Award No. 2205
Docket No. 2077
2-T&NO-CM-'56

NATIONAL RAILROAD ADJUSTMENT BOARD

SECOND DIVISION

The Second Division consisted of the regular members and in addition Referee Adolph E. Wenke when the award was rendered.

PARTIES TO DISPUTE:

SYSTEM FEDERATION NO. 162, RAILWAY EMPLOYES' DEPARTMENT, A. F. of L.—Carmen

SOUTHERN PACIFIC LINES IN TEXAS AND LOUISIANA (Texas and New Orleans Railroad Company)

DISPUTE: CLAIM OF EMPLOYES:

1. That under the current agreement Carman T. L. Duhon was improperly compensated at the straight time rate for service performed on November 12 and 17, 1954.

2. That accordingly the Carrier be ordered to compensate the aforesaid Carman additionally in the amount of four (4) hours' pay at the straight time rate for each of the above dates.

EMPLOYES' STATEMENT OF FACTS: Carman T. L. Duhon, hereinafter referred to as the claimant, regularly assigned on the repair track, Lake Charles, Louisiana, from 7:30 A. M., to 3:30 P. M., was instructed on Friday, November 12, 1954, by the foreman to report for work on the 3:30 P. M., to 11:30 P. M., to fill in for Car Inspector J. R. Doucett while he was off on his earned vacation. The claimant returned to his regular assigned position on the 7:30 A. M., to 3:30 P. M., shift on Wednesday, November 17, 1954.

The carrier has declined to adjust this dispute on a basis satisfactory to the employes.

The agreement effective September 1, 1949, as subsequently amended is controlling.

POSITION OF EMPLOYES: It is submitted that when the claimant changed from working his regular assigned shift hours of 7:30 A. M., to 3:30 P. M., to the shift hours of 3:30 P. M., to 11:30 P. M., on Friday, November 12, 1954, in compliance with the instructions of the foreman, he was entitled to be compensated for the hours 3:30 P. M., to 11:30 P. M., on Friday, November 12, under the clear and unambiguous provisions of Rule 10, which reads as follows:

CONCLUSIONS

Carrier submits that its position in the instant dispute is well founded and that the claim should in all things be denied on bases hereinbefore detailed and as summarized below:

1. The claim is predicated on a situation of one employe having been granted a paid vacation and of another employe, claimant herein, having worked the resulting vacation assignment pursuant to provisions of the vacation agreement and, therefore, that agreement, being complete in its coverage of the subject of vacations and filling of vacation assignments, is controlling. The vacation agreement provides no penalty overtime when a vacation assignment is filled but to the contrary expressly negates the intention that any penalty will be assessed. Accordingly, the claim is contrary to the letter and intent of the vacation agreement and without merit.

2. The agreement provision allegedly relied upon by the organization, viz., first paragraph of Rule 10 of the shop crafts agreement, was written many years prior to provisions of the vacation agreement covering paid vacations and the filling of vacation assignments and, therefore, can not reasonably be contended as having been intended to apply to vacation assignments. Moreover, formal interpretation by Referee Morse to the effect that the penalty provision as contained in Rule 10 (shop crafts agreement) has no application to vacation assignments has always been controlling on the T&NO by reason of and as evidenced by (a) Article 14 of the vacation agreement and the additional stipulation by joint committee authorized thereunder when they submitted the identical question of the instant case to Referee Morse for decision (b) the affirmative act of the carmen's organization in abandoning claim in the Broussard case from T&NO property and in claiming no penalty overtime when vacation assignment was filled in the case of Carman O. F. Rogers disposed of by Award 1259, Second Division, and (c) by expressed positive statement of the carmen's general chairman in progressing the Migl claim. The organization's alleged supporting rule having no application to the vacation situation in the instant case, the claim is without merit.

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

The carrier or carriers and the employe or employes involved in this dispute are respectively carrier and employe 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.

The parties to said dispute were given due notice of hearing thereon.

This claim is made in behalf of Carman T. L. Duhon under Rule 10 of the parties' agreement effective September 1, 1949. It is contended that on November 12 and 17, 1954 claimant was paid at the applicable straight time rate for the services he rendered when, under the provision of Rule 10, he should have been paid at the overtime rate. Consequently the claim is here made that there is owing claimant an additional four (4) hours' pay on each of these two days at the applicable straight time rate.

