# Award No. 10377
# Docket No. SG-10129

## NATIONAL RAILROAD ADJUSTMENT BOARD

## THIRD DIVISION
## (Supplemental)

**David Dolnick, Referee**

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**PARTIES TO DISPUTE:**

**BROTHERHOOD OF RAILROAD SIGNALMEN OF AMERICA**

**THE NEW YORK CENTRAL RAILROAD, EASTERN DISTRICT**
**(Except Boston Division)**

STATEMENT OF CLAIM: Claim of the General Committee on the New York Central Railroad Company (Buffalo and East):

(a) That the carrier violated the National Vacation Agreement of December 17, 1941, Supplemental Agreement of February 23, 1945, and subsequent Agreements of March 19, 1949, and August 21, 1954, when it arbitrarily changed the starting date of the vacation period requested by Leading Signal Maintainer F. E. Keller, with headquarters at Oneida, New York, from September 4, 1956, to September 3, 1956.

(b) The Carrier now grant Mr. F. E. Keller one additional day's vacation in lieu of working Monday, September 10, 1956, or compensate him at his respective Leading Signalman's rate of pay for one day (8 hours) in lieu thereof. [Carrier's File 114-BV (SG 57.2)]

EMPLOYES' STATEMENT OF FACTS: Leading Signal Maintainer F. E. Keller is regularly assigned to the Leading Signal Maintainer's position with headquarters at Oneida, N.Y. His position is assigned a work week of Monday through Friday with rest days of Saturday and Sunday. He was entitled to a vacation of fifteen days for the year 1956 as he had properly qualified for vacation in 1956 by working the required number of days in the year 1955. On this property, it has been the practice for the Signal Supervisor to send to the employes a vacation request form in duplicate on which the employes are required to mark down their respective requests for their vacation periods and return to the Signal Supervisor, who in turn approves the requests and then returns a copy of the schedule to the employes. The employes then take their vacations according to the vacation schedule. **The local committee of the organization on this Division is not consulted and is not permitted to cooperate in the assigning of the vacation dates.**

In this instant dispute, Mr. Keller submitted a request that his first vacation period of five days be granted from September 4, 1956, through September 10, 1956, and requested that the remaining ten days be granted from November 19, 1956, through November 30, 1956.

CONCLUSION:

The contentions of the Employes are not supported by agreement, understanding or practice. The scheduling of employes vacations to start on the first day of the employes' work week provides an orderly, practicable and satisfactory method of working off vacations. There is no merit to the claim of the Employes and it should be denied.

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All facts or arguments herein presented have been made known to the Employes.

(Exhibits not reproduced.)

**OPINION OF BOARD:** There is no disagreement about the facts. At the time this dispute arose, F. E. Keller was employed by the Carrier as a Leading Signal Maintainer assigned at Oneida, New York. Under the terms of the then existing Agreement between the parties, Mr. Keller became eligible to 15 consecutive work days of vacation. The Supervisor at this station, in accordance with past practice, sent all Employes under his supervision a form, in duplicate, requesting that the Employes indicate their vacation preference date. Mr. Keller returned this form and requested his three weeks or 15 consecutive work days of vacation be separated into two periods. The first to start on September 4, 1956 and to continue through September 10, 1956 and the second to start on November 19, 1956 and to continue through November 30, 1956. This requested vacation schedule was returned to Mr. Keller by his Supervisor with a notation which read: "(9/3-9/7)?" Prior to the start of his vacation, Mr. Keller wrote his Supervisor that he was starting his vacation on September 4, 1956, in accordance with his schedule. The Supervisor replied that he could not start on September 4, 1956, but must start on September 3, 1956. September 3, 1956 was Monday, Labor Day, a paid holiday under the Agreement. Mr. Keller complied with his Supervisor's instructions, but soon thereafter the Local Chairman of his Organization filed a claim for an additional day's vacation or in lieu thereof compensation for eight hours at the appropriate rate of pay.

Keller's regular scheduled work week at that time was Monday through Friday with Saturday and Sunday as his days of rest.

