Award No. 5976
Docket No. MW-6012

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Fred W. Messmore, Referee

PARTIES TO DISPUTE:

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES

GULF, MOBILE AND OHIO RAILROAD COMPANY

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

(1) That the Carrier violated the provisions of the effective agreement when they failed to assign an Assistant B&B Foreman to Bridge Gang No. 2, on the M&M District during the vacation of the regularly assigned Assistant B&B Foreman;

(2) That Mr. J. Q. Wiygul be allowed the difference in wages received and what he would have received at the Assistant B&B Foreman's rate of pay because of the violation referred to in part (1) of this claim.

EMPLOYES' STATEMENT OF FACTS: Assistant Bridge and Building Foreman W. M. Fowler was assigned Period 13, July 3, to 16, inclusive, as his vacation assignment for 1951.

At his request, his vacation assignment was advanced to Period 10, May 21, through June 4. With this change of vacation assignment, the Carrier advised that no one would be assigned to perform the duties of an Assistant Bridge and Building Foreman in Bridge Gang No. 2 during Mr. Fowler's absence.

It has been customary in the past to assign the senior available employe to perform the duties of a vacationing Assistant Bridge and Building Foreman, in accordance with the requirements of Rule 36, reading as follows:

"An Assistant Foreman will be assigned to all Bridge and Building gangs, regularly working more than eight (8) men exclusive of the Foreman."

However, in the year 1950, without the Organization's knowledge or consent, the Carrier diverted from this customary practice on seniority districts 5 and 6 and in this instant case, on the M&M District in 1951. During these three specific periods when this diversion took place, the positions held by vacationing system Bridge and Building Foremen were not filled during the vacation period of the regular assignee.

Claim was filed in behalf of Bridge and Building Carpenter J. Q. Wiygul for pay at the Assistant Bridge and Building Foreman's rate during the period of Mr. Fowler's absence.

Claim was declined.

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 schedule 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."** (Emphasis supplied).

The Carrier believes that it has clearly shown that the Vacation Agreement was entered into contemplating that a situation such as here presented would arise, and that Assistant Bridge and Building Foreman Fowler would go on his vacation, and unless the Carrier deemed it necessary or his fellow employees assumed more than 25 percent of his work load, his position would not be filled during his vacation.

Carrier respectfully requests that this claim be denied.

This claim has been handled in accordance with the provisions of the Railway Labor Act, as amended.

OPINION OF BOARD: The record shows that Assistant Bridge and Building Foreman W. M. Fowler was assigned July 3 to July 16 as his vacation period for the year 1951. He requested his vacation assignment be advanced to May 21 through June 4, 1951. This request was granted. No one was assigned to perform the duties of an Assistant Bridge and Building Foreman in Fowler's place.

There is an Agreement between the parties effective April 28, 1950.

The Employes rely on that portion of Rule 36 which reads as follows: "An Assistant Foreman will be assigned to all Bridge and Building gangs, regularly working more than eight (8) men exclusive of the Foreman."

Claim was filed in behalf of Bridge and Building Carpenter J. Q. Wiygul for pay at the Assistant Bridge and Building Foreman's rate during the period of vacation of the regularly assigned Bridge and Building Foreman. The claim was denied and is properly before this Board for determination.

Rule 36 quoted above was included in the Agreement between the parties dated April 28, 1950, without modification at that time.

The Employes contend the terms and conditions of the Rules Agreement take precedence over any conflicting terms or conditions that might be

contained in the "Vacation Agreement" upon which the Carrier relies, citing in support of their contention Awards 5108, 4690, and 3785 of this Division, and Award 5421. Insofar as necessary, those Awards will be discussed later in the Opinion.

The Carrier presents Vacation Agreement of December 17, 1941, which became effective January 1, 1942. It appears that Rule 36, above quoted, is also found in the Agreement between the parties effective Jun 1, 1942. Also contained in the Agreement effective June 1, 1942, is Rule 45, entitled "Vacations", which reads: "In accordance with requirements of its Section 15, the 'Vacation Agreement' signed at Chicago, Illinois, the 17th day of December 1941, and effective January 1, 1942, during its life, unless modified or changed by agreement, is incorporated herein as a supplement." That is, it is made a part of the Agreement covering rates of pay, rules and working conditions covered by the Agreement between the parties.

