Award No. 15837
Docket No. MW-14725

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Herbert J. Mesigh, Referee

PARTIES TO DISPUTE:

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES

ELGIN, JOLIET AND EASTERN RAILWAY COMPANY

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

(1) The Carrier violated the Agreement when, instead of assigning a Crane Operator to perform the work of operating Bulldozer No. 428 on July 17, 19, Crane No. 84 on July 23, 24, 25, 26, 27, Speed Swing No. 534 on July 30, 31, August 1, 2, 3, 6, 7, 10, 13, 14, 15, 16, 17, 20, 21, 22, 23, 24, 27, 28, 29, 30 and 31, 1962, it assigned said work to Truck Driver W. E. Loving who holds no seniority rights as a crane operator.

(2) Crane Operator A. L. Biro be allowed 240 hours' pay at his time and one-half rate because of the violation referred to in Part (1) of this claim.

EMPLOYES' STATEMENT OF FACTS: The claimant is a regularly assigned crane operator on the seniority district where the subject work was performed. On the dates covered by this claim he was employed on the night shift.

The Carrier assigned Truck Driver W. E. Loving, who does **not** hold any seniority rights as a crane operator, to perform the work of operating Bulldozer No. 428 on July 17, 19, Crane No. 84 on July 23, 24, 25, 26, 27, Speed Swing No. 534 on July 30, 31, August 1, 2, 3, 6, 7, 10, 13, 14, 15, 16, 17, 20, 21, 22, 23, 24, 27, 28, 29, 30 and 31, 1962. Truck Driver Loving worked eight hours on each of the aforementioned dates and the Carrier has contended that he performed this work as a "vacation relief crane operator."

The claimant was available, willing and able to perform the subject work and would have done so had the Carrier assigned him to it.

Claim was timely and properly presented and handled at all stages of appeal up to and including the Carrier's highest appellate officer.

The Agreement in effect between the two parties to this dispute dated August 1, 1952, together with supplements, amendments, and interpretations thereto is by reference made a part of this Statement of Facts.

On this basis he contended that the claims should be paid. (See Carrier's Exhibit E.) However, even though it is actually immaterial, to date the Organization never has disclosed when it received Mr. Shepley's February 19, 1963 letter affirming the Division Engineer's decision.

For the sake of saving argument as to when the Organization's letter dated December 24, 1962 was placed in the mail, commencing to count on December 25, 1962, the sixtieth (60th) day (under Article V of the August 21, 1954 National Agreement) expired on Midnight February 22, 1963. The U. S. Mail is not just the normal and customary means for processing time claims and grievances on this property, it is the means. The U. S. Postal Department by long established custom and practice has become the Organization's and the Carrier's common agent. Only on extremely remote occasions has the Organization's General Chairman or one of its Local Chairmen personally submitted a claim or initiated an appeal of a declination.

INVOLVED RULES

The Carrier and the Organization are parties to the December 17, 1941 National Vacation Agreement as adjusted by the amendments of February 23, 1945, March 19, 1959, August 21, 1954 and August 19, 1960. We also mutually recognize the Official Disputes Committee interpretations of these Agreements. The Carrier and the Organization also are parties to Article V, the Time Limit on Claims Rule, of the August 21, 1954 National Agreement. These National Agreements are on file before the Board and will not be requoted herein.

The Organization in final handling on the property primarily relied upon the portion of Rule 4 of its August 1, 1952 Schedule which reads:

> "Rule 4. Seniority rights of all employes are confined to the sub-department and group in which employed . . ."

but the Organization deigned to ignore the clause ending the above sentence reading:

"except as otherwise provided herein."

(Exhibits not reproduced.)

OPINION OF BOARD: Claimant is a regularly assigned crane operator on the Seniority District where the subject work was performed. On the dates covered by the claim, he was employed on the night shift. Carrier utilized truck driver, W. E. Loving, who does not hold any seniority rights as a crane operator, to perform work on the dates set forth in the claim.

