Award No. 14621
Docket No. MW-12716

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

(Supplemental)

Nathan Engelstein, Referee

PARTIES TO DISPUTE:

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES

CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY

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

(1) The Carrier violated the effective Agreement when it assigned an employe junior to Frog Welder R. E. Beard to fill the position of Head Welder during the vacation absence of Head Welder C. F. Graf from October 5 through October 16, 1959.

(2) Mr. R. E. Beard now be allowed the difference between what he received at the Frog Welders' rate and what he should have received at the Head Welder's rate during the period referred to in Part (1) of this claim.

EMPLOYES' STATEMENT OF FACTS: Claimant R. E. Beard, who has established and holds seniority as a Head Welder as of April 26, 1956, was regularly employed as a Frog Welder, whereas Mr. G. M. Mattocks, who holds no seniority as a Head Welder, was regularly employed as a Welder under the supervision of Head Welder C. F. Graf.

During the vacation absence of Head Welder C. F. Graf (from October 5 through October 16, 1959), the Carrier assigned and used Mr. G. M. Mattocks as Head Welder although Claimant Beard was ready, willing, available and qualified to perform such relief service.

The Agreement in effect between the two parties to this dispute dated September 1, 1949, together with supplements, amendments, and interpretations thereto is by reference made a part of this Statement of Facts.

CARRIER'S STATEMENT OF FACTS: Claimant was a regularly assigned frog welder in charge of a frog welding gang working at Rockford, Illinois, on the dates specified in the claim. C. R. Graf, a Head Welder, was in charge of a rail end welding gang working at Corning, Missouri, 685 miles from Rockford. C. R. Graf was on vacation from October 5 to October 16, ten working days, and was relieved during this period by a rail end welder working in his gang at Corning, Missouri, in the same manner that Head Welders have always been relieved while on vacation. Petitioner contends

that claimant should have been detached from his regularly assigned position at Rockford and sent 685 miles to Corning, Missouri to relieve Head Welder Graf for 10 days while he was on vacation. This would have necessitated tieing up or laying off claimant's frog welding gang because there were no qualified relief frog welders available to relieve him.

The schedule of rules agreement, effective September 1, 1949, is by reference made a part of this submission.

OPINION OF BOARD: This dispute involves the question of whether Carrier violated the principle of seniority in filling a position during the absence of a vacationing employe. Mr. R. E. Beard, regularly employed Frog Welder, with seniority as a Head Welder, claims that he was available and willing to work and should have been called to perform the vacation relief work during the absence of Head Welder C. F. Graf, instead of Mr. G. M. Mattocks who hold no seniority as a Head Welder. He claims a violation of Rule 25 of Brotherhood of Maintenance of Way Employes Agreement and of Article 12(b) of the National Vacation Agreement.

Carrier denies the claim, stating that Rule 25 is not applicable but that Article 12(b) of the National Vacation Agreement is pertinent and that it complied with this provision.

We find that the mandatory seniority requirements of Rule 25 are inoperative in view of the provisions of Article 12(b) of the National Vacation Agreement, which states that absences from duty because of a vacation do not constitute a vacancy under any agreement. However, under this article, "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."

With reference to the availability of Claimant for the work involved, the record shows that Claimant was working for Carrier in Rockford, Illinois, 685 miles away from the vacation assignment at Corning, Missouri. Hence Claimant was available in the sense that Carrier was actually availing itself of his services. In declining the claim Carrier relies to a large extent on the grounds that Mr. Beard was unavailable due to his working on a regular assignment. From this denial we cannot conclude that other qualified Frog Welders were unavailable to relieve Claimant from October 5 through October 16, 1959. Carrier also stated that Claimant rejected other relief assignments because of long distances involved but it does not give evidence that he did, or would have rejected the relief position at Corning if offered to him.

The contention by Carrier that Head Welders have always been relieved on vacation, as has been done in this case, is not a compelling justification to do so in the circumstances giving rise to this claim, when Article 12(b) clearly requires Carrier to make an effort to observe the principle of seniority in filling relief vacation positions. See Award 11463.

