Award No. 2197
Docket No. 2040
2-WAB-MA-'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. 13, RAILWAY EMPLOYES' DEPARTMENT, A. F. of L. (Machinists)

WABASH RAILROAD COMPANY

DISPUTE: CLAIM OF EMPLOYES: (1) That under the current agreement the Carrier improperly compensated Machinist C. F. Cook at straight time hourly rate for service performed on September 27, 1954 and October 16, 1954.

(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 seniority date of May 9, 1954, and is regularly assigned to the 3:00 P. M.—11:00 P. M. shift as a machinist with a work week Saturday through Wednesday, rest days Thursday and Friday. The claimant was instructed, by the carrier, to report for work on September 27, 1954 on the 11:00 P. M.—7:00 A. M. shift to work the vacancy of Machinist F. Hillard who was off work because of annual earned vacation. The assignment of Machinist Hillard is 11:00 P. M. to 7:00 A. M. shift, Monday through Friday with Saturday and Sunday rest days.

On October 16, 1954 the claimant was returned to his regular assignment on the 3:00 P. M.—11:00 P. M. shift.

Claimants' time claims for eight (8) hours pay at time and one-half rate for change of shift on September 27, 1954 and October 16, 1954 have been declined up to and including the highest designated official.

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.—11:00 P. M. to the shift hours of 11:00 P. M.—7:00 A. M. on September 27, 1954, in compliance with the instructions of the carrier, he was entitled

cation for pay purposes or the exercise of orderly displacements is not such. It is classifications for purposes of seniority only that have application here. It appears from Award 6688 that the employes involved were of the same craft, in the same seniority district, carried on the same seniority roster, were in classes having common seniority, and were qualified to perform the work involved. **Under such circumstances, we cannot agree with the result reached.** We think the right to stagger work weeks in accordance with carriers' operational requirements contemplates that such positions may be staggered for the very purpose of avoiding the assignment of rest day work which is not necessary to the economic and efficient operation of the railroad. **We cannot agree with the holdings of Award 6688** with reference to carriers' right to stagger work weeks or with the interpretation placed upon classes or classifications of work. **Award 6690 appears to have adopted the same erroneous conclusions. We think the foregoing awards fail to consider the overall purpose of the 40 Hour Week Agreement. They fail to consider all of the provisions of that Agreement and give stress to particular provisions which create an illusory result.** A part of the bargain for a five day week at the then existing pay for six days' work, was the right of the Carrier to eliminate the necessary rest day work to the extent that it could by the expedient of staggering work weeks." (Emphasis added.)

The Fourth Division in Award No. 740, Edward F. Carter, referee said:

"The Organization relies upon Award 726 to sustain the claim. We have carefully examined that award. The result there attained is not based on any rule of the agreement or practice on the property. The award completely ignores the fact that Patrolmen on that Carrier had, when required, provided themselves with uniforms at their own expense over the years. The award assumes that the requirement of a uniform by the occupant of a position, which the Carrier had not previously required to procure a uniform, is a change in working conditions warranting an affirmative award. **With this we cannot agree.** If a practice were proven which had not been abrogated or modified by the collective agreement, the practice could not be unilaterally changed. But such is not the case in Award 726. **As a precedent, an award is no better than the reasoning which supports the result.** We are obliged to say that no rule or practice is shown to support Award 726, and it is quite evident that none could be shown. **Consequently, we are required to say that the affirmative award based on the facts recited in the Opinion is a complete non-sequitur.**

It is fundamental that the burden is upon the Claimant to show a violation of the collective agreement, or a practice which by mutual acquiescence over an extended period of time, estops the parties, or either of them, to deny its validity. In the present case, it is shown that most Patrolmen are required to wear uniforms and no objection has been made thereto over the years. The position here involved was bulletined as one requiring a uniform. No objection was made to the form of the bulletin and it was bid in by Claimant with full knowledge that a uniform was required to meet service requirements. Nowhere is it pointed out that the Carrier ever agreed to pay for them and it is shown indisputably the Carrier never has done so. There was, therefore, no practice or agreement requiring such payment. A basis for liability on the part of the Carrier, therefore, does not exist." (Emphasis added.)

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.

This claim is made in behalf of Machinist C. F. Cook under Rule 10 of the parties' Agreement effective June 1, 1939. It is contended that on September 27 and October 16, 1954 claimant was paid at the applicable straight time rate for the services he rendered when, under the provisions 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 (2) days at the applicable straight time rate.

Claimant was regularly assigned to duty as a machinist in carrier's enginehouse at Montpelier, Ohio. On Monday, September 27, 1954, claimant was used to fill a temporary vacancy on a position occupied by Machinist F. Hillard while the latter was off on a fifteen (15) day vacation, claimant returning to his regular assignment on Saturday, October 16, 1954. He was paid for each of these days at the applicable straight time rate.

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 interpretations thereof are here controlling and create an exception thereto Rule 10 would require a sustatning of the claim for by moving from his job to that of Machinist Hillard, while the latter was on vacation, and then back to his own, under the facts here shown, claimant did, in each instance, make a change of shifts within the meaning of the rule as evidenced by the agreed to interpretations thereof.

There are three articles of the National Vacation Agreement which we think are sufficiently related to the issues herein involved that we shall set them out in full. They are 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 therefore 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 regular 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 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."
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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.

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 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 therefore and outlined in Article 13: 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 and 1806 of this Division and 2304, 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 carrier's position that these punitive payments are not required."

In presenting their views to the referee the organizations' spokesman 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 changes in accordance with Article 13 of the Railway Labor Act.

Spokemen for the carriers likewise contended they were appearing before the referee in order to get the vacation agreement itself interpreted but contended that such interpretation of the articles 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.

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 was 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 uninformed, then it is up to the parties to adjust the matter through the machinery for negotiations as provided for in Section 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 did not apply. In other words, the referee held that in such instances the employe used was not covered by the 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 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 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 the effect of Referee Morse's interpretation on this subject meant. 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 eleven (11) years the organization, without objection, accepted such application of the referee's holding. We think, in view of this long period of acceptance by the organization of the carrier's application of the referee's holding, 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 11), 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 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." 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 find carrier properly paid claimant and that, because thereof, 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 1st day of August, 1956.

DISSENT OF LABOR MEMBERS TO AWARD NO. 2197

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 and 1806 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."

In view of the foregoing and the fact that the claim in Award 1806, cited by the majority, involved the same parties, the same schedule agreement, and the same question as the instant claim, but for a different period of time, and Award 1806 held that ". . . 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 . . ." it is impossible to reconcile 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. This holding is also inconsistent with Award 3022, cited to support the earlier holding of the majority, in which award it was decided that the rules of

the schedule agreement should prevail over provisions of the Vacation Agreement as interpreted by Referee Morse. In this connection we would call attention to Third Division Award 3795 wherein the author of that award called attention to Award 3022 and stated "We find that holding to be correct."

There is no evidence in the record in the instant case to support the majority's statement that "The carrier put into practice the specific holding of the referee dealing with the subject matter here involved. For about eleven (11) years the organization, without objection, accepted such application of the referee's holding." Not only is there no evidence to support such a statement but the statement is also refuted by the fact that the identical question here involved was resolved in Award 1806, issued in July 1954. 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 implication here 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 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 2197.

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