Award No. 15081
Docket No. CL-15091

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Herbert J. Mesigh, Referee

PARTIES TO DISPUTE:

BROTHERHOOD OF RAILWAY AND STEAMSHIP CLERKS, FREIGHT HANDLERS, EXPRESS AND STATION EMPLOYES

CHICAGO UNION STATION COMPANY

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood (GL-5589) that:

(1) Carrier violated the terms of the National Vacation Agreement when on June 10, 11, 12, 13, 14, 17, 18, 19, 20 and 21, 1963, it required and permitted the Janitor Foreman to perform the work of the position of Janitor, account the incumbent being assigned to take his vacation the above dates.

(2) Carrier violated the terms of the National Vacation Agreement when it distributed more than the equivalent of twenty-five percent of the work load of the vacationing employe among fellow employes without hiring a relief worker and without agreement permitting a larger than the equivalent of twenty-five percent distribution.

(3) The claim of L. S. Rodriguez for ten days' pay at the rate of $18.267 per day for June 10, 11, 12, 13, 14, 17, 18, 19, 20 and 21, 1963 be allowed.

EMPLOYES' STATEMENT OF FACTS: On June 7, 1963, a notice was posted on bulletin boards in the janitors' locker room and at the time clock which read:

"NOTICE

To All Employes in Janitor Department Roster E:

Mr. J. V. Bianco will be Acting Supervisor of Building Service vice R. W. Stanek during vacation period effective June 10th to June 30th, inclusive.

During this same period Mr. Frank Lach will act as Janitor Foreman on the 10:30 P. M. to 7:00 A. M. shift.

Please be governed accordingly.

/s/ R. W. Stanek
Supvr. of Bldg. Service"

The Janitor Department 1963 vacation schedule at the Chicago Union Station showed Johnny Johnson's vacation from June 10th to June 21st, both dates inclusive. Johnson took his vacation as scheduled and Foreman Frank Lach performed the work on that vacation vacancy. The position of Janitor Foreman was excepted from the promotion, assignment and displacement rules.

Employment records furnished by management for the month of May, 1963 show Rodriguez' last day of work as May 17, 1963 and reverted to furlough status effective May 18, 1963. Employment records furnished by management for the month of June, 1963 showed "No change" in Roster E during June, 1963. Roster E being the Janitor Department roster. "No change" indicated no employes were hired, left service, furloughed or recalled.

CARRIER'S STATEMENT OF FACTS: The Chicago Union Station has three shifts of janitors and cleaning women engaged in the work of keeping the premises neat and orderly. On the 10:30 P.M. shift there are approximately 10 employed as janitors. On the 7:00 A.M. shift there are approximately 29 janitors, and on the 6:00 P.M. shift there is one janitor. The balance of the 6:00 P.M. shift are cleaning women.

On each shift there is a janitor foreman, an employe covered by the Agreement with the Brotherhood of Railway Clerks. However, the janitor foremen's positions are excepted from the promotion, assignment and displacement rules of the Agreement. Each foreman works with the men and women he supervises. In his capacity as foreman he often does any of the work items of these employes.

Janitor Johnny Johnson went on his assigned vacation for three weeks, beginning June 10, 1963, and ending June 28, 1963. In accordance with the predominate practice Janitor Johnson was not relieved during this three-week vacation, except for two days in the third week. Johnson was the only janitor on vacation from the 10:30 P.M. shift at this particular time. His work was absorbed by the balance of the janitor force employed on that shift.

The claimant, L. S. Rodriguez, was a janitor off in force reduction in June of 1963. His claim is that he should have been recalled to fill two weeks of this three-week vacation vacancy.

OPINION OF BOARD: The Petitioner claims that Carrier violated the Agreement between the parties effective November 1, 1940, as amended, and the National Vacation Agreement of December 17, 1941, during the period of June 10 to 21, 1963, inclusive, when it failed to utilize the services of Claimant in filling the position of Janitor, the regularly assigned occupant of which was on his assigned vacation, and permitted the Janitor Foreman, an employe excepted from promotion, assignment and displacement under Rule 1, Scope, of the Clerks' Agreement, to work the duties thereof.

The position of the Employes is predicated on the alleged violation of the Scope Rule, Rule 19(j), Reducing Forces, and they 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."

Rule 1, Scope, of the Clerks' Agreement, reads in part as follows:

"The following positions shall be excepted from the promotion, assignment and displacement rules:

* * * * *

Foremen, Janitor Department."

Rule 19 (j), Reducing Forces, reads as follows:

"(j) (Effective April 1, 1952) Qualified, available furloughed employes shall be given preference on a seniority basis to all extra work, short vacancies and/or vacancies occasioned by the filling of positions pending assignment by bulletin which are not filled by rearrangement of regular forces or from the extra board established as provided in Rule 23."

Rule 23 does not apply to the Janitor Department.

