# Award No. 2084
# Docket No. 1912
# 2-MP-CM-'56

## NATIONAL RAILROAD ADJUSTMENT BOARD

## SECOND DIVISION

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

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## PARTIES TO DISPUTE:

## SYSTEM FEDERATION NO. 2, RAILWAY EMPLOYES' DEPARTMENT, A. F. of L. (Carmen)

## MISSOURI PACIFIC RAILROAD COMPANY

**DISPUTE: CLAIM OF EMPLOYES:** 1. That under the current agreement Carman R. L. McManus was improperly compensated at straight time rate for service performed on August 13, 1953.

2. That accordingly the Carrier be ordered to compensate the aforesaid Carman additionally the difference between the straight time rate paid and the time and one-half rate for 7 hours and 15 minutes, the period from 3:45 P. M. to 11:00 P. M., August 13, 1953.

**EMPLOYES' STATEMENT OF FACTS:** R. L. McManus, hereinafter referred to as the claimant, is employed at Alexandria, Louisiana, on the repair track, regularly assigned from 7:15 A. M. to 12:00 Noon, and from 12:00 Noon to 3:45 P. M., Monday through Friday, with rest days of Saturday and Sunday.

After completing his assignment on the repair track on August 13, 1953, he was instructed by the carrier to work on the 3:00 P. M. to 11:00 P. M. shift on that date in place of Car Inspector W. J. Lemoine, who was off on his annual earned vacation. The claimant filled the position while Lemoine was on vacation.

The dispute was handled with carrier officials designated to handle such affairs who all declined to adjust the matter.

**POSITION OF EMPLOYES:** It is submitted that when the claimant doubled over after working his regular assignment to fill the position of Car Inspector W. J. Lemoine, who was off on his annual earned vacation, he was entitled to be compensated for such hours at the time and one-half rate under Rule 10 which reads as follows:

> "Rule 10. Employes changed from one shift to another will be paid overtime rates for the first shift of each change. This will not apply when returning to their regular shift nor when shifts are exchanged at the request of the employes involved or in the exercise of their seniority rights."

and the interpretation of Rule 10, which is submitted herewith and identified as Exhibit A.

page 101, also quoted in paragraph 15 of the carrier's statement of facts, has been in full force and effect on this property ever since Referee Morse made his award. Before that and subsequent to the adoption of vacation agreement, employes on this property were paid in exactly the same manner as suggested by Referee Morse so that the award had the effect of confirming the fact that the then current practice was correct. It is because this interpretation has been in full force and effect since November 12, 1942, and because claimant was paid in accordance with that interpretation that the employes have come to your Board asking you to change the rule through a decision by your Board. The August 21, 1954, agreement in no uncertain terms requires that the interpretations by Referee Morse remain in full force and effect. That interpretation clearly requires a denial of this claim.

On this property, if the interpretation by Referee Morse is to remain in full force and effect, Awards 1806 and 1807 must be ignored. The emphatic provision in August 21, 1954, agreement is convincing proof that the employes approve of the interpretations by Referee Morse and that they wish for the carriers to comply with such interpretations. But in this one instance, where Referee Morse did not give them all that was desired, a means to escape the effect of the interpretation is desperately sought after. The employes should not be permitted to take the favorable part and exclude the unfavorable but should be required to live up to the whole agreement. The desire of the employes that the interpretation by Referee Morse remain in full force and effect reveals clearly that the employes understand and agree that the vacation agreement is to amend or supersede any conflicting provisions in the basic agreement. The practice on this property under circumstances similar to the facts in the instant case for these 14 years has been in accordance with this recent expression of the desires of the employes. No reason exists for changing this practice.

The vacation agreement itself was and is of tremendous benefit to the employes and Referee Morse resolved many disputes between the carriers and their employes over the meaning of the then new agreement is a manner very favorable to the employes. It is not suprising to find the employes insisting upon retention of these benefits. But in this instance, which is one of the few times, Referee Morse in resolving a dispute decided that the carrier's interpretation on this one point was correct. Under the above quoted language the employes do not have the option of taking the interpretations by Referee Morse which are favorable to them and rejecting those which are unfavorable out both sides have renewed the commitment to be bound by all the decisions made by Referee Morse.

Referee Morse's interpretation as demonstrated above is susceptible of only one interpretation. The illustration presented is identical to the facts in this claim. Your Board does not have the authority to write a new rule for the parties, but only has the authority to interpret the agreement between the parties. See Section 3 First (i) of the Railway Labor Act. The intent of Article 12 of the vacation agreement has been made clear by interpretation of a referee, and that interpretation requires a denial of this award. Since it is the duty of your Board to decide the dispute in accordance with the agreement, it follows that this claim must 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.

What we said in our Award No. 2083, (Docket No. 1906) likewise applies to the instant case.

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 position, nor is he entitled to time and one-half for the first shift he works upon returning 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 Divsion, 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. Refereé 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 Agreeement, 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 Article 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**