Award No. 2083
Docket No. 1906
2-SP(PL)-CM-'56

# NATIONAL RAILROAD ADJUSTMENT BOARD

## SECOND DIVISION

The Second Division consisted of the regular members and in addition Referee David R. Douglass when the award was rendered.

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## PARTIES TO DISPUTE:

## SYSTEM FEDERATION NO. 114, RAILWAY EMPLOYES' DEPARTMENT, A. F. of L. (Carmen)

## SOUTHERN PACIFIC COMPANY (Pacific Lines)

**DISPUTE: CLAIM OF EMPLOYES:** 1. That under the current agreement Carman George A. Allen was improperly compensated for service performed from 11:30 P. M. April 21, 1954, to 7:30 A. M., April 22, 1954.

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

**EMPLOYES' STATEMENT OF FACTS:** George A. Allen, hereinafter referred to as the claimant, was employed by the Southern Pacific Company, hereinafter referred to as the carrier. The claimant was first employed as carman helper on September 1, 1949, and was upgraded to a carman on September 2, 1949, at carrier's car department repair track in Klamath Falls, Oregon. On April 21, 1954, claimant was employed on the first shift with hours 7:30 A. M. to 4:30 P. M., PST, with one hour off for lunch, Monday through Friday, Saturday and Sunday being his assigned rest days.

Car Inspector Jack Podawiltz was regularly assigned to work from 11:30 P. M. to 7:30 A. M. in train yard. On April 21, 1954, Car Inspector Jack Podawiltz began his annual vacation. The claimant was assigned to fill the position held by Car Inspector Jack Podawiltz during his vacation period, which began at 11:30 P. M., April 21, 1954, after working his regular 7:30 A. M. to 4:30 P. M. shift. The claimant was paid the straight time rate for work thereafter until the return to duty of Car Inspector Jack Podawiltz.

This dispute has been handled up to and with the highest carrier officer so designated by the company, with the result that he has declined to adjust it.

The agreement of April 16, 1942, as it has been subsequently amended, is controlling.

**POSITION OF EMPLOYES:** It is submitted that under General Rule 12, in pertinent part, reading:

since January 1942 under the provisions of the vacation agreement of December 17, 1941, and has been fully known and accepted by present as well previous representatives of the carmen's craft.

The petitioner is simply attempting to secure through an award of this Division a new agreement over and above that which was agreed to by the parties. Inasmuch as the petitioner's position cannot be sustained by any rule of the agreement, the carrier respectfully submits that within the meaning of the Railway Labor Act, the instant claim involves request for change in agreement, which is beyond the purview of this Board. To accept petitioner's position in this docket would be tantamount to writing into the agreement a provision which does not appear therein and was never intended by the parties.

## CONCLUSION

The carrier asserts that the claim in this docket is entirely lacking in either merit or agreement support; therefore, requests that said claim be 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 this dispute were given due notice of hearing thereon.

The question now before this Board has been passed on in Awards 1806 and 1807. The Second Division of the National Railroad Adjustment Board, as now constituted, concludes that an employe, changing shifts to fill the position of a vacationing employe, is not entitled to time and one-half for the first shift he works in filling said position, nor is he entitled to time and one-half for the first shift he works upon return to his position.

Rule 12 of the effective agreement, which was also in the agreement prior to the adoption of the Vacation Agreement of December 17, 1941, reads as follows:

"CHANGING SHIFTS

> Rule 12. 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 will not apply when shifts are changed in the exercise of seniority or exchanged at the request of the employes involved. This rule does not apply to employes on relief assignments."

The pertinent part of Article 12 (a) of the National Vacation Agreement of December 17, 1941 (to which this organization and this carrier were parties), reads:

> "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."

Article 13 of the Vacation Agreement of December 17, 1941 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 employes, 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."

Article 14 of the Vacation Agreement of December 17, 1941 is as follows:

"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.

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."

It is clear that the parties to the Vacation Agreement of December 17, 1941 recognized that there would arise conflicts between working agreement rules and the provisions of the Vacation Agreement. Such is evidenced by the machinery provided in Articles 13 and 14 of the Vacation Agreement.

The question which is now before us arose during the early part of 1942. The representatives of the carrier and the employes could not agree to the application of Article 12 (a) of the Vacation Agreement with respect to a Change of Shift Rule requiring payment of time and one-half; said Change of Shift Rule being a part of a Working Agreement in effect prior to and following the adoption of the Vacation Agreement. In order to solve this problem, the parties had two devices provided by the Vacation Agreement. They could have handled the question on the individual properties in accordance with Article 13. Bear in mind that Article 13, by its very wording, is a permissive provision. Article 13 provides that the parties MAY make changes in the working rules or enter into additional written understandings.