Some time prior to September 3, 1956, the Carrier issued instructions that all Employes should start their vacation on the first day of their scheduled work week. On April 23, 1956 Mr. B. H. Steuerwald, who was then General Chairman of Organization, wrote to Mr. T. A. Seymour, Assistant General Manager, Labor-Relations of the Carrier, protesting the vacation instructions issued by the Carrier. This letter in part said:

> "Our members desire to start their vacation the day after a paid holiday and starting on any day of the week, regardless of this beginning their vacation on the first day of their work week as injected by the management. The employes may take their vacation from January 1 to December 31 consistent with the requirements of the service. I fail to find any rules in the vacation agreement that give the management their prerogative as to when an employe can start his vacation. The instructions were not issued, to my knowledge, prior to the August 21, 1954 Agreement, and this agreement did not make any changes to effect the date an employe may start his vacation.

"Therefore, I am requesting that our members may select any day of the week, be it Monday or Friday, to start their vacation dates, and in accord with the Vacation Agreements dated December 17, 1941, supplemental agreement of February 23, 1945 and August 21, 1954."

Mr. T. A. Seymour replies under date of May 2, 1956, and in part said:

"It is our opinion that when we grant employes an annual vacation of 5, 10 or 15 'consecutive work days with pay' according to their qualifications, we are complying with the agreement and we cannot agree to give individual employes the privilege of arbitrarily deciding on the day that their vacations will be started. We must accordingly decline your request."

It should be noted that this correspondence took place several months before Keller was scheduled to start his first vacation period. The parties had already sharply disagreed upon the interpretation of the contract concerning the scheduling of vacations.

Article 4 (a) of the Vacation Agreement provides:

"Article 4 (a) 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 of their vacations.

"The local committees of each organization signatory hereto and the representatives of the Carrier will cooperate in assigning vacation dates."

Section 3 of Article I of the Vacation Agreement dated August 21, 1954, says:

"Section 3. 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."

The Organization argues that the Carrier violated Article 4 (a) by unilaterally issuing instructions that Employes must start their vacations on the first day of their scheduled work week. The Carrier argues, with equal sincerity, that it did not violate this Article 4 (a) but on the contrary Section 3 of Article I implies that the Carrier had every right to issue such instructions.

In support of its position the Carrier has reviewed the history of Holiday Pay and Vacations, citing particularly the proposals of the Organization and several Emergency Board recommendations. It is their position that Section 3 of Article I was agreed to after the Emergency Board recommendations with the implied understanding that no Employe could arbitrarily select vacations in holiday weeks and then to start such vacations a day after the holiday. The Instructions, the Carriers contend, are fair and equitable to all Employes and to the Carrier.

Both parties have cited numerous Board Awards to sustain their respective positions. Unfortunately, these Awards have no semblance of unanimity. On the contrary, there is considerable divergence of opinion. This makes the task of the Board more difficult. But it has a responsibility to decide the issue in the face of such difference of opinion. In reaching a decision the Board has read and considered the full Record, the Briefs and has carefully read all the Awards cited by the parties.

Article 4 (a) has never been changed since it was first agreed to by the parties in 1941. Neither the Record nor the Briefs claim that this Article was discussed, considered or mentioned in any of the Emergency Board recommendations on Holiday Pay and Vacations. The Carrier argues, instead, that there is "nothing in the Vacation Agreement which precludes the Carrier from requiring that vacations begin on the first work day of an Employe's work week." It is true that there is no specific language stating that the Carrier can or can not do so. But there is Article 4 (a) which says that:

> "That the local committee of each organization signatory hereto and the representative of the Carrier will cooperate in assigning vacation dates."

Although the Interpretation of Article 4 (a) by Referee Wayne Morse was made in 1942, about twelve years before Section 3 of Article I was agreed to, his Interpretation, nevertheless, must be seriously considered because he was concerned with the meaning and intent of only Article 4 (a) and that Article is still a part of the Agreement in its original form.

