Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 40278
Docket No. MW-39275
10-3-NRAB-00003-060014
(06-3-14)

The Third Division consisted of the regular members and in addition Referee M. David Vaughn when award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employes Division - IBT Rail Conference
(BNSF Railway Company (former Burlington Northern Railroad Company)

STATEMENT OF CLAIM:

"Claim of the System Committee of the Brotherhood that:

(1) The Carrier violated the Agreement when it arbitrarily altered portions of Mr. R. Hohbein's requested and scheduled vacation days and thereby required him to work on his requested and scheduled vacation days of June 7, 2004 and July 12, 2004 (System File B-M-1199-H/11-04-0100 BNR).

(2) As a consequence of the violation referred to in Part (1) above, Mr. R. Hohbein shall now be compensated for a total of sixteen (16) hours at his respective time and one-half rate for being required to work on each of the aforesaid requested and scheduled vacation dates of June 7, 2004 and July 12, 2004."

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.

The Carrier implemented a formal vacation scheduling plan for members of the Organization effective for calendar year 2002. The Claimant's seniority date of May 20, 1977 entitles him to 25 vacation days in 2004 pursuant to Appendix A, Section E of the Agreement.

Evidence in the record indicates that Claimant's work assignment was Monday through Friday. In a request dated November 10, 2003, the Claimant listed his choices for vacation in 2004. He requested that one week of five days be designated as "floating days." His first choices for the remainder were to be taken in five-day increments beginning Monday, February 2, 2004; Tuesday, June 1, 2004; Tuesday, July 6, 2004; and Monday, September 27, 2004.

In an attempt to cooperate, on December 9, 2003, representatives of the Carrier and Organization met via telephone conference call to discuss vacation schedules for employees assigned on Montana Seniority District 200. During the call, the parties negotiated vacation issues for 2004, but did not agree on what day of the week vacations would have to start. The Carrier applied a policy requiring that vacations start on the first day of the workweek. In a letter dated December 19, 2003, the Carrier notified the Claimant that his choices for vacation to begin on June 1 and July 6 would not be allowed and would be modified to begin on Monday, May 31 and Monday, July 5, respectively.

The Carrier indicates that it started requiring vacation schedules to be filled out for 2002 and that because there were no disputes until this one for 2004, it is therefore untimely filed. The Board finds no support in the Agreement for the notion that if no claim is filed the first time an alleged violation occurs, all later claims based on similar allegations are waived and barred. Rule 42 - Time Limits states:

> ". . . all claims or grievances must be presented in writing . . . within sixty (60) days from the date of occurrence on which the claim or grievance is based."

The Board finds that contrary to the Carrier's assertion, the alleged violation is not a future date. It occurred on December 19, 2003 when the Carrier rejected and revised the Claimant's first choice for vacation days. The record indicates that the claim was filed on January 16 which is within 60 days of December 19, 2003. Accordingly, the claim was timely.

The Carrier argues that employees must take vacation in units of one week, two weeks, three weeks, four weeks or five weeks and that a five-day week of vacation must correspond to a five-day week of work – day for day. It reasons that because the Claimant's workweek began each Monday and ended each Friday that his vacation must begin on a Monday and end on a Friday. In support of its position, the Carrier draws the Board's attention to the following language in Article K of Rule 24 of the Agreement:

> "The term "work week" for regularly assigned employees shall mean a week beginning on the first day on which the assignment is bulletined to work."

The Carrier asserts that the Claimant is not permitted to begin his one-week vacation segments on Tuesday June 1 or Tuesday July 6 because each vacation segment would then begin the day immediately after a holiday – Decoration Day and Independence Day, respectively. The Carrier draws the Board's attention to the following language in Appendix A, Section M (3) of the Agreement:

> "M (3) . . . An employe's vacation period will not be extended by reason of any of the eleven recognized holidays (New Year's Eve Day, New Year's Day, President's Day, Good Friday, Decoration Day, Fourth of July, Labor Day, Thanksgiving Day, Day after Thanksgiving Day, Christmas Eve Day, and Christmas Day), or any day which by agreement has been substituted or is observed in place of any of the eleven holidays enumerated above, or any holiday which by local agreement has been substituted therefore, falling within his vacation period."

The Carrier argues that the Organization's acceptance of the concept of scheduling vacations in five-day increments constituted a tacit agreement that the days would start on the first day of the week's work assignment.