Petitioner asserts that Claimant, the senior crane operator, should have been used in preference to truck driver Loving on each of the dates involved in the claim and asks for 240 hours' pay at time and one-half rate for the alleged violation.

Carrier contends that truck driver Loving was properly used to fill in on vacation absences and such assignments did not violate the effective agreement rules.

In handling this dispute on the property, the Petitioner asserted that Carrier violated Article V of the August 21, 1954 National Agreement, by not

declining the claim within the required time limits. The Carrier's submission and the exhibits contained therein, rejects this contention by the Petitioner and shows that the Carrier did decline the claim within the 60-day mandatory time limit provision in the National Agreement of August 21, 1954.

Carrier counter-charges on the procedural issue in that the Petitioner did not present a proper appeal when in its letter to the Chief Engineer dated December 24, 1962, it merely stated:

> "Please be advised that we cannot agree with, or accept Mr. Dangremond's decision on this case. Hence, appeal is hereby made to you for your consideration thereon."

Carrier further asserted that this claim would then, therefore, be barred under Article V because the Petitioner, as the moving party, failed to present supporting data to the appeal officer outlining its reasons for appeal. In the opinion of the Board, the declination letter of February 19, 1963, by S. H. Shepley, Chief Engineer, took cognizance of the Petitioner's position in processing the claim in that he enlarged upon certain requirements regarding the assignment of work to crane operators and denied that the Carrier had violated the Agreement — "your claim on appeal is deemed to be without merit," therefore, Petitioner did not develop the nature of the claim, as alleged by the Carrier, from some independent source of his own but denied it on the strength of the Petitioner's letter of December 24, 1962. Therefore, since both parties to this dispute have complied with the procedures in accordance with the Railway Labor Act, the dispute is properly before us on its merits.

The basic issue is whether Article 12(b) of the National Vacation Agreement, dated December 17, 1941, as amended, supports Carrier's action in making the disputed work assignments or whether Rules 3 and 4 of the Agreement, supports the Employes' position and are applicable in the instant dispute.

The Board is of the opinion that the Claimant was the qualified senior employe and would have been entitled to filling the positions in dispute under Rules 3 and 4, had not a "vacation absence" been involved.

The Board has consistently held:

> "The Vacation Agreement by its terms, has defined a vacation absence as **not a vacancy under any agreement.**" (Emphasis ours.)

Therefore, it is clear from the facts of the record that Carrier was under no mandatory obligation to assign the Claimant to the positions on an overtime basis as alleged by him. Prior holdings by this Board have removed such "vacation vacancies" from the mandatory application of the scheduled rules, in this case, Rule 3 and Rule 4 of the parties' agreement.

The Organization repeatedly asserts that truck driver Loving was not employed as a "vacation relief crane operator" because he was not filling the position of a crane operator absent due to vacation. In Carrier's Ex-Parte Submission, Carrier names these operators and sets forth the exact vacation dates of the regularly assigned day shift crane operators which were three "vacation vacancies" falling within the period of July 23rd through August 31, 1962, which we believe supports Carrier's contention that these were in fact vacation vacancies.

By Carrier's own admission the dates set forth in the claim of July 17 and 19, 1962, did not involve "vacation vacancies" in regular crane operator positions of the day shift. Carrier has not provided substantial proof that Loving drove a truck on July 17, and it also appears from the record that Carrier has previously paid claims made in behalf of crane operators who operated bulldozers, therefore we will sustain the claim in part as to the dates of July 17 and 19, 1962 and allow the Claimant pay at his time and one-half rate for these two days' violation. The claim for the period from July 23 through August 31, 1962, will be denied.

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 Carrier violated the Agreement only as to the claim involving the dates of July 17 and 19, 1962, as set forth in the opinion.

AWARD

Claim sustained in part and denied in part as set forth in the opinion.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 29th day of September 1967.

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