Award No. 10869
Docket No. MW-10898

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

(Supplemental)

Harold Kramer, Referee

PARTIES TO DISPUTE:

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES

BOSTON AND MAINE RAILROAD

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

(1) The Carrier violated the Agreement on July 13 and 14, 1957, when it failed to recognize the seniority of the claimants and utilized the services of employes junior to them instead;

(2) That each claimant be now compensated at their respective time and one-half rate of pay for all time lost on account of the violation referred to in part (1) of this claim.

EMPLOYES' STATEMENT OF FACTS: Each of the claimants was assigned to a vacation consisting of five consecutive work days starting on July 8, 1957 and ending on July 12, 1957.

All of the claimants were assigned to the same crew, namely a construction crew at Winchester, Massachusetts, with rest days designated as Saturday and Sunday

This crew was scheduled to perform overtime service on Saturday, July 13, 1957, and on Sunday, July 14, 1957, and did perform eight hours of overtime service on July 13, 1957, and seven hours of overtime service on July 14, 1957.

Inasmuch as the claimants had all completed their assigned vacations as of Friday, July 12, 1957, and aware that their gang was scheduled to work overtime on Saturday, July 13 and Sunday, July 14, each of the claimants reported for work both on the morning of July 13 and on the morning of July 14. However, the Acting Supervisor refused to let any one or more of the three claimants perform this overtime service, despite the fact that his attention was directed to the fact that junior employes were permitted to perform this overtime service. In fact, one of said junior employes (Andrew Lane) had first entered the service of the Carrier on June 11, 1957, and had

CONCLUSION

In view of the foregoing this claim should be denied because:

1. Historically and traditionally, the National Vacation Agreement supports the Carrier's position.

2. The work in question was not part of the assignment of the claimants.

3. The work in question was part of the assignment of the men used.

OPINION OF BOARD: Claimants were employed by Carrier as Trackmen and during the year 1956 they rendered the necessary number of days of compensated service to entitle them to a five day vacation in 1957. Claimant's vacation for 1957 was scheduled in cooperation between Carrier Representatives and the Local Committee and in fact began their vacation on Monday, July 8, 1957 and concluded five consecutive days thereafter at the close of Friday, July 12, 1957. Claimants were on a five day week schedule with rest days on Saturday and Sunday.

All of the Claimants were assigned to the same crew, namely, a construction crew at Winchester, Massachusetts, with rest days designated as Saturday and Sunday. This crew was scheduled to perform overtime service on Saturday, July 13, 1957 and on Sunday, July 14, 1957, and did perform eight hours of overtime service on July 13, 1957 and seven hours of overtime service on July 14, 1957.

Each of the Claimants voluntarily reported for work on the rest day following their vacation, that is on July 13, 1957. The Acting Supervisor refused the three Claimants permission to perform this overtime service.

It is conceded that Claimants had seniority and that men junior were employed during dates involved in this dispute.

We have before us in this dispute only the question of whether the seniority rule is applicable on the normal rest days immediately following a vacation period.

The position of the Organization is presented in a letter dated November 1, 1957 to Mr. R. W. Pickard and signed by the General Chairman, Harry H. Cameron, as follows:

"BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES

"November 1, 1957

"Mr. R. W. Pickard
Vice President-Personnel
Boston and Maine Railroad
Boston 14, Massachusetts

"Dear Sir:

"An unfavorable decision has been received from Mr. J. S. Andrews, Division Engineer, in connection with the Committee's claim in favor of Trackmen George Provencher, Floyd Kind, and Armand Manseau.

"The claim is essentially as follows:

"1. That the carrier violated the Agreement on July 13 and 14, 1957, when it failed to recognize the seniority of the claimants and utilized the services of employees junior to them instead.

"2. That each claimant be now compensated at their respective time and one-half rate of pay for all time lost on account of the violation referred to in part (1) of this claim.

"The facts are as follows:

"On dates of claim, the claimants owned regular assignments in the Construction Crew, Winchester, Massachusetts. The work week of their assignments was Monday through Friday with Saturday and Sunday as rest days.

"In accordance with prearranged plans, the crew was required to perform service on Saturday, July 13, and Sunday, July 14. However, in setting up such plans, someone not only neglected to call the claimants but also refused them the right to render service when they reported for the overtime work and allowed employees junior to them to work instead.

"When the claimants requested a reason for not being permitted to work, they were told that this was in accordance with prior instructions of the Supervisor relative to the use of vacationing employees.

"I agree that the instructions referred to were entirely proper if applied to bonafide vacationing employees; however, I do not agree, nor will the records sustain, that either July 13 or July 14 was part of the claimants' vacation period.

"Under the provisions of the Vacation Agreement, each of the claimants was entitled to a vacation of five (5) consecutive **work days** and took such vacation as scheduled starting on July 8, 1957, and ending, July 12, 1957.

"In declining the Committee's claim, Mr. H. P. Mason, Supervisor, stated:

> 'Ownership to rest days can only be acquired by a man working the days immediately prior thereto. As these men were on vacation and did not work the work days immediately prior to their rest days of July 13 and July 14, they were not entitled to the work on these days.'

"In making such statement, it is noted that Mr. Mason did not refer to any rule of either the effective Agreement or the Vacation Agreement in order to sustain his position; and the reason is obvious, because no such a rule exists. It is interesting to note however, that in his statement, Mr. Mason first states the claimants lost owner-

ship to the rest days of July 13 and 14 and then follows by referring to such days as 'their rest days.'

"As evidence that Mr. Mason's position is not only without basis but also inconsistent with the language and intent of the Vacation Agreement, I quote in part Article 12 (b) of such Agreement, dated December 17, 1941:

> '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 work will not constitute "vacancies" in their positions under any agreement.' (Emphasis mine)' "

The Organization relies heavily on Award 6599 to which the Carrier responds as follows:

> "Concerning citation of Third Division Award 6599 — such award is not pertinent to the instant dispute, as the employees in question in such award were paid on a monthly basis, and further, the opinion by your Board was for the express purpose of determining the breaking point on a monthly rate when a monthly rated position is covered by two different individuals within a given month, and not for purposes of determining when a man's vacation terminates."

The Carrier asserts that historically and traditionally that when a man goes on vacation he has no rights to return to service until the first work day on which he is scheduled to return to work. Here too, the Organization cites Award 6599 in refuting the Carrier's assertion.

OPINION

Neither the covering Agreement nor the Vacation Agreement is of any comfort or guide to us in our attempt to rule on the matter before us. Nor does it appear that this specific matter has been heretofore presented to this Board.

We are inclined to accept the position of the Carrier regarding the tradition and practice in this matter in view of the fact that nowhere in the submission does the Organization directly refute the statement by the Carrier made at several different times, except indirectly by pointing to Award 6599. Award 6599 is not in our opinion indicative of common practice and tradition on this property.

The burden of proof rests upon the Petitioner and in the instant dispute, we are not persuaded that the Organization has fulfilled this requirement.

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 (1) and (2) not sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 24th day of October 1962.