The Organization asserts that during the December 9, 2003 telephone conference the parties agreed that employees who submitted proper vacation requests would be allowed to receive their first choice of vacation, but that there was no agreement that vacations would have to start on the first day of the workweek.

In the absence of agreement between the Parties, the Organization argues that the Carrier violated the Agreement. Its position is that there is no language in the Agreement authorizing the Carrier to require vacation periods to begin on the first day of the workweek. It argues that each calendar year employees are entitled to vacation on any date from January 1 through December 31 in periods of five days, ten days, 15 days, 20 days and 25 days depending on their number of qualifying years. It cites the following language in Appendix A of the Agreement.

> "4. A. Vacations may be taken from January 1st to December 31st and due regard consistent with requirements of service shall be given to the desires and preferences of the employes in seniority order when fixing the dates for their vacations.
>
> The Local committee of each organization signatory hereto, and the representatives of the Carrier will cooperate in assigning vacation dates."

The Organization further asserts that the Carrier provided no evidence as to how seniority or the requirements of the service necessitate a change in the Claimant's first choice or how the Claimant's request impaired the requirements of the service.

The Carrier asserts that the term "workweek" means a week beginning on the first day the assignment is bulletined to work. The Carrier argues that "logically" vacations would begin on the first day of the assigned workweek. During bargaining each party may have a "logical" argument on its side for many topics. Resolution of this claim by the Board, however, rests on contract interpretation – what the parties contracted for or agreed to do – not on the logic proffered by a party for any particular issue.

The Organization agrees with the Carrier that a week of vacation corresponds to a week of work. However, it argues that a week of work is five days

regardless of whether the Carrier schedules it to start on a Monday or on any other day. Therefore, a week of vacation corresponds to five days of work.

The Organization asserts that a workweek which the Carrier starts on Tuesday, for example, is five days. The work days are Tuesday, Wednesday, Thursday, Friday, and Saturday. Sunday and Monday are rest days, not work days. An employee assigned a workweek beginning on Tuesday who takes that week as vacation takes off Tuesday, Wednesday, Thursday, Friday and Saturday as vacation. In such a situation, Sunday and Monday are not vacation days. They remain rest days. The employee in this example would be authorized to be absent from the property for all seven days – five vacation days and two rest days.

The Carrier argues that the term "workweek" means a week beginning on the first day the assignment is bulletined to work. This may or may not be a correct interpretation of the term "workweek," however it is not the issue raised by this claim. The issue raised by this claim is whether in the Agreement the parties agreed that vacations can only start on a Monday or on the first day of the workweek and whether, in the absence of an agreement in the cooperative telephone conference the Carrier's decision to enforce a first-day-of-the week vacation Rule was a violation of the Agreement.

In other words, does Appendix A, Section 4 of the 1941 Vacation Agreement cited above authorize the Carrier to enforce a policy that vacations will only start on the first day of the workweek? The Agreement is silent on that topic. No mutually acceptable arrangement was arrived at in bargaining for the Agreement or in the December 9, 2003 telephone conference aimed at cooperation between the parties in assigning vacation days. During the telephone conference, the parties discussed vacation scheduling, but came to no agreement on the issue raised by this claim. The Carrier made a final decision and a claim was filed.

Evidence in the record indicates that employee choices are to be considered by the Carrier on the basis of seniority. The Claimant was entitled to 25 vacation days in 2004. The Carrier could have defended its actions by providing evidence that it gave away the days requested by the Claimant to a more senior employee, but the Carrier provided no such evidence. There was no attempt to show that rejection of the Claimant's request was due to his being "bumped" by the choice made by an individual with greater seniority than the Claimant.

The Carrier asserts that in addition to seniority, it has the right to schedule vacations "consistent with the requirements of service." The Board concludes that the Carrier may consider the needs of the service when scheduling vacations in order to have proper coverage on critical jobs. In its Submission, the Carrier did not defend its revision of the Claimant's vacation choice by providing evidence of requirements of the service, nor did it provide evidentiary support for its written argument to the Board that allowing employees to start vacations on Tuesdays would result in "chaos" when the Carrier was scheduling filling positions and in filling relief replacements.

The Board finds that, in the absence of a showing by the Carrier that its action is consistent with the requirements of the service, it cannot, under the language of the Agreement, exclude any given day, or period from the vacation schedule.