Claimant was assigned to duty on carrier's repair track at Lake Charles, Louisiana. On Friday, November 12, 1954, claimant was used to fill a temporary vacancy on a position occupied by Car Inspector J. R. Doucett while the latter was off on vacation, claimant returning to his regular assignment on Wednesday, November 17, 1954.

Rule 10 of the parties' agreement, which was in effect when the National Vacation Agreement was entered into, provides, insofar as here material, that "Employes changed from one shift to another will be paid

overtime rates for the first shift of each change. Employes working two shifts or more on a new shift shall be considered transferred." Unless the National Vacation agreement, to which the carrier and organization here involved are parties, and Referee Wayne L. Morse's interpretation thereof are here controlling and create an exception thereto Rule 10 would require the claim to be sustained.

There are three articles of the National Vacation Agreement which we think are sufficiently related to the issue here involved that we shall hereinafter set them out in full. They are Articles 12(a), 13 and 14, and are as follows:

> "12(a) Except as otherwise provided in this agreement a carrier shall not be required to assume greater expense because of granting a vacation than would be incurred if an employe were not granted a vacation and was paid in lieu therefor under the provision hereof. However, if a relief worker necessarily is put to substantial extra expense over and above that which the regular employe on vacation would incur if he had remained on the job, the relief worker shall be compensated in accordance with existing relief rules."
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> "13. The parties hereto having in mind conditions which exist or may arise on individual carriers in making provisions for vacations with pay agree that the duly authorized representatives of the employes, who are parties to one agreement, and the proper officer of the carrier may make changes in working rules or enter into additional written understandings to implement the purposes of this agreement, provided that such changes or understandings shall not be inconsistent with this agreement."
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> "14. Any dispute or controversy arising out of the interpretation or application of any of the provisions of this agreement shall be referred for decision to a committee, the carrier members of which shall be the Carriers' Conference Committees signatory hereto, or their successors; and the employe members of which shall be the Chief Executives of the Fourteen Organizations, or their representatives, or their successors. Interpretations or applications agreed upon by the carrier members and employe members of such committee shall be final and binding upon the parties to such dispute or controversy.
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> This section is not intended by the parties as a waiver of any of their rights provided in the Railway Labor Act as amended, in the event committee provided in this section fails to dispose of any dispute or controversy."

In view of these provisions we think the vacation agreement is self executing only as to matters covered by it which are not covered by any rule or rules in the parties' schedule agreements, but when the subject is covered by the schedule agreements that then the National Vacation Agreement is ineffective until such time as it has been made effective in the manner provided therefor and outlined in Article 13 thereof: That is, all schedule agreement rules remained in force and effect after the execution of the vacation agreement and, in the absence of negotiated changes, are to be enforced according to their terms. See Awards 1514, 1806 and 1807 of this division and 2340, 2484, 2537, 2720, 3022, 3733 and 5717 of the Third Division.

Many controversies arose over the interpretation and application of the vacation agreement which the committee created by Article 14 was not able to agree upon. As a result these were submitted to Wayne L. Morse as referee with an agreed to understanding that his decision upon the issues submitted to him should be final and binding. These issues included one involving schedule rules with respect to changing shifts, the identical question here presented. It was framed in the following language:

"(b) A shop craft employe on the third shift is allowed a 6 day vacation. It is necessary to fill his position and an employe is transferred from the second shift. The transferred employe claims that schedule rules with respect to changing shifts and doubling over apply to filling vacation vacancies and claims time and one-half for the first shift he works in filling the vacationing employe's position, and time and one-half for the first shift he works upon return to his position. It is the carriers' position that these punitive payments are not required."

In presenting their views to the referee the organizations' spokesmen said they were appearing in order to get the vacation agreement itself interpreted and not to strike down any rules in schedule agreements. That if, as a result of such interpretations, carriers would want to change the schedule rules of any agreement to comply therewith they would be required to seek such change in accordance with Article 13 of the Railway Labor Act. Spokesmen for the carriers likewise contended they were appearing before the referee in order to get the vacation agreement itself interpreted but contended that such interpretations of the vacation agreement could be and should be applied without the necessity of going back on the properties and making new agreements in order to apply them.

