata day.

The Organization argues that Article IV of the December 17, 1941 National Agreement requires that Claimant be allowed his vacation on the dates requested. Article IV states:

> "Vacations may be taken from January 1st to December 31st and due regard consistent with requirements of service shall be given to the desires and preferences of the employes in seniority order when fixing the dates for their vacations. * * *"

While we agree that employes should, if possible and consistent with the service, be given the vacation dates desired, but there is no requirement by this rule that the employes must have vacations as requested. Although Claimant may have been senior to other employes if he were to be allowed to start his vacation on July 5 as requested the record shows that on July 25, there would have been only one Signal Maintainer to cover three territories and there would have been no Signal Maintainer in this area who would be available for emergency calls. We are in no position to decide that Management was wrong and that no Signal Maintainers were necessary or that there would be no emergencies. Special Board of Adjustment No. 173, Award No.

2, recognized the Carrier's right to advance vacation schedule by one day so as to have it coincide with the actual work week, wherein that Board held:

> "Carrier's instructions to the effect that employes schedule full vacations to begin on the first day of their respective work weeks, was a reasonable requirement best suited to least disturb routine, and as such, was entirely consistent with the requirement of the service.
>
> "Accordingly, rejecting Claimant's vacation selection of May 31 to June 13, 1955, and assigning him, in lieu thereof, a vacation period to extend from May 30 to June 10, 1955, was not violative of Article IV of the December 17, 1941 Agreement.
>
> "Furthermore, the counting of the May 30 holiday as a vacation day is sanctioned in this instance, by Section 3, Article I, 'Vacations' of the Agreement dated August 21, 1954. No additional vacation incurement is due herein."

Award 8509 by this Board supports the right of the Carrier in "advancing their vacation schedule by one day so as to secure for Carrier the benefit afforded it by Article I, Section 3."

For us to say that Article IV of the December 17, 1941 Vacation Agreement supersedes Article I, Section 3 of the August 21, 1954 Agreement would be erroneous. This Board has recognized and supported the rule of contract that a subsequent Agreement will supersede a prior Agreement. Award 8479.

There was no change in the regular assignment of the Claimant so that he would have to start his vacation on July 4, it was the first day of his regular assignment and the Carrier properly gave him his first day vacation on the start of his work week, namely July 4, 1955.

We must deny this claim.

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 not violated.

AWARD

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 26th day of October, 1959.

DISSENT TO AWARD 9038, DOCKET SG-8805

The majority has said concerning Article I, Section 3, of the August 21, 1954 Agreement—

> "Article I, Section 3, gives the Carrier the right to include July 4 as part of the vacation period when it 'falls on what would be a work day of an employe's regularly assigned work week, such day shall be considered as a work day of the period for which the employe is entitled to vacation.' In this instance Monday (July 4) was the first day of the work week of Mr. Kaser."

Article I, Section 3 of said Agreement reads as follows:

> "When, during an employe's vacation period, any of the seven recognized holidays (New Year's Day, Washington's Birthday, Decoration Day, Fourth of July, Labor Day, Thanksgiving Day and Christmas) or any day which by agreement has been substituted or is observed in place of any of the seven holidays enumerated above, falls on what would be a work day of an employe's regularly assigned work week, such day shall be considered as a work day of the period for which the employe is entitled to vacation."

Thus it is plain that the majority, by the simple expedient of manipulation of language, seeks to make it appear that when a holiday falls on what would be a work day of an employe's regularly assigned work week Carrier has the right under Article I, Section 3, to include the holiday as a part of the vacation period even to the extent, as here, of completely disregarding the employe's stated preference of vacation dates. Obviously, no such authority is given the Carrier by Article I, Section 3. The fact of the matter is that it is only **when, during an employe's vacation period,** any of the seven holidays or another day, by agreement, has been substituted or is observed in place thereof falls on what would be a work day of the employe's regularly assigned work week that the Carrier can consider that day as a work day of the period for which the employe is entitled to vacation. The holiday in this case fell "during an employe's vacation period" only because Carrier unilaterally set the period during which Claimant could take his vacation.

The majority also states:

> "For us to say that Article 4 of the December 17, 1941 Vacation Agreement supersedes Article 1, Section 3 of the August 21, 1954 Agreement would be erroneous. This Board has recognized and supported the rule of contract that a subsequent Agreement will supersede a prior Agreement. Award 8479."

The purpose of the first sentence of the foregoing is not clear because neither party to the dispute contended that Article 4 of the December 17, 1941 Vacation Agreement superseded Article I, Section 3, of the August 21, 1954 Agreement. The remainder of the quotation, while generally true, is highly misleading in this case because one of the determining factors in Award 8479 was Rule 21 of an Agreement reading as follows:

> "This agreement shall be effective as of February 1, 1956 and **shall supersede and be substituted for all rules and existing agreements, practices and working conditions** * * *. (Emphasis supplied.)"

whereas in the instant case the later rule, i.e., Article I, Section 6, of the August 21, 1954 Agreement states:

> "Section 6. Except to the extent that articles of the Vacation Agreement of December 17, 1941 are changed by this Agreement, the said agreement and the interpretation thereof and of the Supplemental Agreement of February 23, 1945, as made by the parties, dated June 10, 1942, July 20, 1942 and July 18, 1945 and by Referee Morse in his award of November 12, 1942, shall remain in full force and effect.
>
> "In Sections 1 and 2 of this Agreement certain words and phrases which appear in the Vacation Agreement of December 17, 1941, and in the Supplemental Agreement of February 23, 1945, are used. The said interpretations which defined such words and phrases referred to above as they appear in said Agreements shall apply in construing them as they appear in Sections 1 and 2 hereof."

Article 4(a) of the December 17, 1941 Vacation Agreement was not changed by any Article or Section of the August 21, 1954 Agreement and any intention of the majority to find otherwise would be in error. Claimant was entitled to the vacation period of his choice as contemplated by and consistent with the provisions of Article 4(a) of the 1941 Vacation Agreement. A "requirements of the service" argument was not available to Respondent because Claimant's position as Signal Maintainer was blanked throughout the period he was on vacation. Furthermore, the "requirements of the service" argument seems to have been an afterthough on the part of the Carrier when it made its presentation to the Division. The reason advanced on the property for denying the claim was that the August 21, 1954 Agreement, the particular article and section not identified, gave Carrier the right to start vacations on the first day of the work week which, of course, is not supported by any agreement brought to the attention of the Division.

What the majority has said concerning the report of Presidential Emergency Board No. 106 is true but meaningless until it has been properly determined that Article 4(a) of the 1941 Vacation Agreement has been changed by a later rule.

Regarding prior awards on the subject as cited by the majority, since we are not fully familiar with all of the details involved in the case covered by Award No. 2, of Special Board of Adjustment No. 173, we do not presume to pass upon either the rightness or the wrongness of it but the quoted portion would seem to indicate that the circumstances there are distinguishable. As for our Award 8509, because an error has been previously committed, neither requires nor justifies erring again.

The action of the majority in this instance serves to destroy agreements rather than encourage the parties to make and maintain agreements as contemplated by the Railway Labor Act and I, therefore, dissent.

/s/ G. Orndorff