# Award No. 5108
# Docket No. CL-5079

## NATIONAL RAILROAD ADJUSTMENT BOARD
## THIRD DIVISION

**Jay S. Parker, Referee**

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## PARTIES TO DISPUTE:

## BROTHERHOOD OF RAILWAY AND STEAMSHIP CLERKS, FREIGHT HANDLERS, EXPRESS AND STATION EMPLOYES

## KANSAS CITY TERMINAL RAILWAY COMPANY

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood that:

(a) The Carrier arbitrarily required Stockman R. R. Brummit to relinguish his regular position to relieve Stockman Geo. Poulos for the purpose of absorbing overtime necessary to fill the position of Poulos while the latter was on vacation, and;

(b) The Agreement was violated when Stockman L. C. Hill was denied the right to fill the position of Stockman Geo. Poulos on a seniority basis while the latter was on vacation July 18 to July 31, 1949, and;

(c) The Agreement was violated when Stockman L. C. Hill was denied the right to fill the position of Geo. Poulos on a seniority basis on Sundays July 24 and 31, 1949, and;

(d) Stockman Brummit be allowed 8 hours pay at straight time Stockman rate for the week days, including Saturdays, during the period he worked the Poulos position, in addition to amount already paid, and;

(e) Stockman Hill be allowed eight hours pay at the Stockman overtime rate for Sundays July 24 and 31, 1949.

EMPLOYES' STATEMENT OF FACTS: Geo. Poulos, 27th Street Store, Purchasing and Stores Department, having regular assignment as a Stockman, with assigned hours 10:15 P.M. to 6:45 A.M., Saturday rest day, was on vacation July 18 to July 31, 1949, both dates inclusive. The Poulos position was one of the positions in a pool of six relieved by Relief Stockman E. M. Dotson, as follows:

Tuesday, W. Mustoe, Stockman, 6:45 A.M. to 3:15 P.M.
Wednesday, Jas. Looney, Stockman, 8:00 A.M. to 4:30 P.M.
Thursday, R. Rhodes, Counterman, 8:00 A.M. to 4:30 P.M.
Friday, L. Young, Stockman, 1:45 P.M. to 10:15 P.M.
Saturday, Geo. Poulos, Stockman, 10:15 P.M. to 6:45 A.M.
Sunday, L. C. Hill, Stockman, 11:45 P.M. to 8:15 A.M.
Monday, Rest day of relief man.

The Carrier attempted to comply with the terms and decisions by referee contained in the Vacation Agreement. The action taken by the Carrier in filling the vacation under the Vacation Agreement does not conflict with the rules of the parent agreement.

(Exhibits not reproduced.)

**OPINION OF BOARD:** The salient facts applicable to all phases of the claim will be summarized as briefly as the state of the record permits. Those deemed essential to special features of the controversy will be referred to later in the Opinion.

On all dates in question Claimant Brummit held a regularly assigned 6 day position as Stockman in the Carrier's 27th Street Storehouse hours 8:00 A.M. to 4:30 P.M., with Sunday as his rest day. Claimant Hill was the holder of a 7 day position as Stockman, assigned hours 11:45 P.M. to 8:15 A.M., at Carrier's North Coach Yard Storehouse, with Sundays off and was senior to Brummit. Stockman Poulos was the occupant of a 7 day position at the 27th Street Storehouse, hours 10:15 P.M. to 6:45 A.M., with Saturdays off.

From July 18 to 31, 1949, inclusive, Poulos was on vacation. During his absence his position, which it is conceded was essential to continuous operation of the Carrier and hence had to be worked, was filled by Brummit who was suspended from his own regular assignment during that interim. While working the position Brummit took its rest day (Saturday) and received its rate of pay which included time and one-half for Sunday. At the end of the vacation period he was returned to his own position. Shortly thereafter the Petitioner, over the the protest of Brummit who disclaimed any desire to do so, filed the instant claim with the Carrier, in which it claimed in substance —as it does here—that the action of the Carrier in taking Brummit from his regularly assigned position and requiring him to work the position occupied by Poulos, and in failing to assign Hill to the latter's position on Sunday, July 24, and Sunday, July 31, resulted in violations of Rule 40 of the Agreement, providing employes will not be required to suspend work during regular hours to absorb overtime, as well as its Seniority Rules.