The current Agreement between the parties effective April 28, 1950, contains Rule 45, titled "Vacations". Without repeating the substance of the rule, it was modified so as to conform to the 40-Hour Week Agreement.

The Carrier cites the following rules of the Vacation Agreement and principally relies on Rule 6 thereof.

> "Rule 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 employes remaining on the job, or burden the employe after his return from vacation, the carrier shall not be required to provide such relief worker."

> "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 employe 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 employe on vacation would incur if he had remained on the job, the relief worker shall be compensated in accordance with existing regular relief rules.

> "Rule 12 (b). 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 'vacancies' 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."

In support of the Carrier's contention, Awards 5921, 5192, 5461, and 3022 of this Division are cited.

Referring to Award 5192, this is a case based on Rule 17 of the Agreement dealing with seniority, which the Carrier is alleged to have violated. The Carrier contended Rule 12 (b) of the Vacation Agreement was controlling. The Award held: "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 the matter squarely under the terms of Rule 12 (b) of the 'Vacation Agreement' * * *." 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 of the current Agreeement. Rule 12 (b) of the Vacation Agreement deals with the principle of seniority, as does Rule 17 of the Agreement. Thus, under the circumstances Rule 12 (b) of the Vacation Agreement was controlling.

We make reference to Award 5461—this Division. This is a seniority case. Involved is an interpretation of the "Vacation Agreement" and the seniority rules of the parties. Rule 17 (g) of the Agreement provided when a temporary vacancy in position of less than thirty days occurs it will be awarded to the oldest available employe on the extra board, provided he is qualified. The Award held, as did Award 5192 just cited: "Rule 12 (b) of the "Vacation Agreement' governed under the circumstances. Stating the Vacation Agreement however makes express provision as to the application of seniority in providing 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."

In addition, in this cited Award 3022 referred to, the following language appears. We quote: "We necessarily conclude that when there is any conflict between the schedule agreement and the Vacation Agreement the schedule agreement must be applied. Upon 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 foregoing cited Awards make clear the Carrier's conception of the principle that should be applied in the instant case. That is, the above cited Awards confirm the right of determination on the part of the Carrier as to whether a position will be filled during the absence of an employe on pay, also that these Awards confirm the principle that vacation periods are not vacancies under the Agreement. As before stated, the Carrier maintains that the Vacation Agreement is controlling and takes precedence over the Schedule Agreement.

We now turn to the Awards cited by the Employes: 5108, 4690, 3785. From an analysis of these Awards we conclude the same are cited only for the principle developed therein. We quote from Award 5108: "The National Vacation Agreement, 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. * * * Under the rules 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 * *' ". Rule 36, has no application to a "vacation period" of employes. In other words, it bears no relevancy to the subject.

The Vacation Agreement is self executing upon any matter covered by it which is not covered by any rule in the Schedule Agreement.

We hold that Rule 36 is not so conflicting with the Vacation Agreement that it cannot be harmonized therewith. An analysis of the two Agreements sustains this conception. The Vacation Agreement is controlling in this case.

Rule 6 of the "Vacation Agreement" confers upon the Carrier the right to determine under certain conditions, (and these conditions are contained in the rule and are specific), whether or not the Carrier will fill the position of a vacationing employe under pay while on vacation.

The restriction placed upon the Carrier, as evidenced by Rule 6, is that failure of the Carrier to provide relief worker does not burden the employes remaining on the job or burden the employe on his return from vacation.

There is no evidence of probative value to indicate any burden was placed upon the Foreman in charge of the gang, or any of the employes remaining on the job during Fowler's vacation period. The admitted fact is that no burden was placed upon Fowler on his return from vacation.

We believe Rule 6 of the Vacation Agreement is the controlling rule in this case. The Employes have failed to meet the burden of proof which is on them with respect to Rule 6 of the Vacation Agreement; that, the Foreman of the gang, the workmen remaining on the job, were burdened during the period Fowler was on vacation, nor that Fowler was burdened upon his return from vacation.

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 for reasons given in the Opinion the claim should be denied.

AWARD

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST:(Sgd.) A. Ivan Tummon
Secretary

Dated at Chicago, Illinois, this 31st day of October, 1952.