Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 36834
Docket No. SG-36426
04-3-00-3-595

The Third Division consisted of the regular members and in addition Referee Edwin H. Benn when award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Railroad Signalmen
(
(Union Pacific Railroad Company

STATEMENT OF CLAIM:

"Claim on behalf of the General Committee of the Brotherhood of Railroad Signalmen on the Union Pacific Railroad Company:

Claim on behalf of J. D. Sampy, Sr., for payment of 240 hours at the straight time rate, account Carrier violated the current Signalmen's Agreement, particularly Rule 26, when it failed to provide vacation relief on the Valentine Subdivision during June and July of 1999. Carrier File No. 1205422. General Chairman's File No. SWGC-2040. BRS File Case No. 11280-UP."

FINDINGS:

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

The carrier or carriers and the employee or employees involved in this dispute are respectively carrier and employee within the meaning of the Railway Labor Act, as approved June 21, 1934.

This Division of the Adjustment Board has jurisdiction over the dispute involved herein.

Parties to said dispute were given due notice of hearing thereon.

During the periods of June 28 to July 7, July 16 to July 30, and July 19 to July 30, 1999, three Signal Maintainers at Tower 47, Alfalfa and Marfa, respectively, went on vacations for greater than one week periods and were not relieved.

Rule 26 - RELIEVING FOREMEN AND MAINTAINERS provides:

> "When Signal Maintainers or Signal Maintenance Foremen are off for periods that exceed one week in duration, they will, if relieved, be relieved by the Relief Signal Employee; and if not available, the senior qualified employee of Class 1 assigned to the Signal or Maintenance Gang.
>
> The Carrier will make every effort to provide vacation relief on Signal Maintainer positions when the incumbent is off duty longer than one week."

On the property, the Carrier defended against the claim by asserting that the phrase "if relieved" means that "it is up [to] the carrier to determine when relief will be assigned" and further argued that the phrase "if relieved" means that "[t]he Carrier is not required to relieve . . . maintainers when they are off work for various reasons . . . [t]he Carrier is only required to have the Relief Signal Employee, if available, or the senior qualified employee of Class 1 relieve the position if the position needs [to be] relieved in the Carrier's opinion."

By itself, the phrase in Rule 26 "if relieved" is correctly interpreted by the Carrier. That phrase does not mandate that relief be assigned, but gives the Carrier the option of providing vacation relief for Signal Maintainers who are off for periods exceeding one week. Stated differently, in those situations where a Signal Maintainer is off for periods exceeding one week, the phrase "if relieved" gives the Carrier the managerial prerogative to assign - or not assign - vacation relief.

But there is more to the Rule. Rule 26 further provides that "[t]he Carrier <u>will make every effort</u> to provide vacation relief on Signal Maintainer positions when the incumbent is off duty longer than one week." [Emphasis added.] The vacation periods taken by the Signal Maintainers in this case were for longer than one week. What "effort" did the Carrier make to provide relief in this case? The record discloses no efforts by the Carrier. The Carrier merely defended the claim on the ground that it had the discretion to provide vacation relief and it exercised its discretion not to do so.

The phrase "if relieved" certainly gives the Carrier managerial discretion with respect to providing vacation relief when the incumbent Signal Maintainer is off duty longer than one week. But that discretion is then tempered by the phrase stating that the Carrier "will make every effort to provide vacation relief." The phrase "will make every effort to provide vacation relief" requires the Carrier to show some evidence of the efforts it made. However, if there were such efforts in this case, the record fails to reveal the extent of those efforts. Axiomatic rules of contract construction require that negotiated contract language should be read as a whole and interpretations which make language meaningless should be avoided. To interpret Rule 26 as the Carrier argues to give it complete and unfettered discretion not to provide vacation relief if it so chooses completely ignores the phrase "will make every effort to provide vacation relief" and, for all purposes, renders that phrase absolutely meaningless. That is not how language should be interpreted.

We, therefore, find that under Rule 26 the Carrier has discretion to determine whether to provide vacation relief for Signal Maintainers who are off duty longer than one week. However, in the exercise of that discretion, Rule 26 also requires that the Carrier show some evidence that it made every effort to provide such relief. This record does not show what efforts, if any, the Carrier made. The claim therefore has merit.

The Carrier's reliance on other Awards does not change the result in this case. Third Division Awards 31814 and 35028 involved BRS/SP Rule 76, which was identical to Rule 26. We do not find those Awards persuasive.

Award 31814 denied the claim, but reasoned:

> "From the Board's review of the Agreement provisions and after considering the arguments of the parties, it is concluded that there has been no violation of any Agreement provision by the Carrier. The language of Rule 76 is permissive in nature. It outlines procedures which will be applicable IF the vacationing employee is relieved and provides that Carrier will make 'every effort' to provide relief. It does not mandate that vacation absences must be filled, nor does it define to what extent Carrier must go to make an effort to provide relief. Such rule language, absent convincing probative evidence of misfeasance on the part of the Carrier, does not create an absolute enforceable right."

