Award No. 2230
Docket No. 1952
2-AT&SF-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 renderd.

PARTIES TO DISPUTE:

SYSTEM FEDERATION NO. 97, RAILWAY EMPLOYES' DEPARTMENT, A. F. of L. (Carmen)

THE ATCHISON, TOPEKA & SANTA FE RAILWAY COMPANY (Western Lines)

DISPUTE: CLAIM OF EMPLOYES: 1. That under the current agreement Carman A. T. Boese was improperly compensated at the straight time rate for his services performed due to having been changed from working on one shift to working on another shift on October 7th and 18th, 1954 respectively.

2. That accordingly the Carrier be ordered to additionally compensate this employe at the overtime rates on the aforesaid dates.

EMPLOYES' STATEMENT OF FACTS: Carman A. T. Boese, hereinafter referred to as the claimant, was regularly employed by The Atchison, Topeka and Santa Fe Railway System, hereinafter called the carrier, bulletined and assigned to work on the repair tracks at Hutchinson, Kansas, from 8:00 A. M. to 12:00 Noon and from 1:00 P. M. to 5:00 P. M. Mondays through Fridays, with rest days Saturday and Sunday.

Carman C. I. Teter was regularly employed, bulletined and assigned as follows:

1. At car repairing on the repair track form 8:00 A. M. to 5:00 P. M. on Wednesdays of each week.

2. As Car Inspector in the train yard from 12:00 midnight to 8:00 A. M. on Thursday, Firday, Saturday and Sunday each week.

3. With rest days Monday and Tuesday of each week.

4. To an annual vacation beginning Wednesday at 12:00 Midnight, October 6, and which ended on Monday at 8:00 A. M., October 18, 1954.

The claimant was assigned to begin filling the position of Carman Teter

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 A. T. Boese under Rule 12 of the parties' agreement effective August 1, 1945. It is contended that on October 7 and 18, 1954 claimant was paid at the applicable straight time rate for the services he rendered thereon when, under the provisions of Rule 12, he should have been paid at overtime rate. Consequently it is claimed there is owing claimant an additional four (4) hours of pay on each of these two (2) days at the applicable straight time rate.

Claimant was regularly employed by carrier on its repair tracks at Hutchinson, Kansas. He was used to fill a vacancy on the position held by Carman C. I. Teter while Teter was off on a ten (10) day vacation. He started on this vacation relief assignment at midnight on Thursday, October 7, 1954, returning to his own position on Monday, October 18, 1954. On each of these two (2) days claimant was paid for the services he performed at the applicable straight time rate.

Rule 12, insofar as here material, provides:

> "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. * * *."

This carrier was not a party to the National Vacation Agreement of December 17, 1941, but did, on March 2, 1942, enter into an agreement with the employes here involved which was patterned after and sought to conform to the National Agreement. Rule 10(a) thereof was the same, in effect, as 12(a) of the National Agreement. Subsequently, by item (29) of Appendix "B" of the General Agreement effective August 1, 1945, the parties substituted the National Vacation Agreement dated December 17, 1941 and the supplemental agreement of February 23, 1945, subject to authoritative interpretations theretofore placed thereon, in place of the March 2, 1942 agreement.

For about ten (10) years after a Vacation Agreement came into operation on this carrier, and until claims were filed in 1952, it was the practice of carrier to pay straight time rates, as it still is, under all situations of this character and the organization was fully aware thereof but made no objection or protest to its doing so. On August 21, 1954, the parties herein involved became parties to the national Agreement which made certain changes in the Vacation Agreement and further provided in regard thereto, as far as here material, that:

> "Except to the extent that articles of the Vacation Agreement of December 17, 1941 are changed by this Agreement, the said agreement and the interpretations 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." Article I, Section 6.

Considered in the light of this background the dispute presents the identical questions that were presented in the dockets on which our Awards 2197 and 2205 are based. Consequently what was said and held therein is

here controllling. In view thereof we find the claim here made to be 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 17th day of September, 1956.

DISSENT OF LABOR MEMBERS TO AWARD No. 2230

It is true that this carrier was not a party to the National Vacation Agreement of December 17, 1941 until August 1, 1945, at which time it substituted the National Vacation Agreement for the Memorandum of Agreement dated March 2nd, 1942 and the supplemental Agreement of February 23, 1945; however, the majority in the instant case overlooked the fact that the substitution aforementioned did not and could not change any rule in the schedule agreement until such time as a change might be negotiated. No change has been negotiated in Rule 12, which is the controlling rule in the instant case.

The majority intimates that the organization has conceded that the act of incorporating the vacation agreement in the schedule agreement had the effect of changing the schedule agreement rules. Such is not a fact and, as was pointed out in the findings in Award No. 1806, "That effect is guarded against in the vacation agreement itself and the interpretations thereto. By placing the vacation agreement in effect, existing schedule agreement provisions are protected by its very terms until such time as they are changed by negotiation."

There is no evidence in the record in the instant case to support the majority's finding that "For about ten (10) years after a Vacation Agreement came into operation on this carrier, and until claims were filed in 1952, it was the practice of carrier to pay straight time rates, as it still is, under all situations of this character and the organization was fully aware thereof but made no objection or protest to its doing so." Even though a record would show evidence of practice, and acquiescence in the practice, it has been repeatedly held that practice will not change a plain unambiguous rule—such as is Rule 12 of the instant schedule agreement.

The majority in referring to Referee Morse's award ignored the fact, as set forth in the employes' brief, that Referee Morse said:

> "The parties have provided in Article 13 for the procedure which is to be adopted in making any changes in the working rules. Hence, . . . the parties must be deemed to be bound by existing working rules until they negotiated changes in them by use of the collective-bargaining procedures set out in Article 13 . . ."

The principle is well established that where there is a conflict between the Vacation Agreement and existing working rules the terms and conditions of the Rules Agreement control until such time as they are modified or changed through the medium of negotiation. See Second Division Awards Nos. 1514, 1806, 1807, and Third Division Awards Nos. 3733 and 3795. In the latter award the instant referee stated "we think the folowing, as stated in Award 2340, correctly determines its (the Vacation Agreement's) status in relation to all rules agreements: 'it seems clear, therefore, that all rules agreements remain as before the execution of the Vacation Agreement, and that, in the absence of a negotiated change, they are to be enforced according to their terms.' "

We believe it is clear from the record in the instant case, as well as from a review of Referee Morse's interpretations, previous awards of the Second Division, and the findings of the instant referee in Third Division Award No. 3795 that the instant findings and award are erroneous.

George Wright

R. W. Blake

C. E. Goodlin

T. E. Losey

Edward W. Wiesner