Award No. 1806
Docket No. 1682
2-WAB-MA-'54

NATIONAL RAILROAD ADJUSTMENT BOARD

SECOND DIVISION

The Second Division consisted of the regular Members and in addition Referee Edward F. Carter when award was rendered.

PARTIES TO DISPUTE:

SYSTEM FEDERATION NO. 13, RAILWAY EMPLOYES' DEPARTMENT, A. F. of L. (Machinists)

WABASH RAILROAD COMPANY

DISPUTE: CLAIM OF EMPLOYEE: (1) That under the current agreement Machinist C. F. Cook was improperly compensated at the straight time rate for service performed on July 13th and 26th, 1953.

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

EMPLOYES' STATEMENT OF FACTS: C. F. Cook, hereinafter referred to as the claimant, is employed by the carrier at its Montpelier, Ohio roundhouse with a machinist helper seniority date of February 15, 1924. On or about April 16, 1953, the claimant was up-graded to a machinist under the terms of the memorandum of agreement effective March 1, 1943, and regularly assigned to the 3:00 P. M. to 11:00 P. M. shift as a machinist with a work week of Saturday through Wednesday and rest days of Thursday and Friday. On July 13, 1953 the claimant was instructed by the carrier to report for work on the 11:00 P. M. to 7:00 A. M. shift to fill in for Machinist F. O. Hillard while he was off on his annual earned vacation. The claimant returned to his assigned position on the 3:00 P. M. to 11:00 P. M. shift on July 26, 1953.

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

The agreement effective June 1, 1939, as subsequently amended, is controlling.

POSITION OF EMPLOYES: It is submitted that when the claimant changed from working his regular assigned shift hours of 3:00 P. M. to 11:00 P. M. to the shift hours of 11 P. M. to 7:00 A. M. on July 13, 1953 in compliance with the instructions of the carrier, he was entitled to be compensated for the hours 11:00 P. M. to 7:00 A. M. on July 13, 1953 under the clear and unambiguous provisions of Rule 10, reading in pertinent part and the interpretation thereto reading as follows:

(2) "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 payment."

(3) "The referee submits that the employe's position on this illustration is a good example of a strained and highly technical interpretation of existing working rules."

(4) "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 position is such that it must be filled with a relief worker, an additional cost of overtime pay must be incurred for the first shift."

It has been the practice of this carrier since the inception of the vacation agreement of December 17, 1941, to pay straight time to employes who are transferred from one shift to another to fill a vacation vacancy. There has been no contention on the part of the employes at any time prior to the instant case that overtime should be paid under these circumstances. Working for twelve years without protest under the carrier's construction of the vacation agreement indicates concurrence on the part of the employes.

In this connection, attention is directed to the fact that in 1952, F. Hillard (the filling of whose vacation vacancy in 1953 brought about this controversy) was entitled to ten (10) working days' vacation during the year 1952 and took his vacation during the period July 14, 1952, to July 25, 1952. At that time Hillard was regularly assigned to work 11:00 P. M. to 7:00 A. M. Monday through Friday, with Saturday and Sunday being assigned rest days. Edward Fritzinger, assigned as a machinist at Montpelier, Ohio enginehouse, Saturday through Wednesday, with Thursday and Friday being assigned rest days, worked his regular assignment 3:00 P. M. to 11:00 P. M. Sunday, July 13, 1952. Fritzinger was transferred from his regular assignment to work during Hillard's vacation period beginning Monday, July 14, 1952, and he worked the entire vacation period to and including Friday, July 25, 1952. Fritzinger returned to his regular assignment at 3:00 P. M. on Monday, July 28, 1952. Fritzinger was paid straight time for July 14 and 28, 1952, and the employes took no exception to this method of payment.

The contentions of the committee should be dismissed and the claim denied.

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.

Claimant is employed at the Montpelier, Ohio, roundhouse as a machinist. He was regularly assigned a work week of Saturday through Wednesday, 3:00 P. M. to 11:00 P. M., with Thursday and Friday as his rest days. On July 13, 1953, he was instructed to work on the 11:00 P. M. to 7:00 A. M. shift to fill the position of Machinist F. O. Hillard while he was on his annual vacation. He returned to his assigned position on July 26, 1953. Claimant contends that he is entitled to be paid the time and one-half rate on the days he was changed from one shift to another as provided by Rule 10, current agreement. Carrier contends that a denial of the claim is required by Rule 12 (a) of the Vacation Agreement of December 17, 1941, and the interpretation of Referee Wayne O. Morse made in connection therewith. That there is a conflict between the schedule agreement and the vacation agreement

is self evident. The dispute contains issues not heretofer decided by this Division and warrants a consideration of the relationship of the vacation agreement to the schedule agreement.