No Collective Bargaining Agreement can be equitably administered without cooperation of the parties. The meaning and intent to the many Rules and conditions of employment can best be fully realized by full and frequent discussion of the problems concerning the parties. It is not enough to unilaterally accept the naked words of the Agreement nor to justify implications. In this contract the cooperation of the parties is specifically spelled out in Article 4 (a). Mr. Morse gave it fuller meaning when he concluded:

> "(1) It was the intention of the parties when they agreed upon Article 4 to cooperate in administering the granting of vacations. To that end, they specifically provided in paragraph 2 of Article 4 (a) that the local committee of each organization signatory to the agreement and the representatives of the carriers would cooperate in assigning vacation dates. Thus, they restricted the management's control over the administering of the granting of vacations. The adoption of a procedure whereby representatives of the employes and of the carriers shared a joint responsibility in assigning vacation dates necessarily gave to the representatives of the employes the right to a voice in determining whether or not in given instances the desires and the preferences of the employes in seniority order as to vacation dates were consistent with requirements of services. However, it appears that when the employes attempted to exercise a voice in determining whether or not the granting of certain vacations would interfere with requirements of service, some of the carriers took the position that the employes were attempting to interfere with managerial rights."

Further in his Interpretation, Mr. Morse recognizes that unregulated Vacation scheduling may impose undue operating and financial hardship on the Carrier. On this point he said:

"It is the opinion of the referee that it was not intended by the parties that the desires and preferences of the employes in seniority order should be ignored in fixing vacation dates unless the service of the carrier would thereby be interfered with to an unreasonable degree. To put it another way, the carrier should oblige the employe in fixing vacation dates in accordance with his desires or preferences, unless by so doing there would result a serious impairment in the efficiency of operations which could not be avoided by the employment of a relief worker at that particular time or by the making of some other reasonable adjustment. The mere fact that the granting of a vacation to a given employe at a particular time may cause some inconvenience or annoyance to the management, or increased costs, or necessitate some reorganization of operations, provides no justification for the carriers refusing to grant the vacation under the terms of Article 4 of the agreement."

The issue before this Board in Docket No. SG-9029, and decided in Award No. 9558 (Bernstein) is identical with the issue in this case. That Award held:

"On the language of Article 4 (a) above, the unilateral issuance of such 'Instructions' constitutes a contract violation . . . . "

"The early Interpretations and Award . . . make clear that consultations and joint assignment were key elements of the Vacation Agreement. Such consultations were not, and are not, mere formalities; to the contrary, they are at the very heart of the Agreement and the contract made by the parties."

Not only were the Instructions issued unilaterally, but the denial to Keller of his request to start his first vacation period on September 4, 1956, was denied to him without consultation with him and his proper Organization Representative. If the scheduling of Keller's vacation on September 4, 1956, would have seriously impaired the efficiency of the Carrier's operations, this fact was not made known nor proof presented either to Keller or to the Organization Representatives. It is not now cogent to argue that by scheduling his vacation to begin on Monday, September 3, 1956, instead of Tuesday, September 4, 1956, it enables "the better use of vacation relief workers." There is no evidence in the record showing that the start of Keller's vacation on September 4, 1956, would materially impair the "requirements of service." It is conceivable that where a holiday falls on a Wednesday and an employe selects to start his vacation on Thursday even though his regular scheduled work week is Monday through Friday, that such a schedule may "impair the requirements of service." But even in such a case the Carrier is obligated to consult with the employe involved and the Organization, and to show by clear evidence that the schedule would "impair the requirements of service." Mere inconvenience is not sufficient. The proof must be clear and unequivocal that the Carrier's service would be materially impaired and that the Carrier would be put to an unreasonable additional cost.

The fact that Carrier's Instructions "provides uniform treatment for all employes" does not relieve the Carrier of its obligation to comply with Article 4 (a). No matter how equitable and more convenient an Instruction by one party to the contract may be, it can not ignore the specific obligation under the Agreement or the Interpretations which have been given to that obligation.

The Carrier relies heavily on the findings in Award 9038 (Murphy) wherein the Board denied a somewhat similar claim. There is nothing in the

Statement of Facts in that case to indicate that the unilateral instruction to schedule all vacations to start the first scheduled work day of the employe's scheduled work week had then been issued. The dispute arose in July, 1955. The Record in this case showed that the Organization protested the Carrier's Instructions by letter dated April 23, 1956. Also the Board in Award No. 9038 found that:

> "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 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."