The Carrier asserts that enforcement of a policy that vacations can start only on the first day of an assignment would result in more employees working. Even if this is accepted as true for the sake of considering the Carrier's argument, it is not supported by language from the Agreement; and none was offered in support. The Organization may welcome the Carrier's attempts to put more of the Organization's members to work, but the topic at issue is vacation start days, not full employment.

Among materials submitted by the Carrier to the Board is a document entitled "Vacation Scheduling Questions and Answers." It is intended for use in scheduling splits of 2002 vacation days. It indicated that vacation must be taken in units of one or more whole weeks; however, five days of vacation may be taken one day at a time as personal floater days. It indicates that vacation choices are granted based on seniority.

Attached to the Carrier's Submission are calendars for 2002, 2003, and 2004 and a sample form illustrating for employees how to list their alternative requests for each of those years. Using the example of "J. A. Doe," the Carrier's sample form for 2002 has hypothetical employee J. A. Doe making 38 different requests for vacation splits. There is a column entitled "Monday Begin Date." Most of the 38 choices handwritten in this column by the Carrier begin on Mondays, however, six choices – numbers 21, 22, 26, 27, 28 and 29 – pick splits beginning on November 4,

November 11, November 18 and November 25 – each of which is a Friday. The Board finds that the Carrier's documents indicate that it contemplates five-day units of vacation starting on days other than the first work day of an assignment.

The Carrier raised the language in Appendix A of the 1954 Vacation Agreement which states:

> "An employee's vacation period will not be extended by reason of any of the eleven recognized holidays . . . falling within his vacation period."

A careful review of this language in the Agreement indicates that the sentence refers to an employee's "vacation period" rather than to the employee's "time off" or "consecutive days off work." An employee who takes vacation for five consecutive days where the holiday falls within the five days is not entitled to collect a sixth day off by having the holiday bump or extend the first and last days of vacation to be farther apart. This would be extending the vacation period.

Over time, the parties have carefully defined terms including "rest days," "holidays," "vacation days," and "within his vacation period." Examples of how this language can be applied are as follows:

Example 1: An employee who takes five vacation days beginning on a Wednesday and who has two rest days on Saturday and Sunday can be away from work for seven consecutive days, two of which are rest days and five of which are vacation days.

Example 2: Likewise, an employee who takes five vacation days beginning on a Monday and has two rest days on Saturday and Sunday can be away from work for an extended period of nine consecutive days, four of which are rest days and five of which are vacation days. These rest days do not extend the vacation period beyond five days. Starting the vacation on Monday instead of Wednesday in order to take advantage of both sets of rest days provides nine consecutive days away from work, but does not extend the number of vacation days beyond five. Friends and family members who are not familiar with collective bargaining agreements may state colloquially that the railroader is "on vacation" for an extended period of nine

days, but the Carrier did not increase the number of vacation days to which the employee was originally entitled.

Example 3: An employee who takes five vacation days beginning on a Monday where Monday is a holiday and who has two rest days on Saturday and Sunday can be away from work for an extended period of nine consecutive days, four of which are rest days and five of which are vacation days. These rest days plus the holiday within the five days do not extend the vacation period beyond five days. Starting the vacation on Monday, the holiday provides only nine consecutive days away from work and does not extend the number of vacation days beyond five.

Example 4: An employee who takes five vacation days beginning on a Tuesday where Monday is a holiday and who has two rest days on Saturday and Sunday can be away from work for ten consecutive days, four of which are rest days, one of which is a holiday and five of which are vacation days. These rest days and the holiday do not extend the period allocated to vacation beyond five days. Starting the vacation on Tuesday, the holiday provides ten consecutive days away from work, but does not extend the number of vacation days beyond five. The Board points out that in this example the holiday day after a holiday does not fall "within" the vacation period. Instead, it falls just prior to the start of the vacation period.

As a consequence, the Board concludes that the above portion of the Agreement does not require or prohibit the Claimant from selecting vacation days where a holiday falls within them or outside them or is next to them.

No matter how logical and desirable the Carrier-advocated "first day of the workweek" policy may be from the Carrier's view point, it cannot be adopted unilaterally, but must be the subject of negotiation between the parties before it can be applied on the property. The Board finds that it was not mutually agreed to but was applied by the Carrier, thus violating the Agreement. Based on the evidence in the record, the Organization carried its burden of proof and the Carrier's first-day-of the-week defense was not persuasively established. The Board concludes that the Agreement has been violated and the claim is sustained.

AWARD

Claim sustained.

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 15th day of January 2010.