At the outset the Carrier raises two questions which must be determined before giving consideration to the merits of the cause. First it contends the dispute arises from its application of the vacation Agreement of December 17, 1941, and therefore should have been referred to the Committee provided for in Article 14 thereof. Such a contention has been rejected by this Board on at least three different occasions. See Awards Nos. 2537, 2484, 2340. Next it is insisted Brummit's claim is not here because it is being prosecuted over his protest. That claim has long since been decided to be without merit. In Award No. 3256 we said:

> "It is fundamental, and has been many times held, that a collective agreement is between the employer and the organization representing the employes and an employe cannot by agreement conduct or acquiescence vary the terms of the collective agreement."

See, also, Award No. 3416, holding that rights established by a collective agreement cannot be bartered away by an individual beneficiary covered by it.

In approaching a decision on the merits it should, we believe, be pointed out that when any claim is founded upon rights alleged to exist because of the granting of a vacation the National Vacation Agreement of December 17, 1941, and the Rules Agreement in force and effect between the parties must be considered together and harmonized whenever possible. However, in the application of this principle it is well settled and must be kept in mind that whenever provisions of the two Agreements are so conflicting as to be irreconcilable the terms of the Rules Agreement prevail. See Award 4690 where it is said:

". . . This Board has consistently held that in an instance where there is a conflict between the Vacation Agreement and the Rules Agreement, the terms and conditions of the Rules Agreement control, until such time as that Agreement is modified or changed by the parties thereto . . ."

The Carrier insists that its action in taking Brummit from his regular position and in having him work the vacation position was justified by terms of the Vacation Agreement and violated no provision of the Rules Agreement. Let us see.

Under the rule of construction to which we have heretofore referred the rules of the Vacation Agreement are of little consequence if the parties have incorporated in the current Working Agreement a rule so conflicting the provisions of the two Agreements cannot be reconciled. Therefore, we must first turn to the controlling Agreement which, we pause to note, was negotiated by the parties and became effective on October 1, 1942, some nine months after the effective date of the Vacation Agreement.

Rule 40 of the current working Agreement reads:

"Employes will not be required to suspend work during regular hours to absorb overtime."

It has been established by our decisions (see Award No. 5105) this day adopted and other Awards cited therein) that a rule such as we have just quoted means that the Carrier assenting to its inclusion in the negotiated Agreement cannot require an employe to suspend work on his regularly assigned position in order to work another position when its action in doing so results in the employe so assigned absorbing overtime which belongs to his own or another employe's position.

We fail to find anything in the current Working Agreement warranting a conclusion the provisions of Rule 40 had been superseded or become inoperative on the dates here involved and it is conceded work on Brummit's regularly assigned position was suspended during the time he worked the vacation position. Therefore, our first task is to determine whether he absorbed overtime while temporarily assigned to that position. This decision, it should be kept in mind, must be based upon the result of what was required and done without regard to the Carrier's motive in suspending the work of such position (see Awards 2823, 2884, 3301).

In the instant case it is conceded to have been necessary, as we have heretofore indicated, that Poulos' position be filled while he was on vacation. This concession makes it obvious relief for his position was required. Article 6 of the Vacation Agreement expressly provides that the Carrier will provide vacation relief workers when necessary. The record reveals it had provided no such worker and had no extra men available to fill the vacation position. The same source makes it apparent that to assign other employes available to do the work of such position and at the same time permit them to fill their regularly assigned positions would have caused them to work overtime. Instead of providing a vacation relief worker for the position, or working available regularly assigned employes thereon upon their rest or relief days, until it could do so, the Carrier elected to suspend Brummit from his regularly assigned position—in effect blanked it—and caused him to work the vacation position.

We are convinced, that under the foregoing conditions and circumstances, the Carrier should have left all employes, including Brummit, on their regular assignments and filled the vacation position by calling such employes on their rest or relief days, even at the expense of overtime, and that the effect of its action in suspending the work of Brummit's position during its regular hours was to prevent the payment of overtime to employes available

on their rest or relief days. It follows Brummit absorbed overtime while working the vacation position and that the Carrier violated Rule 40 in requiring him to do so.