The parties' representatives chose not to handle the question on the basis of individual properties. Instead, it was decided to dispose of such question on a national level through the action of the committee provided by Article 14. The committee, being unable to resolve the question between themselves, requested the National Mediation Board to appoint a referee. Referee Wayne Morse was named to hear the question and to make an interpretation. The representatives of the parties to this instant case agreed, by jointly signed letter of July 20, 1942, that the decision of Referee Morse "shall be final and binding."

Referee Morse held that a working agreement rule providing for time and one-half pay for shift changes did not apply when such changes were made to fill the position of a paid vacationing employe. Referee Morse upheld the carriers' interpretation concerning the application of Article 12 (a) of the Vacation Agreement.

Thus was the issue settled. The interpretation of Referee Morse was, and is, just as binding as if the parties had negotiated directly and had written an interpretation without the aid of a referee.

Subsequent agreements between the parties have continued to recognize the interpretations to the December 17, 1941 Vacation Agreement and while

changes in that agreement have been made, the interpretations have been retainned.

AWARD

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of SECOND DIVISION

ATTEST: Harry J. Sassaman
Executive Secretary

Dated at Chicago, Illinois, this 13th day of March, 1956.

## DISSENT OF LABOR MEMBERS TO AWARDS NOS. 2083 AND 2084

The majority acknowledges that the subject matter of these disputes has been passed on in Second Division Awards 1806 and 1807 but then implies that the Second Division, as now constituted, holds a view opposite to that determined in Awards 1806 and 1807. The majority in an attempt to justify their conclusion "that an employe, changing shifts to fill the position of a vacationing employe, is not entitled to time and one-half for the first shift he works in filling said posititon, nor is he entitled to time and one-half for the first shift he works upon return to his position" ignore the well established principle 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.

In Second Division Awards 1806 and 1807 Referee Carter, sitting as a member of the Division, stated "It appears clear to us from the interpretations made by Referee Morse that schedule agreement rules prevail over conflicting provisions of the vacation agreement." Referee Carter calls attention to the fact that Awards of this Board have consistently so held. Referee Carter so held in Award 2340 of the Third Division.

Referee Wenke in Award 3795 of the Third Division states "we have again examined the Vacation Agreement, Interpretations dated July 20, 1942, and the Referee's Award of November 12, 1942, involving the interpretation and application thereof. While there may be single statements of the Referee which it might be said are contrary thereto, we think the following, as stated in Award 2340, correctly determines its 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 the terms.' " The records in the instant dockets disclose that there has been no negotiated change in the "changing shifts" rules.

We do not agree with the majority's finding that "Referee Morse held that a working agreement rule providing for time and one-half pay for shift changes did not apply when such changes were made to fill the position of a paid vacationing employe. Referee Morse upheld the carriers' interpretation concerning the application of Article 12(a) of the Vacation Agreement." This finding of the majority is contrary to the opinion of the Board in Award 3733 of the Third Division wherein Referee Swaim, sitting as a member, calls attention to the fact that Referee Morse did not uphold the carrier, saying (p. 98 of Vacation Agreement booklet):

> "As the Referee has stated elsewhere in this decision, throughout the negotiations which led up to the vacation agreement, it was definitely understood by the parties that the vacation plan should not 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 processes of collective bargaining negotiations conducted between the parties or if necessary through those procedures of the Railway Labor Act which provide for the settlement of disputes."

and also (p. 99):

"(5) That the provisions of existing working rules agreements as to relief workers are by implication a part of the vacation agreement, binding upon the parties except in so far as they are modified, changed, or waived as the result of negotiations conducted under Artictle 13."

It is clear from a review of the interpretations of Referee Morse that schedule rules prevail over conflicting provisions of the Vacation Agreement of December 17, 1941. That this is self evident is also shown not only by aforementioned awards of the Second and Third Divisions but also by the findings of Judge Parker in Second Division Award 1514; Referee Carter in Third Division Awards 2484, 3022, 3023, 3024, 3025, 3026, 3027, 3028, 3029, 3049; Referee Blake in Third Division Award 2537; Referee Tipton in Third Division Award 2720; Referee Connell in Award 4690 of the Third Division, Referee Smith in Third Division Award 5717, and Referee Donaldson in Third Division Award 5488.

Careful consideration of the interpretations of Referee Morse and the enumerated awards of the Second and Third Divisions discloses that Awards 2083 and 2084 are erroneous.

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