Perhaps the Board in that case, based on the record, found that the vacation requested by that Employe would impair the "requirements of service" as set out in Article 4 (a). That seems to be the basic creteria of that Award even though it cites the Award No. 2 of Special Board of Adjustment No. 173. Furthermore, the decision in Award No. 9038 was overruled by Award No. 9558 where the facts and circumstances are more akin to the facts and circumstances in this case.

The Carrier also stresses the findings of Award No. 2 of the Special Board of Adjustment No. 173 (Gilden) which upheld the right of the Carrier to schedule full vacations to begin on the first day of the Employe's regular scheduled work week. Unfortunately, the facts in that case are not fully reported.

There may have been meetings between the parties. The "requirement of service" may have been fully presented to that Board. In view of the fact that a report of the evidence and circumstances are lacking, it can not be given the weight and consideration which it would otherwise have deserved. Furthermore, there is nothing in that Award showing that the Organization invoked the provisions of Article 4 (a) or that this contract obligation was considered by that Board in reaching its decision. It follows that Awards 3, 4 and 5 by the same Board are in the same category.

The Carrier also contends that Award No. 9558 has been "overruled by Award No. 9635" (Johnson). The facts in the latter case are comparable to the facts in Award No. 9558 and to this case. The findings, however, are contrary to the specific provisions of the Agreement and inconsistent with good labor management relations. The Board in Award No. 9635 said:

> "There can be no doubt that each party is entitled to formulate and advocate its own assignment policy, and that if in any instance the parties do not agree, this Board must decide which is right, without arbitrarily denying either the right to be heard. To that extent Award 9558 is clearly wrong. We are, therefore, not entitled to refuse to consider the vacation assignment policy of either party, especially in view of the above Interpretation, which the parties have followed."

What "vacation assignment policy" did the Board consider? The unilateral instructions of the Carrier? Apparently so. And, did the Board give equal consideration to the provisions of Article 4 (a)? Apparently only to a limited degree. The Board was more concerned with "regularity and order." As the Board said in that case:

> "Regularity and order are of the essence of the complicated railroad industry and a uniform, orderly nondiscriminatory policy seems normally consistent with the requirements of service; consequently a departure from it should have sounder reason than the demand of one employe for preferential treatment to avoid the application to him of a rule."

No one can disagree that "regularity and order" are necessary to efficiently operate any business, particularly a railroad. But "regularity and order" alone can not be substituted for specific contract obligations. Neither can Employer-Employe relations always be administered with such "regularity and order." The human elements which concern this relationship can never be ignored. There is nothing in Award No. 9635 which shows that the granting of the vacation to the Employe as requested would have materially upset the "regularity and order" required to efficiently operate the railroad. Any vacation upsets "regularity and order." But would the Employe's vacation request have "impaired the requirements of service" as provided in Article 4 (a) and as interpreted by Mr. Morse? There is nothing in the record or in the Opinion of the Award indicating that it would. For this reason we cannot agree with the Findings in Award No. 9635.

Award No. 10292 (Harwood) which was decided on January 11, 1962, held contrary to the Award No. 9635, and affirms Award No. 9558. Even though no holidays were involved in the vacation issue determined by Award No. 10292, the basic unilateral instruction by the Carrier that Employes start their vacation on the first day of their scheduled work week was involved and was in issue. After reviewing the respective position of the parties and all of the presented arguments and considerations the Board said:

> "Examination of the many awards dealing with this subject leads to the conclusion that no matter how logical and desirable such advocated 'first day of the work week' rule may be from the Carriers' point of view, nevertheless it can not be made of unilateral adoption by the Carriers, but must necessarily be the subject of future negotiation between the parties."

There are many other Awards cited by both parties all of which have been examined. It will serve no useful purpose to try to reconcile or distinguish each of them. Suffice it to say, that there is a great deal of conflict in the Awards made on this subject. In the light of the Opinion herein expressed, we conclude that the Agreement has been violated and the claim of F. E. Keller is sustained.

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

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

That the Agreement has been violated.

AWARD

Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 27th day of February 1962.