However, spokesmen for the carriers requested the referee, in any event, to lay down a yardstick or general framework by his interpretations which would give to the people back on the properties some standards upon which they could negotiate and make supplemental agreements, if it should be determined such were necessary.

That the referee fully understood that his authority was limited to interpreting the vacation agreement is evidenced by the following quotes taken from his report. At page 71 thereof he stated:

"It is the duty of the referee to interpret and apply the vacation agreement in accordance with the meaning of its language, and if that results in a conflict with some working rule about which the referee was uniformed, then it is up to the parties to adjust the matter through the machinery for negotiations as provided for in Sections 13 and 14 of the agreement. However, the referee has no power to force the parties to make such adjustments in their rules, no matter how fair and reasonable such adjustments would be."

And again, on page 87, he said:

"* * * the submission agreement which defines and limits the jurisdiction of the referee in this case gives him no power to modify working rules either by express amendment or by way of interpretation. This referee does not propose to exceed his jurisdiction, at least knowingly and intentionally."

However, in answering the question hereinbefore set forth the referee did not follow the admonition he had given to himself for he answered the question put to him as follows:

"It is the referee's opinion that the carriers' position on this illustration is absolutely sound and within the meaning and intent of the vacation agreement. It is his view that under Article 12(b) the vacancy created by an employe going on vacation does not constitute such a vacancy as to entitle a relief worker to punitive payments. The referee submits that the employes' position on this illustration is a good example of a strained and highly technical interpretation of existing working rules. He is convinced that it was not the intent of the parties, nor is it reasonable to assume that they could have intended, that when a carrier grants an employe a vacation and his job is such that it must be filled with a relief worker,

an additional cost of overtime pay must be incurred for the first shift."

By his answer it is clear the referee held that when employes are used to fill temporary vacancies caused by other employes being off on vacation that the changing shifts rule contained in schedule agreements does not apply. In other words, the referee held that in such instances the employes used were not covered by the schedule rule involving change of shifts but excepted therefrom.

Under this situation the holding created an uncertainty as to just what the carrier should do. Should it follow the specific holding on the subject involved in the question, or should it follow what the referee had said about the extent of his authority and the necessity for negotiating such exception. Certainly the two different holdings of the referee were inconsistent and created an uncertain and ambiguous situation. In view of this ambiguity we must necessarily look to the practice which the parties either acquiesced in or accepted as indicating what they understood Referee Morse's interpretation to mean. See Award 1735 of this Division.

The carrier put into practice the specific holding of the referee dealing with the subject matter here involved. For about twelve (12) years the organization, without objection, accepted such application of the referee's interpretation and, in fact, in many instances took the same position. We think, in view of this long period of acceptance by the organization of the referee's interpretation that it is now estopped from claiming the referee had no authority to make it.

As stated in Third Division Award 1645: "Having stood by for nine years (here 12), with full knowledge of the facts, without protesting the arrangement the organization should not now be allowed to assert a claim for violation of the agreement."

There is a further reason why, since August 21, 1954, the position of the organization cannot be sustained. As of that date the parties here involved joined in a National Agreement making certain changes in the vacation agreement of December 17, 1941, and the supplements thereto. In Article I, Section 6 thereof it provides that: "* * * the said (vacation) agreement and the interpretation thereof and of the Supplemental Agreement of February 23, 1945, as made by the parties, * * * and by Referee Morse in his award of November 12, 1942, shall remain in full force and effect." If Referee Morse lacked authority to make the interpretation that he did at the time he made it this provision certainly supplies any such lack. We think, by agreeing to keep this interpretation in force and effect, the requirements of Article 13 of the vacation agreement are fully met and complied with.

In view of what we have hereinbefore said we think carrier properly paid claimant and that his claim for additional compensation is without merit.

AWARD

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of SECOND DIVISION

ATTEST: Harry J. Sassaman
Executive Secretary

Dated at Chicago, Illinois, this 3rd day of August, 1956.

