Award No. 7773
Docket No. MW-7514

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Livingston Smith, Referee

PARTIES TO DISPUTE:

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES

SOUTHERN RAILWAY COMPANY

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

(1) The Carrier violated the Agreement in its failure to assign vacation due to, and relieve for vacation purposes during the year 1952, Track Department Laborer Earl Scott when Track Department Laborer C. H. Duncan was available and willing to be used for such relief purposes;

(2) Furloughed and available Track Department Laborer C. H. Duncan be compensated at the applicable straight-time rate for ten (10) eight (8) hour days account of the Carrier's violation of the Agreement.

EMPLOYES' STATEMENT OF FACTS: Earl Scott, regularly assigned Track Department Laborer, earned ten (10) days vacation in the calendar year of 1952, by performing the required number of days compensated service during the year 1951. The Carrier failed to assign Scott a definite date to take his vacation and with the arrival of the last half of December, 1952, Scott was permitted to remain at work. Hence he was granted pay for ten (10) eight (8) hour days in lieu of his 1952 vacation, in addition to his regular straight-time wages for such a period.

Furloughed Track Department Laborer C. H. Duncan was available to perform vacation relief work during the month of December, 1952. In fact, Duncan was furloughed from his force in such a class on September 30, 1952. Duncan was not recalled to perform this service and filed a time claim at the applicable straight-time rate for ten (10) eight (8) hour days' pay because of having been deprived of the right to perform this vacation relief work. The Carrier has denied the claim.

The Agreement in effect between the two parties to this dispute dated August 1, 1947, together with supplements, amendments, and interpretations thereto are by reference made a part of this Statement of Facts.

POSITION OF EMPLOYES: The Employes contend that Article 4 (a) of the Vacation Agreement provides for the assigning of vacation dates. This the Carrier failed to do. The Article referred to reads:

> "Vacations may be taken from January 1st to December 31st and due regard consistent with requirements of service shall be

Claimant C. H. Duncan was cut off on September 30, 1952. He notified the Division Engineer, by letter dated October 14, that he was ready to go back to work at any time called. He was subsequently utilized in another sub-department until November 27, at which time he was again furloughed. In letter dated December 17, 1952, he notified the Division Engineer that he was ready to go to work again as soon as he was called. He was subject to the provisions of Rule 10 of the Laborers' Agreement. That rule obligated him to file his name and address with the Division Engineer within thirty days from the date laid off, and to advise the Division Engineer, in writing, within thirty days of any change in his address.

Rule 10 (c) obligates the Carrier to recall to the service a laborer who has complied with Rules 10 (a) and 10 (b), by filing his name and address within the specified time, **"only to fill a permanent position, expected to last sixty (60) or more working days."** There is no obligation under the rule to recall furloughed men to fill temporary vacancies. Had Laborer Earl Scott taken a vacation, there would **not** even have been a temporary vacancy, as Scott's job would have been blanked. It would **not** have been filled, but even if it had been filled, Rule 10 specifically provides that there was no obligation on the Carrier to recall a cut-off man to fill a temporary vacancy. The conclusion is, therefore, inescapable that Claimant Duncan had no contractual right to be recalled, even if Scott had taken a vacation and not been paid in lieu thereof. Certainly, when Laborer Scott did not take a vacation and was paid therefor, Duncan cannot, by any such strained interpretation as the Brotherhood here seeks to have placed upon the Agreement, have a valid claim.

Furthermore, Article 6 of the Vacation Agreement provides that "the vacation system shall not be used as a device to make unnecessary jobs for other workers." Prosecution of the instant claim by the Brotherhood is an effort to make an unnecessary job for Claimant Duncan.

In addition, the Brotherhood is here attempting to obtain by a Board award a new rule which it did **not** and **could not** obtain in negotiations. That the Adjustment Board has no authority to grant rules is a well recognized fact.

As to the penalty claimed on behalf of the claimant, penalties are **not** awarded under a contract, unless the contract so specifically provides.

The Third Division of the Board, in making Award 5697, Referee Smith, held:

> "While the Respondent had the right to work regular employes on the dates in question on Claimant's relief assignment, such action was not contractually mandatory. Likewise, **the sole penalty provided for in the Vacation Agreement (Article 5) in cases where employes are not permitted to take theeir vacations, is pay in lieu thereof."** (Emphasis added)

In the claim here being considered, the Carrier has paid the **sole penalty provided for in the Vacation Agreement,** in that it has paid Laborer Earl Scott for ten days' vacation not taken. Claimant Duncan has no contractual right to be paid for the same ten days. The Board cannot, therefore, do other than make a denial award. That it should do.

