Award No. 9556

Docket No. SG-8853

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Merton C. Bernstein, Referee

PARTIES TO DISPUTE:

BROTHERHOOD OF RAILROAD SIGNALMEN OF AMERICA

NORFOLK AND WESTERN RAILWAY COMPANY

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood of Railroad Signalmen of America on the Norfolk and Western Railway that:

a. The Carrier violated the Signalmen's Agreement when it failed to call Signal Maintainer R. L. Adkins for relief work on January 31, 1955, and February 1, 2, 3, 4, 8, 9, 10, and 11, 1955.

b. Signal Maintainer R. L. Adkins, furloughed from the Scioto Division, be paid eight (8) hours at the Signal Maintainer's straight-time rate of pay for January 31, 1955, and February 1, 2, 3, 4, 8, 9, 10, and 11, 1955, for the temporary relief work performed by Signal Maintainer Shannon Duty.

EMPLOYES' STATEMENT OF FACTS: On January 31, 1955, and February 1, 2, 3, and 4, 1955, Signal Maintainer C. M. Reid, whose headquarters are located at Lucasville, Ohio, was on vacation, thereby causing his position to be vacant during that period of time. On February 8, 9, 10, and 11, 1955, Signal Maintainer F. R. Coakley, whose headquarters are located at Portsmouth, Ohio, was on vacation, thereby causing his position to be vacant during that period of time.

Signal Maintainer R. L. Adkins was furloughed from the Scioto Division and was forced to reduce himself in class to the class of Assistant Signalman, as there was no junior Signal Maintainer whom he could displace. Therefore, he exercised his rights as an Assistant Signalman in Signal Foreman Gilmer Howley's Signal Gang located at Pulaski, Virginia.

Instead of the Carrier assigning R. L. Adkins (claimant to the positions which were vacated while the Signal Maintainers were on vacation the Carrier assigned Leading Signal Maintainer Shannon Duty to the positions while both Signal Maintainers were on vacation.

On February 21, 1955, General Chairman J. T. Sink filed a claim in behalf of Signal Maintainer R. L. Adkins, with Assistant Superintendent H. B. McColgan, as follows:

There was no obligation on the Carrier's part to provide a relief employe to relieve Signal Maintainers Coakley and Reid while they were on vacation, therefore, regular assigned Assistant Signalman Adkins, the claimant, had no right to work as signal maintainer reliveing Coakley January 31, February 1, 2, 3, 4, 1955, and relieving Reid February 8, 9, 10 and 11, 1955.

The Vacation Agreement of December 17, 1941 was the first agreement providing for vacations for employes covered by the Signalmen's Agreement. Neither party to the rules in the Signalmen's Agreement effective August 1, 1939, relied on by the Employes in the instant case, could have had in mind vacation relief when the agreement of August 1, 1939 was entered into, as employes covered by the Signalmen's Agreement were not accorded vacations until over two years later by the Vacation Agreement of December 17, 1941. The First Division in Award 17482 stated: "In the absence of language indicating a contrary intention, parties to a written agreement are presumed to have contracted with respect to circumstances and conditions known to them a the time." The Carrier therefore asserts the rules cited by the Employes have no application in the instant case.

The Employes' contention that Coakley and Reid, while absent on paid vacation should have been relieved by Claimant Adkins and that Adkins, who was assigned to and was working a regular position several hundred miles distant, should have been called for such short periods of vacation relief work under penalty of forfeiture of his seniority if he did not return to perform such relief, is made in an attempt to get an impractical application of agreement rules that was not intended by the parties at the time the August 1, 1939 Signalmen's Agreement was negotiated. Such impractical application of the rules as the Employes contend in this case would require that an employe furloughed in one seniority district and holding a regularly assigned position in another seniority district hundreds of miles distant be called for vacation relief for as little as one day under penalty of forfeiture of all his seniority rights on the district to which called, if he did not return for the short period of service. Such would be an impractical application of the rules cited by the Employes and certainly was never intended to be so applied by the parties to the Signalmen's Agreement.

Your Division in Award 7166 stated:

> "No such result was intended by the rules and this Board is not authorized to write such an intent into them in the form of an interpretation of the Agreement. If any change is to be made it must be by negotiation."