DISSENT OF LABOR MEMBERS TO AWARD No. 2205

The majority correctly found that "Rule 10 of the parties' agreement, which was in effect when the National Vacation Agreement was entered into, provides, insofar as here material, that: 'Employes changed from one shift to another, will be paid overtime rates for the first shift of each change. Employes working two shifts or more on a new shift shall be considered transferred.'" The majority asserts that "Unless the National Vacation Agreement, to which the carrier and organization here involved are parties, and Referee Wayne L. Morse's interpretations thereof are here controlling and create an exception thereto Rule 10 would require a sustained award for . . . claimant did, in each instance, make a change of shifts within the meaning of the rule as evidenced by the agreed to interpretations thereof."

The majority rightly asserts that ". . . the vacation agreement is self executing only as to matters covered by it which are not covered by any rule or rules in the parties thereto schedule agreements but if the subject is covered by the schedule agreements then the vacation agreement is ineffective in regard thereto until such time as it has been made effective in the manner provided therefor and outlined in Article 13 . . ." The awards cited by the majority (1514, 1806, and 1807 of the Second Division and 2340, 2484, 2537, 2720, 3022, 3733 and 5717 of the Third Division) all adhere to such a holding, having held that "all schedule agreement rules remain in force after the execution of the vacation agreement and, in the absence of negotiated changes, they are to be enforced according to their terms."

The majority points out that "In presenting their views to the referee (Referee Morse) the organizations' spokesmen said they were appearing in order to get the vacation agreement itself interpreted and not to strike down any rules in schedule agreements. That is, as a result of such interpretations, carriers would want to change the schedule rules of any agreement to comply therewith they would be required to seek such change in accordance with Article 13 of the Railway Labor Act . . ."

The majority even quotes the following from the referee's report to show that he understood that his authority was limited to interpreting the vacation agreement:

> "It is the duty of the referee to interpret and apply the vacation agreement in accordance with the meaning of its language, and if that results in a conflict with some working rule about which the referee was uninformed, then it is up to the parties to adjust the matter through the machinery for negotiations as provided for in Sections 13 and 14 of the agreement. However, the referee has no power to force the parties to make such adjustments in their rules, no matter how fair and reasonable such adjustments would be."

and also:

> "* * * the submission agreement which defines and limits the jurisdiction of the referee in this case gives him no power to modify working rules either by express amendment or by way of interpretation. This referee does not propose to exceed his jurisdiction, at least knowingly and intentionally."

In view of the foregoing, and the fact that it is held in all awards cited by the majority that "all schedule agreement rules remain in force after the execution of the vacation agreement, and, in the absence of negotiated changes, they are to be enforced according to their terms," it is impossible to understand the holding of the majority in the present instance to the effect that the interpretation of the Vacation Agreement takes precedence over conflicting schedule rules. Award 3022, cited by the majority, held that the rules of the schedule agreement should prevail over provisions of the Vacation Agreement as interpreted by Referee Morse.

In Award 3795 of the Third Division the author of the instant award called attention to Award 3022 and stated "We find that holding to be correct."

The implication of the majority in the instant award that the organization claims that Referee Morse had no authority to interpret the vacation agreement is not in accord with the facts. The organization contends only that the vacation agreement and interpretations do not take precedence over the rules of the schedule agreement.

The instant position of the majority with reference to practice constituting the construction of the agreement between the parties is not meritorious. As has been repeatedly held, practice will not change a plain unambiguous rule—such as Rule 10 of the schedule agreement.

The majority's statement that "There is a further reason why, since August 31, 1954, the position of the organization cannot be sustained. As of that date the parties here involved joined in a National Agreement making certain changes in the vacation agreement of December 1941, and the supplements thereto . . ." ignores the very pertinent fact that no change was negotiated insofar as Rule 10 of the schedule agreement is concerned.

The erroneousness of the majority's conclusion that "by agreeing to keep this interpretation (Referee Morse's interpretation) in force and effect, the requirements of Article 13 of the vacation agreement are fully met and complied with" is evidenced by the fact that no change has been negotiated in Rule 10 of the schedule agreement. Since no change has been negotiated in Rule 10 of the schedule agreement, Rule 10 controls in the instant case and the claim of the employes should have been sustained. We must dissent from the erroneous conclusion and award of the majority in Award 2205.

Charles E. Goodlin
R. W. Blake
T. E. Losey
Edward W. Wiesner
George Wright