

Award No. 5461
Docket No. TE-5392

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Alex Elson, Referee

PARTIES TO DISPUTE:

THE ORDER OF RAILROAD TELEGRAPHERS

TENNESSEE CENTRAL RAILWAY COMPANY

STATEMENT OF CLAIM: Claim of the General Committee of The Order of Railroad Telegraphers on the Tennessee Central Railway Company that J. R. Tarpley, extra operator-clerk, who was available but who was not used to provide vacation relief service on the operator-clerk position at Crossville, Tennessee, August 1, 2, 4, 5, 6, 7, 8, 9, and 11, 1949, shall be compensated for 8 hours on each of those dates at the rate of \$1.26 per hour as a result of the Carrier's action in depriving Claimant of work to which he was entitled on the seniority basis.

EMPLOYEES' STATEMENT OF FACTS: On February 28, 1949, Carrier issued a vacation assignment circular showing the assigned starting dates of the 1949 vacation periods for Agents, Agent-Operators and Operator-Clerks. The circular also showed the number of vacation days to which the employees were entitled.

W. A. Johnson regularly assigned Operator-Clerk at Crossville, Tennessee, was assigned a starting date as of August 28, 1949, for his 12 days' vacation period. After the issuance of the vacation assignment circular on February 28, 1949, the assigned starting date of Operator-Clerk Johnson's vacation period was advanced to August 1, 1949.

R. C. Vaughan, unassigned Operator-Clerk, with a seniority date of October 30, 1948, was used to relieve Operator-Clerk Johnson at Crossville, Tennessee, commencing August 1, 1949, and continued to fill the position up to and including August 11, 1949 (except rest days) at which time he was transferred elsewhere and relieved at Crossville by Operator-Clerk J. R. Tarpley, the Claimant in this case. The Claimant herein completed an assignment at Monterey, Tennessee, at 6:00 A. M., on July 28, 1949.

The Claimant J. R. Tarpley, with a seniority date of October 10, 1947, and senior to Operator-Clerk R. C. Vaughan, was unemployed, available and ready for service on August 1, 1949, and remained idle until August 12, 1949.

Time claims filed by the Claimant for August 1, 2, 4, 5, 6, 7, 8, 9, and 11, 1949, were declined by the Carrier.

POSITION OF EMPLOYEES: An agreement, bearing effective date of May 1, 1924, is applicable between the parties to this dispute.

The claim involved in this dispute arose as a result of the Carrier's action in not permitting the Claimant herein to fill a temporary vacancy in

withstanding the fact that it has been shown conclusively that the filling of a vacation absence is not governed by the provisions of Rule 17 (g).

Summary:

1. Arrangement for relief of vacationing employe reasonably in advance of the commencement date of the vacation was proper.
2. When the arrangement was made, the employe instructed to fill the vacation absence was at that time the senior available unassigned qualified employe.
3. Claimant was at that time filling a vacancy of unknown duration.
4. Article 12 (b) of Vacation Agreement provides that "such (vacation) absences from duty will not constitute 'vacancies' in their positions under any agreement."
5. As a vacation absence does not constitute a vacancy in the position under any agreement, any agreement rules governing the filling of vacancies cannot be applicable to the filling of a vacation absence.
6. Notwithstanding the inapplicability of Rule 17 (g) of rules agreement in the filling of a vacation absence, the awarding of the work to the senior available unassigned qualified employe reasonably in advance of the commencement date of the vacation absence conformed to the provisions of the said rule.
7. Claimant made no effort to secure the work in question until after relieving employe had begun work and then requested to displace on the second day of the vacation absence for which there is no support under rule or practice.
8. Provisions of neither rules agreement nor vacation agreement was violated.

For the reasons stated, the claim should be denied.

(Exhibits not reproduced.)

OPINION OF BOARD: This is a seniority case. Involved is an interpretation of the Vacation Agreement and the seniority rules of the parties.

The agreed facts are that the Carrier assigned an employe, R. C. Vaughan, junior to claimant, J. R. Tarpley, to relieve another employe who began his vacation on August 1, 1949. The claimant had been filling a vacancy of unknown duration and was released some time prior to 10:00 P. M., July 29, 1949, when the assigned man returned. On August 1, at 1:30 P. M., claimant advised the chief dispatcher he was available and that he wished to displace the employe junior to him who had already begun the vacation relief. This request was refused, Vaughan was laid off on account of sickness on August 1, 1949, and the remainder of the vacation absence was filled by claimant.