The Employes further allege a violation of Article 10 (b) of the "Vacation Agreement", which reads as follows:

"10. (b) Where work of vacationing employes is distributed among two or more employes, such employes will be paid their own respective rates. However, not more than the equivalent of twenty-five per cent of the work load of a given vacationing employe can be distributed among fellow employes without the hiring of a relief worker unless a larger distribution of the work load is agreed to by the proper local union committee or official."

The Carrier's position is that no violation of the Agreement occurred because the vacancy created by the incumbent's vacation was not a "vacancy" under any provision of the Collective Bargaining Agreement; that Janitor Foremen are covered by the Scope rules of the Agreement, and can perform janitor work; that Article 10 (b) of the "Vacation Agreement" is not applicable as janitor work in the instant case was not divisible or was there a burden placed upon the remaining janitorial force, nor was overtime necessary; and, that the predominate practice with the janitor force was not to fill the majority of janitor "vacation vacancies."

Carrier also cites Article 10 (b) (quoted above) and Article 6 and 12 (b) of the National Vacation Agreement to sustain its position.

Article 6 reads:

"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."

Article 12 (b) reads:

"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."

As stated in prior Awards of this Board, absent a contract prohibition, it is within the prerogative of the Carrier to assign work to employes of its choice. The Scope Rule referred to is general in nature and only names the position and not the explicit duties or work to be performed by the Janitor Foreman.

The burden of proof rests with the Organization to establish its right to the work which it contends belongs to the janitorial employes. Although the Scope Rule is general in nature, the position of Janitor Foreman is included within the Scope of the Agreement, and in Award 13963 (Wolf), the Board held:

> "In the interpretation of Award 3563 (Serial No. 70) we held that where a position was exempted from specified rules **it is the occupant of the position not the work that is excepted from the rules.** It would follow that all the work within the Scope of the Agreement could be performed by any employe subject to the agreement even though he is excepted from the application of specified rules." (Emphasis ours.)

We do not find that the Organization sustained its burden of proving that Carrier violated the Scope Rule in the instant case. The statements from three janitors that the Foreman Janitor "did the work"; "did work"; and, "performed all the duties" of the incumbent's position would have had great impetus, rather than mere assertions or conclusions, if they could have conclusively shown what specific or actual work the Foreman Janitor performed which belonged to the incumbent, and identify their and the other janitor duties with specific work and assignments. Also to identify the work of the Foreman Janitor. The bulletined position states, "sweep, mop and clean floors in stairways in depot, handle loading tables, and all other work pertaining to janitors as assigned." From the duties described in this manner, it is apparent that the work as such is not divisible, and that no one janitor can claim the right to perform certain cleaning work by location.

Carrier contends that Rule 19 (j) of the Clerks' Agreement has no application in view of Article 12 (b) that absences on vacation do not constitute "vacancies" under any other agreement. The Employes state, however, that at no time do they claim that the absence of the incumbent on vacation constituted a "vacancy" in his position, but when the position of a vacationing employe is to be filled or work performed, Rule 19 (j) of the Clerks' Agreement does provide for the filling of short vacancies with available furloughed employes. Therefore, where there is a conflict between the Rules of the Agreement and the provisions of the Vacation Agreement, the working rules prevail. Employes cite several Awards of this Division and the Second Division to this effect; however, we hold that Rule 19 (j) is not so conflicting with the provisions of the Vacation Agreement that cannot be reconciled. We do not find that a vacation absence is a "vacancy" **which must be filled by** applying Rule 19 (j) under the facts in the instant case. Article 12 (b) is explicit in stating "**when** the position of a vacationing employe is to be filled . . ." is not language that would be mandatory that the Carrier fill the vacancy under discussion. The Vacation Agreement by its terms has defined a vacation absence **as not a vacancy under any agreement,** and to this extent has limited the application of Rule 19 (j) of the current Agreement. Article 12 (b), therefore, is controlling. (Emphasis ours.)

Article 6 of the Vacation Agreement restricts Carrier in that where a vacation relief worker is not needed in a given instance, failure to provide a relief worker must not burden those employes remaining on the job or burden the employe, after his return from vacation. Here the Employes point out that Carrier did not fill the incumbent's position during his vacation absence with a regular relief worker; therefore, Carrier, since it did not elect to do so under Article 6, was actually in violation of Article 10 (b) by not distributing work of the position to two or more employes or not more than twenty-five per cent of the workload among fellow employes.

The Board does not find that Carrier violated Article 10 (b) of the Vacation Agreement. The Employes have argued that the Foreman performed 100% of the work of the incumbent's position; however, as stated above, the Employes have not proved any specific work or duties performed by the Foreman and, certainly, not to any percentage. If the work of the Janitors, the Foreman, and the incumbent could have been ascertained or, in other words, if the work was divisible to identify the specific work performed, even as to location, then Carrier would have been restricted to work performance by fellow employes.

In conclusion, we find from the Record that Carrier has not acted to the detriment of Employes in Roster E in filling janitors' vacation vacancies, or acted unfairly in blanking vacation vacancies, not only in the instant case, but past practice and custom support that inference.

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 not violated.

AWARD

Claims denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 16th day of December 1966.

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