Claimant is allowed the difference between what he should have received at the Head Welder's rate and what he actually received at the Frog Welder's rate for the period October 5 through October 16, 1959.

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 violated.

AWARD

Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 29th day of June 1966.

CARRIER MEMBERS' DISSENT TO AWARD 14621 DOCKET MW-12716 (Referee Engelstein)

Entirely correct is the ruling in this award that the ". . . mandatory seniority requirements of Rule 25 are inoperative in view of the provisions of Article 12(b) of the National Vacation Agreement, which states that absences from duty because of a vacation do not constitute a vacancy under any agreement. . . ." Equally correct is the implied ruling that the Claimant's rights could not have been violated if there was no qualified man available to relieve him on his own assignment. Patently wrong, however, is the finding that the unavailability of such a relief man was not established in the record On this point the award states:

> ". . . In declining the claim Carrier relies to a large extent on the grounds that Mr. Beard was unavailable due to his working on a regular assignment. From this denial we cannot conclude that other qualified Frog Welders were unavailable to relieve Claimant from October 5 through October 16, 1959. . . ."

In denying the claim on the property Superintendent Tracy told the General Chairman:

> "If we did move Mr. Beard from Rockford, Illinois, to Corning, Mo. to handle the rail end gang for two weeks it would have necessitated tying up Mr. Beard's frog welding gang account no relief frog welders available."

The only response of the Employes on the property and in their initial submission was that Rule 25 and its "mandatory" provisions were applicable. Neither on the property nor in their initial submission did they question in any way the complete truth of Carrier's statements that the Claimant's own gang would have to be tied up had Claimant been used for this vacation relief work. This assertion is therefore admitted for purposes of this case, and the Employes' outlandish attempt throughout most of their rebuttal to disprove that statement with all sorts of irrelevant and inconclusive new evidence should have been completely disregarded. See Section 3, First (i) of the Railway Labor Act, Circular No. 1 of this Board, and Awards 13741 (Dorsey),

13664 (Kornblum), **12646** (McGovern), **11665** (Engelstein), **11182** (no referee), **10529** (Hall), **9261** (Hornbeck).

The record clearly substantiated Carrier's defense that there was no qualified Frog Welder available to relieve Claimant. This constituted a complete bar to a sustaining award under the rule recognized in the award itself. Also see **Award** 8128 (Smith) where the vacation relief work and the Claimant's regular assignment were in the same general location but Claimant's claim for the relief work was denied because there was no qualified employe available to relieve the Claimant on his regular assignment.

The record also establishes that Carrier would have been under no obligation to call Claimant for this relief work even if he could have been relieved from his own assignment. He held a regular assignment at a point 685 miles from the location of the vacation relief work. This fact is brushed aside in the award with the irrelevant observation that ". . . Carrier was actually availing itself of his services. . . . "

Claimant himself conceded that it would have been unreasonable to expect him to perform this vacation relief work. Claimant submitted a claim for relief work in December of the same year that was in every material respect identical with the instant claim. The only difference was that the distance from his assignment to the location of the work in the December claim was only 650 miles, 35 miles less than in the instant claim. The record shows, without contradiction, that in the course of handling the December claim the Claimant was asked if he would have accepted the relief work had it been offered him and ". . . he replied that he would not, because the distance to travel was too great and he would have lost time and money to boot. . . ." In subsequent months when such work was offered to Claimant, he refused it. Furthermore, Carrier's decision to consider Claimant not available was supported by consistent practice followed by these parties since adoption of the Vacation Agreement in 1941. On such a showing, no sensible reason can be advanced for refusing to find that under Article 12(b) of the Vacation Agreement Carrier was under no obligation to offer this vacation relief work to Claimant, irrespective of whether he could have been relieved.

Pertinent here are the remarks of the Court in **ACLRR vs BRSC**, 210 F.2d 812 (1954) that:

> "Collective bargaining agreements like other contracts are to be given a reasonable construction, not one which results in injustice and absurdity."

On the property and in their initial submission the Employes prosecuted their claim exclusively on the contention that this vacation relief work was a "vacancy" within the "mandatory provisions" of Rule 25. Since that contention has been categorically rejected by this Board and is found to be erroneous in this award, the claim should have been denied.

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