The granting of vacations with pay by agreement was an innovation brought into the railroad industry by the execution of the Vacation Agreement of December 17, 1941, which was an agreement made on the national level. It is evident that the parties signatory thereto intended that in consideration of the allowance of vacations with pay that cerain concessions would be made by the organizations relative to the rates of pay of those filling the positions of employes on vacations. Such concessions necessarily were in conflict to some extent with the rules in the schedule agreements on the different properties governing hours of service and working conditions. Much confusion resulted as to the proper rules to be applied with respect to vacancies created by employes on vacation, the retention or establishing of seniority rights, regular and temporary relief, rates of pay for double-overs and shift changes, particularly where regularly assigned employes were involved.

The carrier contends that the claim should be denied under Article 12 (a) Vacation Agreement, which provides:

> "Except as otherwise provided by this agreement a carrier will not be required to assume greater expense because of granting a vacation than would be incurred if an employee were not granted a vacation and was paid in lieu therefor under the provisions hereof.
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> * * *"

It is contended by the carrier that the foregoing provision of the Vacation Agreement supersedes Rule 10, current agreement, the agreement provision relied upon by the organization. Rule 10 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 should be considered transferred. This will not apply when shifts are exchanged at the request of the employes involved."

The organization argues that the vacation agreement is a self executing instrument and that it is in full force and effect except where direct conflict with schedule rules exist. In support of this contention, it relies on Article 13, Vacation Agreement, and the interpretations thereof by Referee Wayne O. Morse, it having been agreed by the contracting parties that the referee's decision upon the issues submitted should be final and binding.

Article 13, Vacation Agreement, provides:

> "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 employees, who are parties to one agreement, and the proper officer of the carrier may make changes in the 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."

The meaning to be given to Article 13 was discussed by Referee Morse in connection with his interpretation of several provisions of the Vacation Agreement. In his interpretation of Article 6, he said:

> "When the parties returned to Chicago and proceeded with their negotiations on vacations, which negotiations culminated in the Vacation Agreement of December 17, 1941, they well understood that existing rules agreements were applicable to the vacation plan unless modified in negotiations between them."

In his interpretation of Article 6, Referee Morse discussed the relation of schedule agreement rules to the vacation agreement. It is there stated:

> "Thus it is seen that it was not the intention of the Emergency Board that the vacation plan should be administered independently of existing working rules, but rather, that in those instances in which existing working rules if strictly applied would produce unjust results, they should be modified through the process of collective bargaining negotiations conducted between the parties."
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> 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 rules 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.
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> It was understood that the parties would work out between themselves such adjustments of their rules as might be necessary in order to carry out the purpose and intent of Article 6.
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> As stated before, they specifically provided for negotiation procedure in Article 13 of the agreement to accomplish that very purpose. If they have not conducted such negotiations, it is a job which still lies ahead of them. It is not a matter which falls within the powers and jurisdiction of this referee."

In his interpretation of Article 10, the referee stated:

> "The parties have provided in Article 13 for the procedure which is to be adopted in making any changes in the working rules. Hence, unless the referee can find that the vacation agreement itself constitutes a modification of some given working rule, the parties must be deemed to be bound by existing working rules until they negotiate changes in them by use of the collective bargaining procedures set out in Article 13."

In the referee's interpretation of Article 12, it was stated:

> "Articles 13 and 14 of the vacation agreement were proposed by the parties themselves, and it is to be assumed that the parties intended to use those articles in attempting to negotiate adjustments or settlements of differences arising between them over the application of existing working rules to the vacation agreement. At least the referee is satisfied, from the preponderance of the evidence in the record in this case, that the parties did not intend any blanket waiver or setting aside of existing rules agreements when they adopted the vacation agreement."

We point out that the interpretations are as binding upon the parties as the vacation agreement itself. It appears clear to us from the interpreations made by Referee Morse that schedule agreement rules prevail over conflicting provisions of the vacation agreement. Awards of this Board have consistently so held. See Awards 2340, 2484, 2537, 2720, 3022, Third Division; 1514, Second Division.

We adhere generally to the holdings of those awards. This necessarily means 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 urged, however, that there are issues raised in this case that were not before the Board when the awards we have cited were made. It is argued that the incorporation of that part of Rule 141, Memorandum of Agreement dated July 25, 1949, making the vacation agreement a part of the schedule agreement, has the effect of nullifying conflicting agreement rules. The part of the rule referred to reads as follows:

> "Vacation Agreement, signed at Chicago, Illinois, December 17, 1941, and Agreement supplemental thereto, signed at Chicago, Illinois, February 23, 1945, are hereby made a supplement to this Agreement, subject to the following modifications effective September 1, 1949: (The modifications conform the vacation agreement to the forty hour week agreement and are not pertinent to the issue before us)."

