Award No. 5918
Docket No. CL-5962

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Jay S. Parker, Referee

PARTIES TO DISPUTE:

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

TERMINAL RAILROAD ASSOCIATION OF ST. LOUIS

STATEMENT OF CLAIM: Claim of the Terminal Board of Adjustment, Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employes:

(a) That Carrier violated rules of agreements in compensating E. C. Renfro, regular assigned Yard Clerk at Valley Junction (E. St. Louis, Ill.) for services performed on Monday and Tuesday, May 7 and 8, 1951, (designated rest days) as a Yard Clerk at Southern Crossing, relieving regular assigned Yard Clerk H. W. Wilde, absent on vacation.

(b) That Mr. Renfro be compensated for all services performed on those two days, namely, May 7 and 8, 1951, at time and one-half rate.

EMPLOYES' STATEMENT OF FACTS: Mr. Renfro is regularly assigned to position of Yard Clerk at Valley Junction, 7:00 A.M. to 3:00 P.M., with Monday and Tuesday as his designated rest days.

Mr. Wilde is regularly assigned to position of Yard Clerk at Southern Crossing with Saturday and Sunday of each week as his designated rest days.

From May 7 (Monday) to May 23 (Wednesday), Wilde was absent on vacation.

Renfro was requested by Chief Yard Clerk Maher to relieve Wilde during the latter's vacation and he did so with the understanding, however, that he was not available for service on his designated rest days, May 7 and 8, 1951, unless called by Management for service on those two days and paid at over time rate for his services under the rules of the General Agreement. See Employes' Exhibit B.

This claim was initially presented to Chief Yard Clerk Maher on May 26, 1951. Employes' Exhibit B.

June 13, 1951, Mr. Maher declined claim, citing Mr. Wicks' letter of January 28, 1942, as authority therefor, Mr. Maher's letter is introduced as Employes' Exhibit C. Mr. Wicks' letter of January 28, 1942, is introduced as Employes' Exhibit H.

OPINION OF BOARD: Renfro, the employe on whose behalf the instant claim is prosecuted, is regularly assigned to a position of Yard Clerk, Valley Junction, hours 7:00 A.M. to 3:00 P.M., five days per week, Wednesday through Sunday, rest days Monday and Tuesday. Clerk Wilde is regularly assigned as a Yard Clerk at the same point, Monday through Friday, rest days Saturday and Sunday. From Monday, May 7, through Wednesday, May 23, 1951, Wilde was granted a vacation. There being no furloughed or extra clerks or regular relief employes available, Renfro, after working his regular assignment, was called by the Carrier to fill Wilde's position during the latter's absence and complied with the call. In doing so he worked Monday, May 7, and Tuesday, May 8, the designated rest days of his regularly assigned position. The claim is for time at the punitive rate for having been called or required to work those two rest days immediately after completion of his regular Wednesday through Sunday assignment.

In support of its position the claim should be sustained the Organization insists the Carrier's action resulted in violating certain rules of the current Agreement, effective January 1, 1950. The particular rules relied on are: Rule 40 providing that employes notified or called to perform work on their assigned rest days shall be paid a minimum of eight hours, at time and one-half rate; paragraph (e) of Rule 39 stating that service rendered by employes on their assigned rest days shall be paid for under Rule 40, and paragraph (b) of Rule 39 providing that, except under conditions not involved, work in exess of forty (40) straight time hours in any work week shall be paid for at one and one-half the basic straight time rate.

The Carrier's position in defense of its action is (1) that under date of January 28, 1942, confirmed October 11, 1945, the parties reached an agreement to the effect regularly assigned men could be used off their regular job temporarily when extra men were not capable of filling the position of the man on vacation, this without payment of the punitive rate even under the conditions here involved and (2) the Vacation Agreement (Article 12 (a)) provides 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 thereof.

As to the first defense urged by Carrier the parties are far apart on their construction of the 1942 Agreement, the Employes insisting that it contained nothing which would relieve Carrier from paying time at the punitive rate under the facts of record. However, we need not labor the point or discuss the divers contentions advanced with respect thereto. Rule 2 of the current 1950 Agreement provides "These rules shall supersede and be substituted for all agreements, practices and working conditions in conflict herewith, subject to the Memorandum Agreements listed and those that may be subsequently negotiated." The Memorandum Agreements listed, and there are some eighteen of them, do not include the 1942 Agreement and it is not claimed a similar Agreement was subsequently negotiated. Therefore such Agreement, regardless of what it contained, cannot be considered in determining the import to be given the rules now in force and effect.

Carrier's second defense presents a more difficult problem. By Rule 52 of the Agreement the Vacation Agreement is made a part of the current Contract. Therefore the terms of both instruments must be construed together and inconsistent provisions thereof harmonized if possible. That does not mean, as some of the Carrier's arguments seem to infer, that because of the terms of Article 12 (a) of the Vacation Agreement, to which we have heretofore referred, other clear and unequivocal provisions of the working Agreement can be disregarded by the Carrier with impunity. They too are a part of the Agreement and are to be complied with.

Fortunately, so far as the instant case is concerned, we are not called upon to pass on the question of what happens when, after the Vacation Agreement has been incorporated into and made a part of the working Agreement, there appear to be rules so conflicting that they cannot be reconciled. After a careful analysis of Article 12 (a) supra and the rules relied on by the

Organization we think they can be harmonized and all such rules given force and effect by construing 12 (a) supra to mean that while the Carrier is not required to assume greater expense because of granting a vacation, it must nevertheless arrange its force so that it can do so. Otherwise, when it fills a vacation position with an employe who, under rules such as 39 (b) (c) and 40 of the existing Agreement is clearly and unequivocally entitled to pay at the punitive rate for overtime or work on rest days after 40 straight time hours in a work week, it must be regarded as having elected to assume such expense instead of having been required to do so.

In reaching the foregoing conclusion we have not overlooked the Organization's contention that, on October 31, 1950, some ten months after the current Agreement was executed, the parties entered into a written Contract (Memorandum Agreement No. 22) relating to the filling of short vacancies, including what they term "vacation vacancies," warranting a sustaining Award. We note the Vacation Agreement (Article 12 (b)) provides absences from duty by employes on vacation will not constitute "vacancies" in their position under any Agreement. The Carrier insists this Agreement has no application because it is limited to the filling of short vacancies, including the filling of vacation positions, on voluntary request of the Employes. We are not too certain the Agreement is subject to that construction but the point does not require decision in view of our announced conclusion. Nevertheless, assuming without deciding the Carrier's position is correct, we cannot refrain from pointing out that that Agreement contains the following provision:

> "Employes will not be permitted to start filling temporary vacancies on either of the assigned rest days of their regular assignment. Vacancies must start before and extend through those days."

and adding that it seems highly inconsistent for Carrier to solemnly argue employes who volunteer to fill vacation positions are not to be permitted to start filling them on either of the assigned rest days of their regular assignment and at the same time urge that when it sees fit to require them to start filling such positions on those days, it has the right to do so without regard to rules pertaining to punitive rates of pay.

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 the Agreement.

AWARD

Claims (a) and (b) sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: (Sgd.) A. Ivan Tummon
Acting Secretary

Dated at Chicago, Illinois, this 7th day of August, 1952.