First: The relevant provisions of the Vacation Agreement and the effective rules of the parties are as follows:

"Rule 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 for their vacations.

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

"Rule 12 (a) 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 employee were not granted a vacation and was paid in lieu therefor under the provision hereof. However, if a relief worker necessarily is put to substantial extra expense over and above that which the regular employee on vacation would incur if he had remained on the job, the relief worker shall be compensated in accordance with existing regular relief rules.

(b) As employees 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 'vacancies' in their positions under any agreement. When the position of a vacationing employee is to be filled and regular relief employee is not utilized, effort will be made to observe the principle of seniority.

Rule 17 (g). When a temporary vacancy or position of less than thirty (30) days occurs, it will be awarded to the oldest available employee on the extra board provided he is qualified."

Second: It is undisputed that in accordance with Rule 4 (a) of the Vacation Agreement all employees of the Telegraphers' Organization were circularized for choice of vacation periods, and after a conference with the General Chairman of the Organization, a vacation assignment circular was issued on February 28, 1949.

Vaughan had been instructed well in advance of August 1, 1949, to file the vacation period choice involved. At the time he was notified to file the vacation absence, he was the oldest qualified man on the extra board. Claimant was at the time of such notification filling a vacancy of unknown duration.

Third: The primary issue in this case is whether the provision of Rule 12 (b) of the Vacation Agreement, that a vacation absence will not constitute a vacancy in the position under any agreement makes inapplicable Rule 17 (g), which requires that seniority be observed in filling a temporary vacancy of less than 30 days.

In Award 5192 of this Division, this issue, involving the same parties and the same employees, was decided adversely to the Organization. We there said:

"We do not believe that a vacation absence is a 'vacancy' which must be filled by application of Rule 17 of the current Agreement. The facts here bring this matter squarely under the terms of Rule 12 (b) of the Vacation Agreement. If we apply to these facts the contention of the Petitioner, namely, that a vacancy existed in the position which must be filled under Rule 17 of the current Agreement, we would be compelled to ignore the applicable provisions of the Vacation Agreement. This is not the case of a conflict between existing rules. The Vacation Agreement, by its terms, has defined a vacation absence as not a vacancy under any agreement, and to that extent has limited the application of Rule 17."

The Organization claims this holding of Award 5192 is erroneous on the ground that when the Vacation Agreement conflicts with the current Agreement, the current Agreement must prevail until such time as the parties may negotiate a change comparing the conflict between the two rules. It relies particularly on Awards 2340, 3022 and 5048.

We have carefully examined the awards in question. We believe they are sound in principle, but all of them are clearly distinguishable. The issue in these awards was whether overtime rates should be paid under certain circumstances. The rule clearly called for payment of overtime rates.

The Carrier relied on provisions of the Vacation Agreement, that vacations should be given without assuming greater expenses. This Board held that the rules should control.

The distinction is best highlighted by Award 3022, wherein we said:

"We necessarily conclude that where there is any conflict between the schedule agreement and the Vacation Agreement, the schedule agreement must be applied. On any matter upon which the schedule agreement does not deal, but which is covered by the Vacation Agreement, the Vacation Agreement applies. In other words, the Vacation Agreement is self-executing upon any matter covered by it which is not covered by any rule in the schedule agreement."

The Vacation Agreement contains no express provisions abrogating the overtime penalty provisions of the schedule agreement of the parties. Accordingly we have held that the scheduled agreement controls.

The Vacation Agreement, however, makes express provision as to the application of seniority in providing for relief on vacations. Rule 12 (b) not only provides that "absence from duty will not constitute 'vacancies' * * * under any agreement," but requires only that "effort will be made to observe the principle of seniority." The rules do not deal specifically with the subject of applying seniority to vacation relief.

Under these circumstances, we believe that our prior awards would compel a holding that the Vacation Agreement is controlling.

Fourth: The only remaining issue is whether the Carrier complied with the requirement of Rule 12 (b) of the Vacation Agreement that "effort will be made to observe the principle of seniority". When Vaughan was assigned to relieve, he was the seniority employe on the extra board. Claimant did not advise the chief dispatcher of his availability until the very day when the relief assignment began and not until some hours after Vaughan had taken over. We believe the Carrier fulfilled its obligation under Rule 12 (b).

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

That both parties to this dispute waived oral hearing thereon;

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 did not violate the Agreement.

AWARD

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: A. I. Tummon
Acting Secretary

Dated at Chicago, Illinois, this 17th day of September, 1951.