We think that the parties concede that the vacation agreement is in effect where they rely upon it. It matters not whether it is put in effect by special agreement, by incorporating it in schedule rules or by a mutual application of it by the parties. The mere act of incorporating it in the schedule agreement, as was done in this case, does not have the effect of changing schedule agreement rules. 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. We necessarily conclude that including the vacation agreement in the schedule agreement by reference does not have the effect of modifying or changing schedule agreement rules, a matter that is specifically dealt with in the vacation agreement. Its provisions are as valid after incorporation in the schedule agreement as they were before.

It is argued here that the question of penalty pay for changing shifts was specifically and finally decided by Referee Morse in his interpretation of Article 12, Vacation Agreement, wherein he said:

> "(b) A shop craft employee on the third shift is allowed a 6 day vacation. It is necessary to fill his position and an employee is transferred from the second shift. The transferred employee 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 employee's position, and time and one-half for the first shift he works upon return to his position. It is the carrier's position that these punitive payments are not required.
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> It is the referee's opinion that the carrier's position 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 employee going on vacation does not constitute such a vacancy as to entitle a relief worker to punitive payments. The referee submits that the employee's 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 employee 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."

The foregoing interpretation appears to be at variance with numerous statements of the referee in making interpretations of the vacation agreement, including those quoted in this opinion. We quite agree with Referee Morse that the interpretation made by him on the question posed is within the meaning and intent of the vacation agreement. But we point out that the example posed assumed that conflict exists between the vacation agreement and the schedule agreement rules. If this is not so, no reason could exist for asking a ruling on the example cited. In making the interpretation, the

existence of conflicting agreement provisions appears to have been completely overlooked or ignored. The interpretation was made solely with regard to the vacation agreement and, when considered in that light, it is consistent with many similar interpretations made by Referee Morse on this point. We do not overlook the fact that the interpretation is final and binding; but when interpretations of the same standing appear to be in conflict, they must be harmonized if it is at all possible to prevent rendering the agreement nugatory. It is clear to us that the language used in making this interpretation, as nebulous as it appears to be, dealt only with the meaning and intent of the vacation agreement and gave no consideration whatsoever to the assumed fact that conflict existed between the vacation agreement and schedule agreement rules. We are compelled to take the position that the interpretation is based solely on the facts recited by the referee in making it and not on those submitted to him in the posed example. So construed it is consistent with the other interpretations rendered and brings a semblance of order on a point where confusion previously existed. We think that we must assume that the referee intended to be consistent in his interpretations and, if one interpretation appears to be inconsistent with many others, the general meaning given affords a suitable guide to eliminate the resulting confusion. We conclude, therefore, that the last quoted interpretation is based solely on the vacation agreement and its application to the facts cited by the referee in making it. In other words, the issue decided by the referee was not the one presented to him for decision. It is not, therefore, a controlling interpretation as the carrier contends, in a case where a conflict exists between the vacation agreement and schedule agreement rules. We fully realize that the distinction made is somewhat technical; but it is none the less a valid one, and one that is necessary to harmonize the interpretations of the vacation agreement that appear to be in conflict.

It might be argued that the interpretation made would give the vacation agreement a different meaning as to shop craft employes because they were the employes referred to in the example used. This is only an incidental fact. The vacation agreement applies alike to all employes within its terms except when schedule agreement rules apply.

It was the intent of the vacation agreement, clearly expressed that carriers should not be required to assume greater expense because of granting a vacation than would be incurred if an employe was not granted a vacation and paid in lieu thereof. In the absence of a conflicting schedule rule, penalty pay for changing shifts could not be allowed. But in the case before us there was a conflicting schedule agreement rule. The intent and meaning of the vacation agreement never became effective in the present case for the reason that Rule 10 was never changed by negotiation to conform to the language of the vacation agreement.

The carrier asserts that it has been the practice for many years to pay only straight time in cases like the one before us. As we have repeatedly said, practice will not change a plain unambiguous rule although the acquiescence of the organization to the violation may operate as an estoppal as to past claims.

For the reasons stated, claimant is entitled to be paid pursuant to the provisions of Rule 10, current agreement.

AWARD

Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Second Division

ATTEST: Harry J. Sassaman
Executive Secretary

Dated at Chicago, Illinois, this 12th day of July, 1954.