Carrier, not having seen the Brotherhood's submission, reserves the right to present such additional evidence and argument as may be necessary.

Evidence here presented has been made known to employe representatives.

Oral hearing is requested.

OPINION OF BOARD: Claim is here made that one C. H. Duncan, then furloughed, was available to perform vacation relief service for one

Earl Scott, who should have been granted a vacation but was not. Reparations to the extent of ten 8 hour days is sought on the ground that Article 4 and 5 of the National Vacation Agreement, and the interpretation thereof by Referee Morse, were violated by not relieving employe Scott and failing to call the claimant.

The Organization asserts that the Vacation Agreement contemplates the granting of vacations to all employes, save under extraordinary circumstances which were not present here, by virtue of which this Carrier had no option relative to requiring employe Scott to forego his vacation. It was further asserted that Article 4 of the Vacation Agreement requires a Carrier to prepare a Vacation List and make it available to employes, and that since the Vacation Agreement was violated, a penalty can be properly imposed to the extent indicated.

The Respondent takes the position that the claimant had no contractual right to perform the work in question (even though it might have been required) by Rule 10 (a) (b) and (c). It was further asserted that a mutually accepted practice existed not to assign specific vacation dates to laborers; that such practice was not in violation of the National Vacation Agreement and lastly, that there is no showing that if the vacation in question had been granted it would have been necessary to have the work thereof (position) performed or that it would have been performed.

The record here indicates that no vacation list as such was or had been prepared covering the annual period in question. The Respondent asserts that no specific dates (a vacation list) had been assigned to Laborers in the past; thus creating a past practice in no way contrary to the National Vacation Agreement. While we think, absent protest, this is true, it is likewise true that both the letter and intent of Article 4, and the interpretations thereof contemplate mutual cooperation leading to the establishment and assignment of specific vacation periods if and when such a request is made by the Organization. While no such request was here made, a demand would vitiate any past practice to the contrary.

We think the Vacation Agreement contemplates that the work of an employe on vacation should be (1) left undone (2) assigned to other employes covered by the Agreement (3) performed by the relief worker (4) performed by the regular assigned employes under certain circumstances.

This claim is not in behalf of a regularly assigned employe but in behalf of a furloughed employe.

It is well settled that vacation absences do not constitute vacancies, as such under the Vacation Agreement. It is likewise true that where conflicts exist as between the two agreements the rules of the effective agreement always prevail. While there is no showing that if the vacation in question had been granted the work of such position would have been performed, we are of the opinion that Rule 10 is controlling here. Rule 10 (a) (b) (c) provides:

"Notice of Desire to Retain Seniority—Rule 10:

(a) When an employe laid off by force reduction desires to retain his seniority rights, he must file, in writing, his name and address with the Division Engineer or other officer keeping the roster within thirty (30) days from date laid off. In event of change of address, he must file his new address in the same manner within thirty (30) days from the date of such change. Failure to so file as above specified, or return to service within ten (10) days after being notified to report by notice sent to address so filed, will forfeit all seniority rights unless prevented from returning by reason of personal sickness, injury or other similar reason.

(b) When an employe laid off by force reduction desires to be recalled to the service under this rule, he must also file, in writing, with the Division Engineer or other officer keeping the roster within thirty (30) days from date laid off, an application for work on his seniority district, to which his seniority and qualifications would entitle him. An employe failing to file his application as provided herein is barred from filing claim for pay on account of junior employe being used.

(c) A man who has complied with the provisions of paragraphs (a) and (b) of this Rule 10 will be notified to return to the service only to fill a permanent position, expected to last sixty (60) or more working days, on seniority district specified in the notice provided for in paragraph (b) in this rule, and then only in event a senior employe has not applied for the position or is not working thereon; provided nothing in this Rule 10 shall be construed to prevent the recall to service of employes who have complied with the provisions of paragraph (a) if their services are needed but there is no obligation to recall those who do not comply with paragraph (b)."

We cannot agree with Respondent's assertion that claimant did not comply with the requirements of paragraph (a) and (b) of this rule. Communication from claimant to his supervisors clearly refute this contention. However, claimant's rights to recall under paragraph (c) were limited to permanent positions or vacancies of 60 or more working days duration. No such condition existed. No violation took place.

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 Agreement was not violated.

AWARD

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: A. Ivan Tummon
Executive Secretary

Dated at Chicago, Illinois this 11th day of March, 1957.