Award No. 12111
Docket No. TE-10442

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Charles W. Webster, Referee

PARTIES TO DISPUTE:

THE ORDER OF RAILROAD TELEGRAPHERS

CHICAGO, MILWAUKEE, ST. PAUL AND PACIFIC RAILROAD COMPANY

STATEMENT OF CLAIM: Claim of the General Committee of The Order of Railroad Telegraphers on the Chicago, Milwaukee, St. Paul and Pacific Railroad that:

1. Carrier violated the agreement between the parties when it failed and refused to pay V. L. Rockwell for work performed during his vacation period.

2. Carrier shall compensate V. L. Rockwell a day's pay at the rate of time and one-half on August 12, 13, 14, 15, 16, 19, 20, 21, 22, 23, 1956 in addition to pay already received.

EMPLOYES' STATEMENT OF FACTS: The Agreements between the parties are available to your Board and by this reference are made a part hereof. The agreement primarily involved here is the National Vacation Agreement.

At the time cause for this claim arose, V. L. Rockwell was regularly assigned to the third shift Operator-Leverman position at Burlington Tower, Burlington, Wisconsin. The assigned hours 12 o'clock midnight to 8:00 A. M., work week beginning on Sundays of each week with assigned rest days of Fridays and Saturdays, relieved by regular relief operator on rest days.

Operator Rockwell, in accordance with the provisions of the Vacation Agreement, qualified for fifteen working days vacation during the calendar year of 1956. He requested his vacation in installments and the management consented thereto, such arrangement is provided for in Article 11 of the Vacation Agreement which reads:

"11. While the intention of this agreement is that the vacation period will be continuous, the vacation may, at the request of an employe, be given in installments if the management consents thereto."

This arrangement is commonly referred to as a "split vacation". He was assigned a vacation period of ten working days starting on August 12 and

There are two factors in this case that have never ceased to amaze the Carrier, one being that although Claimant Rockwell allegedly " * * * did not receive notice that his vacation was to be deferred", meaning of course that he need not report for work at Burlington Tower at 12:01 A. M. Sunday, August 12, 1956 (the 1st date of his vacation period as originally scheduled) nevertheless he did so in the usual and customary way. The other is, as the Employes were advised in the Carrier's letter of April 23, 1957, that copies of Claimant Rockwell's daily time reports Form 2649 filed by him for each date November 18, 19, 20, 21 and 22, 1956 show, under the heading "Paid for not worked (vacation, etc.)" from 12:01 A. M. to 8:00 A. M.—8 hours with the notation "Scheduled Vacation".

Earlier in this submission Carrier has shown that Claimant Rockwell was scheduled to take the last 5 of his 15 days vacation during the period Sunday, November 25, 1956 through Thursday, November 29, 1956 and that there was no change whatsoever in the period in which claimant was scheduled to take those 5 days. Copies of Claimant Rockwells daily time reports Form 2649 filed by him for each date November 25, 26, 27, 28 and 29, 1956 show, under the heading "Paid for not worked (Vacation, etc.)" from 12:01 A. M. to 8:00 A. M.—8 hours with the notation "Vacation—Unasked for unwanted." In other words, despite the fact that the five day period November 25 through November 29, 1956 was in accordance with claimant's specific vacation request and was so scheduled and granted, claimant now contends it was unasked for and unwanted.

Claimant Rockwell, as previously indicated, was relieved for a 15 day vacation during the period Sunday, November 18, 1956 through Thursday, December 6, 1956. In connection therewith, it is the contention of the Employes that claimant was simply notified that he would be relieved for 15 days beginning Sunday, November 18, 1956 and therefore had no alternative but to comply with such notice. Carrier's position is that Claimant Rockwell was offered the three week period beginning Sunday, November 18, 1956 as his vacation period which meant that of the 10 days deferred, he would be given 5 of those days during the week immediately preceding that portion of his vacation period which had not been changed (November 25 through November 29) and 5 days immediately following that week, which claimant accepted. That claimant did accept and agree thereto is evidenced by copies of the claimant's daily time reports for the five day period November 18, 19, 20, 21 and 22, 1956 which contain the notation "Scheduled Vacation."

Carrier respectfully submits that Part 1 of the claim is without merit and should be denied and that Part 2 of the claim should be dismissed.

All data contained herein has been made known to the Employes.

OPINION OF BOARD: This is a case involving the interpretation of the Vacation Rule Agreement. The Claimant was scheduled to take his vacation from August 12 to 23 inclusive. He was not allowed to take his vacation at that time. Article V of the Vacation Agreement provides:

> "5. Each employe who is entitled to vacation shall take same at the time assigned, and, while it is intended that the vacation date designated will be adhered to so far as practicable, the management shall have the right to defer same provided the employe so affected is given as much advance notice as possible; not less than ten (10) days' notice shall be given except when emergency conditions pre-

vent. If it becomes necessary to advance the designated date, at least thirty (30) days' notice will be given affected employe."

While the Carrier contends that the Claimant was notified that he would not be able to take his vacation at the scheduled time at no place does the Carrier produce any evidence of such notice. In the judgment of this Referee the question of proper notice is an affirmative defense and the burden was on the Carrier to come forward with evidence to show that the Claimant had received notice prior to 10 days of his scheduled vacation. This being so, it is therefore held that the Agreement was violated.

The record discloses that the claim, not the violation, which is before this Board is different than that which was presented by the General Chairman of the Organization to the highest officer of the Carrier. This being so, the award can only be for the amount requested by the General Chairman which is that the Claimant "be paid the difference between the compensation paid and the time and one-half rate."

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

That the parties waived oral hearing;

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 violated.

AWARD

Claim sustained as per Opinion.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 24th day of January 1964.

SPECIAL CONCURRING OPINION, AWARD 12111
DOCKET TE-10442

My concurrence in this award is based solely on its correct disposition of the primary issue, the failure to comply with applicable provisions of the agreement relating to vacations. It does not extend to the limitation of the reparation awarded.

This limitation is based on what the referee considered to be a change in the claim from ". . . that which was presented by the General Chairman of the Organization to the highest officer of the Carrier." In my opinion no change was made in the original claim when it was appealed (not "presented")

to the Carrier's highest officer. The General Chairman's limited reference to one factor was expanded by the referee to engulf the whole claim.

The original claim of reparation, filed by the claimant himself, was for ten days at the time and one-half rate for time worked during the vacation period. The Carrier required him to change his time slips to straight time rate on the theory that his vacation was properly deferred and would be properly granted at a later date.

But the Carrier was mistaken in its theory. In Award 10839, involving an identical situation, we said:

> ". . . where Carrier violated the Agreement by taking away Claimant's vacation period without adequate notice it becomes obligated to compensate him for it at the regular rate and also pay him the time and one-half rate for the period of work. It cannot purge itself of this obligation by forcing Claimant over his protest to accept another vacation period at a later date. The enforced vacation under these circumstances cannot be used to lessen Carrier's liability."

This principle was applied in Award 10919, involving the same parties as in the present award. Of course the same principle is applied here, but the Carrier is being permitted to "lessen its liability" because in one sentence the General Chairman referred to only a part of that liability.

I do not believe this Board functions properly when it seizes upon such trivial excuses to avoid full application of the agreement rules. This claimant was entitled to ten days' pay at time and one-half rate, for working his vacation period, in addition to the vacation allowance. The Carrier's obligation to pay the full amount due was not purged by its giving an improper vacation later, nor by the General Chairman's reference to the difference between straight time and time and one-half.

The claim should have been fully sustained.

LABOR MEMBER
J. W. Whitehouse