The conclusion just announced is supported by Awards 2695 and 4352 stating that regular assignments should not be disturbed except as a last recourse and holding in substance that to disturb them, when there are occupants of other positions who could be called in to work a temporarily unoccupied position, resulted in violation of rules similar to Rule 40 herein involved.

Turning to Stockman Hill's claim it will be noted that subdivision (b) thereof is based upon the premise the Carrier violated the Agreement when it denied him the right to fill the Poulos position on a seniority basis during the entire time that employe was on his vacation while subdivision (c), although based upon the same premise, is limited to two days of that interim, namely, Sunday, July 24, and Sunday, July 31, 1949. It is not urged here that Hill could have filled such position on any dates other than the two specifically mentioned or that he is entitled to reparation greater than that specified in subdivision (e) of the claim. For that reason subdivision (b) of the claim must be regarded as abandoned.

By arguments advanced in support of their respective positions respecting Hill's claim all parties inferentially concede, if in fact they do not actually admit, there is no irreconcilable conflict in applicable seniority rules of the Work and Vacation Agreements. Therefore rules of both Agreements pertaining to seniority must be considered together and given force and effect.

Pertinent provisions of Article 12(a) of the Vacation Agreement reads:

> "Except as otherwise provided in this agreement a carrier shall not be required to assume greater expense because of granting a vacation than would be incurred if an employe were not granted a vacation and was paid in lieu therefor under the provision hereof . . ."

Subsection (b) of the same Article provides:

> "As employes exercising their vacation privileges will be compensated under this agreement during their absence on vacation, retaining their other rights as if they had remained at work, such absences from duty will not constitute 'vancancies' in their positions under any agreement. When the position of a vacationing employe is to be filled and regular relief employe is not utilized, effort will be made to observe the principle of seniority."

The Carrier concedes that when—as we have hereinbefore found—a vacation relief worker is necessary to carry on the work of a vacation position Article 6 of the Vacation Agreement requires it to provide one but contends the provisions of Article 12 (a) above quoted contemplate it shall assume no greater expense because of granting the vacation than would be incurred if the vacationing employe had worked his position and was paid in lieu of vacation.

On the other hand the Employes contend the last sentence of subsection (b), heretofore quoted, was violated when the Carrier failed to recognize Hill's seniority rights over Brummit and refused to permit him to fill Poulos' position on the two Sundays involved at the overtime rate.

After a careful analysis of all seniority rules entitled to consideration under the prevailing facts and circumstances we are inclined to the view the Carrier's position on the point now in question must be upheld. Conceding some inconsistency appears in the language of 12(a), supra, and the last sentence of 12(b), supra, it can be harmonized and both subsections of the Article given full force and effect by construing the last sentence of 12(b)

to mean the effort to observe the principle of seniority required by its terms has application to employes who are so situated they would be able to work the position of a vacationing employe without subjecting the Carrier to payment of overtime under other rules of the Agreement. To hold otherwise would ignore, and result in a failure to give force and effect to, the plain and unequivocal provisions of 12(a), supra, also Rule 50 of the Working Agreement. Award 2490, relied on by the Employes, as authority for a contrary construction, is readily distinguishable, the all important distinguishing feature being that vacation positions and rules of the Vacation Agreement were not involved and hence given no consideration.

From what has been heretofore stated and held we conclude Hill's claim, that the seniority rules of the Working and Vacation Agreements, standing alone and in and of themselves, gave him the right to fill the involved vacation position on the basis of seniority upon the two Sundays in question at the overtime rate, cannot be upheld. Therefore we hold that the Carrier's failure to assign him to such position on those days did not result in a violation of the seniority rules of either Agreement and that his claim, which is based upon that premise, must be denied.

Our conclusion the Carrier's action with regard to Brummit violated Rule 40 of the Working Agreement means (see Awards 4499, 2884, 2823) that he is entitled to be paid for the days he was deprived of work on his regularly assigned position at the pro rata rate of such position. It is so ordered.

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 Carrier violated Rule 40 of the current Working Agreement.

AWARD

Claims (a) and (d) sustained to the extent indicated in the Opinion and Findings.

Claims (b), (c) and (e) denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: A. I. Tummon
Acting Secretary

Dated at Chicago, Illinois, this 27th day of November, 1950.