It is the Carrier's position that there was no obligation on the part of the Carrier under the rules cited by the Employes to call Assistant Signalman Adkins, regularly assigned and working on a signal construction gang several hundred miles distant, to provide vacation relief for Signal Maintainers Coakley and Reid. The claim is not supported by the cited rules of the Signalmen's Agreement as contended by the Employes. Therefore, the Carrier respectfully requests denial of Mr. Adkins' claim.

(Exhibits not reproduced.)

OPINION OF BOARD: Most of the facts are not in dispute. In January and February, 1955 two Signal Maintainers were on vacation consecutively from the Carrier's Scioto Division.

Claimant, who had seniority as a Signal Maintainer, held a regular position as an Assistant Signalman as a result of prior reduction in force among Signal Maintainers. Under the Agreement his seniority in the latter group continued unabated. He claims that during the two vacation periods the vacationers' jobs were filled and that he, as the senior furloughed Signal Maintainer, should have been called to fill the positions.

The claim is based upon the following provisions of Article 3, Seniority:

"Section 5 * * * Employes changed to a lower seniority class by reason of being displaced through exercise of seniority rights, or reduction in force shall continue to accumulate seniority in the seniority class or classes from which displaced. However, such employes must return in the order of their seniority to such higher seniority class or classes when their seniority entitles them to such positions or they will forfeit all such rights. Such employes will be given preference in the order of their seniority in such higher seniority class or classes in filling temporary positions or temporary vacancies in such higher class. * * * "

"Section 13 Employes laid off by reason of force reduction or reduced to a lower seniority class will be recalled to service or to fill positions in the higher seniority class in the order of their seniority. When filling temporary positions, if the senior laid off employe fails to respond or in the case of an emergency, the senior available laid off employe may be used until the senior laid off employe reports."

The Carrier contends:

1. That vacation absences do not constitute 'vacancies' which must be filled under seniority rules;

"2. That Leading Signal Maintainer Duty was not taken off his regular assignment and the two Signal Maintainer positions were not filled while their occupants were on vacation, and

"3. That Claimant was not entitled to fill the positions temporarily based on his seniority as Signal Maintainer or on his availability."

Discussion

1. We agree with the Carrier that the clear language of Article 12 (b) of the Vacation Agreement prevents a vacation from constituting " 'vacancies' . . . under any agreement".

In answer, the Organization's representative asserts that where there is conflict between the Vacation Agreement and working rules the latter shall apply, citing Award 4260.

However, there is no conflict between them. The seniority rules do not declare when vacancies exist or service is to be performed. They merely describe the seniority rights of furloughed employes to such vacancies and positions if and when they are to be filled.

It follows that Article 12 (b) of the Vacation Agreement is applicable to the situation here and negates the existence of a vacancy which would call into operation the seniority provisions invoked.

2. Nor does the Claimant and Organization establish that the Signal Maintainer positions were in fact filled.

It is undenied that Leading Signal Maintainer Duty performed some of the work which the vacationing employes would have performed. Article 6 of the Vacation Agreement does not require a vacation relief worker unless the lack of one would "burden" other employes or the vacationer upon his return; neither condition is alleged to have occurred here. Article 10 (b) of the Vacation Agreement limits the amount of vacationer's work which can be distributed among fellow employes to twenty-five per cent. There is no factual showing that the Carrier did not operate within these limitations. It is undisputed that Duty's job covered the whole division.

Claimant seeks to establish that the vacationers' positions were filled by the following affidavit from Duty:

> " * * * I do not remember the exact language he (a supervisor) used when instructing me to work on these two assignments in question: However it was my understanding that I was to perform such work as the regular assigned Maintainer would perform had he not been on vacation."

The very generality of the statement makes it an insufficient basis for a finding of fact. The employe's "understanding" is not the equivalent of the supervisor's instructions. It does not establish that Duty was to perform all of the vacationers' work. It does not show that the vacationers' work was of normal volume during the period. It is, in short, inadequate to establish that Duty did any more than "cover" the vacationers' jobs while performing his own work, which consisted in part of the very same kind of work.

As the Carrier's contentions on these points are sufficient to defeat the claim it is unnecessary to discuss the Carrier's third point.

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 16th day of September, 1960.