

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

Award No. 39329
Docket No. MW-38139
08-3-NRAB-00003-040026
(04-3-26)

The Third Division consisted of the regular members and in addition Referee Martin F. Scheinman when award was rendered.

**(Brotherhood of Maintenance of Way Employees
PARTIES TO DISPUTE: (
(Union Pacific Railroad Company**

STATEMENT OF CLAIM:

“Claim of the System Committee of the Brotherhood that:

- (1) The Agreement was violated when, commencing on October 15, 2002, the Carrier arbitrarily required Messrs. S. Pollock, N. Trujillo, D. Westbrook, S. Elmstrand, J. Roybal, D. Booth and S. Blaser to take their respective remaining vacation for the calendar year 2002 before being allowed a physical displacement in the exercise of their seniority (System File D-0221-02/1347724)**
- (2) As a consequence of the violation referred to in Part (1) above, Claimants S. Pollock, N. Trujillo, D. Westbrook, S. Elmstrand, J. Roybal, D. Booth and S. Blaser shall now ‘*** be allowed all hours that they were required to take vacation at the overtime rate of pay and they further must be allowed all hours that Claimants were denied and are being denied the right to work at the straight time rate of pay.’”**

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.

The Organization contends that the claim should be sustained inasmuch as the Claimants were forced to use their vacation at or about the time they exercised their seniority – following abolishment of their prior positions - to move to a new Gang in October 2002.

The Carrier contends the claim should be rejected because the Claimants performed work on system gangs throughout calendar year 2002 and voluntarily failed to schedule or use their vacation time before displacing back to the division seniority rosters at the end of the production season.

The key factual question here is whether the Claimants were directed to use vacation in late October/early November 2002, prior to resuming work on their newly selected gang. If they were, the question then is whether the Carrier was permitted to require vacation usage at that point in the vacation year which runs from January – December.

The Carrier's response to the Organization, dated April 16, 2003, states in relevant part: "When the employees exercised their seniority rights to the gang they were informed they needed to take their vacation if they wanted to utilize it for the year. . . ." This is consistent with the Claimants' statements. For example, N. Trujillo's stated, in pertinent part, ". . . October 28, was my last day on gang 4892 in Track Lusk, Wyo. (I was displaced by Senior Employee). I was forced to go on vacation Oct. 29, 30, 31 & 1 of Dec. I had 30 hrs vac. I went to Gang 5381 Nov. 4th 2002."

S. Blaser, another Claimant, stated his job was abolished on November 14, 2002, that he ". . . called . . . the MTM from Cheyenne East. I informed him that I was going to exercise my rights (bump) . . . and place myself at Archer . . . on

November 18, 2002. He said I had to use my remaining vacation before I showed up . . . I did what I was told to do. I took vacation from November 18 through November 22 for 40 hours and showed up for work on November 25, 2002.”

At least as to the above Claimants, there is no evidence to refute each Claimant’s contention that he was instructed to and did take vacation prior to joining the new gang.

Appendix B, section 5 states:

“Each employee who is entitled to vacation shall take same at the time assigned, and, while it is intended that the vacation date designated will be adhered to so far as practicable, the management shall have the right to defer same provided the employee so affected is given as much notice as possible; no less than ten (10) days’ notice shall be given except when emergency conditions prevent. If it becomes necessary to advance the designated date, at least thirty (30) days’ notice will be given affected employee.”

It is apparently undisputed that vacations are to be scheduled in a cooperative manner between the employee and the Carrier. There is insufficient evidence here to demonstrate that the Carrier engaged in cooperative scheduling with the displaced Claimants. Instead, the Carrier adopted a blanket rule that forced individuals to take vacation.

The Carrier argues strenuously the provisions relating to vacation scheduling must not be read to permit employees to essentially ‘game the system’ by failing to schedule vacation toward the end of the year in an attempt to receive payments in lieu of vacation. See, e.g., Appendix B, Section 9, which states: “Vacations shall not be accumulated or carried over from one vacation year to another.”

We agree and are mindful that there are circumstances where this might well occur. Based on the evidence before the Board, however, this is not such a situation. The employees here were apparently given a “use it or lose it” choice at or about the time they exercised their seniority to join a new gang – one with incumbent employees who had presumably already selected vacation for the remainder of the year. While it might have worked a hardship on the Carrier to permit all gang

employees to take vacation at their respective desired times for the balance of the vacation year, its remedy would have been to enter into cooperative scheduling discussions and or to give proper notice and reschedule the vacation periods on the basis of seniority. Our findings here are limited to these specific facts. We do not reach, nor do the facts require the Board to question whether such a move and a requirement to take vacation later in the vacation year would require a different result under the Agreement.

It is not clear from the record if all employees in the class of the Claimants actually took their vacation between the date of notice of their successful exercise of seniority and their first day of work on the new gang. Those who did are entitled to be paid at the straight time rate for vacation days taken between the date of notice of their successful exercise of seniority in or about October 2002 and their first day of work on the new gang. Those who declined to take vacation during the above referenced period, whether they took vacation or not for the balance of the vacation year after joining their new gangs, are not entitled to relief.

AWARD

Claim sustained in accordance with the Findings.

ORDER

This Board, after consideration of the dispute identified above, hereby orders that an award favorable to the Claimant(s) be made. The Carrier is ordered to make the Award effective on or before 30 days following the postmark date the Award is transmitted to the parties.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Dated at Chicago, Illinois, this 29th day of September 2008.