Given the need for stability, we are reluctant to not follow prior precedent even if we believe that prior precedent was wrong. It is only when a prior Award is palpably

in error that we are relieved of the obligation to follow that prior decision. Award 31814 is palpably in error. Although stating ". . . the Carrier will make 'every effort' to provide relief," that Award, for all purposes, reads the phrase "every effort" out of the Rule. Award 31814 then articulates a standard - which is nowhere to be found in the Rule - that there must be "convincing probative evidence of misfeasance on the part of the Carrier." If the Rule "does . . . [not] define to what extent Carrier must go to make an effort to provide relief," where does the requirement for a showing of "convincing probative evidence of misfeasance on the part of the Carrier" come from? The parties certainly did not negotiate that standard. Rather, the Rule merely plainly states that "[t]he Carrier will make every effort to provide vacation relief on Signal Maintainer positions when the incumbent is off duty longer than one week." That plain statement requires the Carrier to make some kind of showing of the efforts it made. It does not require the Organization to demonstrate "convincing probative evidence of misfeasance on the part of the Carrier." We therefore - albeit reluctantly - cannot follow Award 31814 as precedent.

Award 35028 is distinguishable. While that Award refers to Award 31814, in that case the Carrier argued concerning its efforts "that there was no available relief signal employee to fill the position of the vacationing employee." Therefore, the Carrier made some kind of showing in that case about its efforts to provide vacation relief. Here, the Carrier made no similar showing. Here the Carrier stated it decided not to provide vacation relief - period. Under Rule 26, it must show more.

We do not have to decide the degree of showing which must be made in these cases for the Carrier to demonstrate that "every effort" has been made. However, under the plain language of Rule 26, the Carrier must make some kind of showing of what "effort" it made. Here, there is no such showing.

With respect to the remedy, the claim seeks 240 hours at the straight time rate on the Claimant's behalf - i.e., six weeks pay for the three approximate two-week vacation periods that were taken by the three Signal Maintainers and not covered by relief. The Organization states that the Claimant held the senior position on the signal gang on the Carrier's Valentine Subdivision. By the plain terms of Rule 26, he is entitled to a remedy having been deprived of work opportunities. However, under the unique circumstances of this case, we find that the amount of requested relief on the Claimant's behalf is not appropriate.

First, we recognize that in this Award we have deviated from prior precedent because we believe that precedent was palpably in error. It may be that the Carrier was relying upon that prior precedent in the manner in which it constructed its

responses and how it developed its portion of the record on the property concerning any remedy. Under these circumstances, given how we now believe the language should be interpreted, it would be manifestly unfair to impose the full relief requested by the Organization without first allowing the parties the opportunity to fully develop their theories concerning the remedy.

Second, Rule 26 only requires "every effort to provide vacation relief on Signal Maintainer positions when the incumbent is off duty longer than one week." [Emphasis added.] Therefore, for vacation periods of one week or less, no Rule 26 "effort" need be made by the Carrier. It is a reasonable conclusion that because the three vacations were taken in approximate two-week blocks and the Carrier does not have to make "every effort" for vacations of one week or less, the provision "longer than one week" eliminates three of the six claimed weeks. From that conclusion, it also reasonably follows that the Carrier's liability for not making every effort to provide vacation relief did not begin until the first week of the vacation blocks expired and the Carrier therefore should not be held liable for the first week of the vacation periods. On the other hand, it may also be a reasonable conclusion for a remedy that because we have found that the Carrier did not provide the vacation relief that it should be liable for the entire time period of that relief. Given those plausible arguments for a remedy and further given that we have not followed the prior Awards, we emphasize that the parties should in the first instance be allowed to address these remedy questions on the property before the Board imposes a definitive remedy for this type of demonstrated Rule violation.

Finally, we note that two of the vacation periods (for the Maintainers at Alfalfa and Marfa) were overlapping (July 19 through 30, 1999). Given that the claimed relief is only for one employee and he could not have been in two places at one time to afford vacation relief, another week must be eliminated from the remedy.

In sum, given the unique circumstances of this case and limited to the facts and circumstances of this case, we, therefore, find that the Claimant shall be entitled to two weeks compensation at the claimed straight time rate.

AWARD

Claim sustained in accordance with the Findings.

ORDER

This Board, after consideration of the dispute identified above, hereby orders that an award favorable to the Claimant(s) be made. The Carrier is ordered to make the Award effective on or before 30 days following the postmark date the Award is transmitted to the parties.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Dated at Chicago, Illinois, this 28th day of January 2004.