Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 37563
Docket No. SG-37463
05-3-02-3-547

The Third Division consisted of the regular members and in addition Referee Marty E. Zusman when award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Railroad Signalmen
(
(BNSF Railway Company

STATEMENT OF CLAIM:

"Claim on behalf of the General Committee of the Brotherhood of Railroad Signalmen on the Burlington Northern Santa Fe (BNSF):

Claim on behalf of R. M. Young, for payment of 32 hours at the straight time rate, account Carrier violated the current Signalmen's Agreement, particularly Section 6 and Section 10(b) of the National Vacation Agreement, when it distributed more than 25 percent of the workload of a vacationing employee to the Claimant on August 6, 7, 8 and 9, 2001, without assigning a relief employee. Carrier's File No. 35 01 0049. General Chairman's File No. 01-100-BNSF-129-S. BRS File Case No. 12145-BNSF."

FINDINGS:

The Third Division of the Adjustment Board, upon the whole record and all the evidence, finds that:

The carrier or carriers and the employee or employees involved in this dispute are respectively carrier and employee within the meaning of the Railway Labor Act, as approved June 21, 1934.

This Division of the Adjustment Board has jurisdiction over the dispute involved herein.

Parties to said dispute were given due notice of hearing thereon.

Signal Maintainer A. Laird was on vacation on August 6, 7, 8, and 9, 2001. In his absence, Claimant R. M. Young worked eight hours of each day on Laird's territory with a Surfacing Gang and allegedly performed the vacationing employee's work. No relief worker was brought in to work; instead the Carrier used the Claimant "to work both his regular job assignment" and to relieve the vacationing employee. There is no dispute on these facts, but only upon the appropriate payment made to the Claimant.

The Organization argues that the Claimant was not appropriately paid for working the vacation absence as clearly stated by Section 6 and Section 10(b) of the National Vacation Agreement.

> "6. The carriers will provide vacation relief workers but the vacation system shall not be used as a device to make unnecessary 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 employees remaining on the job, or burden the employee after his return from vacation, the carrier shall not be required to provide such relief worker.
>
> 10. (b) Where work of vacationing employees is distributed among two or more employees, such employees 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 employee can be distributed among fellow employees 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."

The Organization argues that the Carrier failed to appropriately pay the Claimant 32 hours at the straight time rate of pay. It argues that the above Agreement clearly is applicable because the Claimant worked his own position and, in addition, more than 25 percent of the vacationing employee's work load. From

the Organization's point of view, the Rule is clear on its face and applicable, because the Claimant did his own job assignment and relieved the vacationing employee working with a Surfacing Gang, changing rail in crossings and taking trouble calls on Laird's territory.

The Carrier argues that the Claimant was properly paid. He was used off of his assigned territory on the adjacent territory of vacationing employee Laird and compensated accordingly, as per Rule 45 (J). That Rule states:

> "When a signal maintainer or assistant signal maintainer (when assigned to a signal maintainer) is used off his assigned territory during the assigned hours of his work week, when instructed by proper authority will be allowed ½ time his hourly rate in addition to his regular straight time hourly or monthly rate for the time consumed off his assigned territory, time to be continuous from the time he leaves the limits of his assignment until he again re-enters his assigned territory; except, that in instances such as ice, sleet, and snow storms, tornadoes, hurricanes, fire and earthquakes where the signal system is interrupted at any point which requires the service of additional signal employees, the adjoining signal maintainer may be used without payment of the ½ time penalty referred to herein during the time their services are used in restoring the signal system to safe and proper working order."

The Claimant was paid the penalty indicated in Rule 45(J). The Carrier maintains that it did not violate the National Vacation Agreement and properly paid the Claimant.

We carefully reviewed all facts. The Board in its appellate role must evaluate carefully what the parties do or fail to do while the dispute progresses on the property. In that regard, similar claims may reach different conclusions depending upon what is presented, rebutted, or neglected by the parties.

In the instant case, the Organization made a prima facie case and the burden of going forward with the evidence shifted to the Carrier. The Carrier rebutted the applicability of the National Vacation Agreement, Sections 6 and 10(b) on this

property. Most important to our decision is the Carrier's position stated in pertinent part:

> ". . . this Rule was negotiated on this property to include all authorized time that a Signal Maintainer is used off his assigned territory for any reason, including vacation and supersedes Section 10 (b) of the National Vacation Agreement.
>
> For many years since the negotiation of Rule 45 (J), Signal Maintainers have been paid the additional ½ time when used on the assigned territory of a Signal Maintainer who is on vacation. They receive this for all such time regardless of whether the time is equivalent of twenty-five percent of the work load of the vacationing Signal Maintainer. I can find no record of the Brotherhood of Railroad Signalmen on this property ever claiming that a Signal Maintainer is entitled to payment such as you are now claiming. The reason that you have not is because Rule 45 (J) was negotiated to cover this situation as well as others."

The Carrier made the above assertion and it was never rebutted. Not one single statement disputing any part of the Carrier's above stated position was ever put into the record. Had it been rebutted, the affirmative defense would have required solid substantiation. As it exists in this record it must be accepted as fact.

Accordingly, on this property, the Board must conclude that the parties negotiated Rule 45 (J) and applied it in the manner argued for a very long time. Such practice by our review of this record is of a very long standing. Considering decades of practice versus arguably unambiguous language in the Agreement the Board must find in these instant circumstances that no violation occurred. (See Third Division Award 32210). Accordingly, the claim must be denied.

AWARD

Claim denied.

ORDER

This Board, after consideration of the dispute identified above, hereby orders that an Award favorable to the Claimant(s) not be made.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Dated at Chicago, Illinois, this 20th day of July 2005.

LABOR MEMBERS DISSENT
Third Division Award 37563
Docket No. SG – 37463

On its face this seemed like a simple issue involving an employee who while working his regular assignment was also required to fill in for a vacationing employee. It was undisputed in the record that the Claimant worked in excess of the 25% as specified in the National Vacation Agreement.

The Award noted that Carrier correctly argued that Rule 45 (J) provides that an employee receives an additional ½ pay when used off his assigned territory except during emergencies. The Carrier incorrectly made the argument that this provision negated the provision of the National Vacation Agreement. These two Agreements stand on their own and both apply in this instant case.

The National Vacation Agreement Section 6 specifically states that where the carrier fails to provide vacation relief and as in this case the Claimant worked his regular assignment and more than 25% of the vacationing employee's position he should be paid his regular rate of pay in addition the amount of time spent on filling the vacationing employee's position. Agreement Rule 45 (J) provides that an employee who is used off his assigned territory will be paid ½ time for those hours worked.

The Board noted that Carrier's assertion was never rebutted. It is unfortunate that the Board failed to read the entire record in this case. If it had, it would have been obvious that the Organization did in-fact rebut Carriers allegations. Notwithstanding, the Board concluded that this faulty interpretation is somehow acceptable because it is a long standing interpretation based on decades of past practice. It is beyond understanding how the Board can on one hand deny a Claim on the proposition that the Organization failed to adequately argue Carriers assertions (which in not accurate) and then take the giant leap to conclude that this somehow establishes some type of precedence.

We agree with the Boards determination that "...similar claims may reach different conclusions depending upon what is presented, rebutted, or neglected by the parties." Our only hope is that the next case will be reviewed in its entirety and that a correct decision will be made.

Based on the foregoing, the Organization must dissent to the Award and Finding of the Board.

C.A. McGraw, Labor Member
Third Division