Award No. 2248
Docket No. 2093
2-IC-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 rendered.

PARTIES TO DISPUTE:

SYSTEM FEDERATION NO. 99, RAILWAY EMPLOYES' DEPARTMENT, A. F. of L. (Carmen)

ILLINOIS CENTRAL RAILROAD COMPANY

DISPUTE: CLAIM OF EMPLOYES:

(1) That under the current agreement Carman G. C. Arnold was improperly compensated at the straight time rate for service performed on April 27, 1953.

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

EMPLOYES' STATEMENT OF FACTS: Carman G. C. Arnold, hereinafter referred to as the claimant, regularly assigned as a test rack operator on the repair track, to work 7:00 A. M. to 12 Noon, 12:30 P. M. to 3:30 P. M., Monday through Friday, with rest days of Saturday and Sunday, at Baton Rouge, La., was instructed to double over on lead car inspectors position on April 21, 1953, to fill in for the lead car inspector while he was off on his regular earned vacation. The claimant was paid time and one half for the service performed on April 21, 1953. The claimant returned to his regular assigned position on April 27, 1953.

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

The agreement effective April 1, 1935 as subsequently amended is controlling.

POSITION OF EMPLOYES: It is submitted that when the claimant changed from working his regular assigned shift hours of 7:00 A. M. to 12 Noon, 12:30 P. M. to 3:30 P. M. to the shift hours of 11:00 P. M. to 7:00 A. M., on April 21, 1953, and worked thereon through April 26, 1953, in compliance with the instructions of the foreman, he was considered transferred under the clear and unambiguous provisions of Rule 14, which in pertinent part reads as follows:

Also applicable is Rule 1 (i):

"(i) Beginning of Work Week—The term 'work week' for regularly assigned employes shall mean a week beginning on the first day on which the assignment is bulletined to work, and for unassigned employes shall mean a period of seven consecutive days starting with Monday."

The claimant's work week on his regular Monday-Friday assignment began on Monday, April 27, 1953, and in the work week beginning Monday, April 27, 1953, he did not work in excess of forty hours. In addition, in returning to his regular job on Monday, April 27, 1953, the claimant was moving from one assignment to another and would not, under the exceptions in paragraphs (C) and (D) of Rule 3, be entitled to overtime even if he had worked in excess of forty hours in his work week. This question was clearly settled in Third Division Award 7087 where the Board said:

"We have repeatedly held that rest days attach to a position, not to an employe so that he may not carry them with him as he moves from one position to another. Consequently, under the exception of Rule 45 (c) the claim of Schnarr is without merit."

There is no basis for the claim in this dispute, and it should 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 said dispute waived right of appearance at hearing thereon.

This claim is made on behalf of Carman G. C. Arnold under Rule 14(A) of the parties' effective agreement. It is contended that on Monday, April 27, 1953, claimant was paid at the applicable straight time rate for the services he rendered thereon when, under the provisions of Rule 14(A), 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 for that day's work.

Claimant was regularly assigned to duty as a test rack operator on carrier's repair track at Baton Rouge, Louisiana. On Monday, April 27, 1953, he was returned to his regular position after having been used to fill the position occupied by a lead car inspector while the latter was off on a regular five (5) day vacation. The two (2) jobs had different shifts, one (1) starting at 7:00 A. M., the other 11:00 P. M. Claimant was paid straight time for the service he performed on April 27, 1953.

Rule 14(A), insofar as here material, provides:

"Employes changed from one shift to another will be paid overtime rate for the first shift of each change. Employes working two shifts or more on a new shift shall be considered transferred. * * *."

The foregoing presents one of the questions presented in the dockets on which our Awards 2197 and 2205 are based.

As to Rule 147(b) of the parties' agreement we agree with what was said in Award 1806 to the effect that including the vacation agreement, as such, or any supplement thereto in the schedule agreement by reference does not have the effect of modifying or changing schedule rules.

The record discloses that the carrier has always paid straight time for changing shifts if the changes were made because of employes being off on vacation and, until this and other claims were filed in 1953, the employes never contended they were entitled to be paid at the overtime rate therefor. That is, for almost eleven (11) years after the vacation agreement and Referee Morse's interpretations thereof came into existence the employes accepted straight time payments in such cases without protest. In view thereof we think the principle of estoppel, which is fully discussed and applied in our Awards 2197 and 2205, is here applicable and controlling for the same reasons as therein stated.

In the discussion leading up to the Division's adoption of Awards 2197 and 2205 the point was raised as to whether or not these awards were in conflict with 3795 of the Third Division, all being by the same referee. Considered in the light of the facts of each case the awards are consistent and not in conflict although they reach the opposite result. The claim in Award 3795 arose in May, 1942, before Referee Morse's interpretations came into existence, and consequently estoppel could not apply and the following principle, approved in 2197 and 2205, was controlling, namely, "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." The same is true of the factual situation in Award 3022 of the Third Division, which is referred to in Award 3795 as setting forth a more complete discussion of the question. As stated in 3022: "We are obliged to say that the schedule agreement existing between this carrier and the Signalmen's Organization controls the disposition of the claim before us."

It is interesting to note that in 3022 the author of that award comes to the conclusion that Referee Morse's answer to the question posed does override the schedule agreements as to changing shifts, the same as we concluded in our Awards 2197 and 2205, although he does not agree thereto. As stated in that award: "we are of the opinion that its conclusion is incorrect when there is a schedule rule in conflict with the Vacation Agreement." and "we do not concur with his conclusion that the Vacation Agreement can be applied when a conflicting schedule rule exists which is applicable to the subject of the controversy." It is this construction of Referee Morse's answer to the same question as is herein involved that leads to the uncertainty referred to and discussed in Awards 2197 and 2205 that brought the principle of estoppel into play.

Thereafter, in Award 1806 of this Division, the author of 3022 came to the conclusion that Referee Morse's answer was not in response to the issue presented to him for, as therein stated, "the issue decided by the referee was not the one presented to him for decision." It is this fundamental change in the construction of Referee Morse's answer which leads to the opposite results arrived at in Awards 1806 and 1807 of this Division rendered on July 12, 1954, and that arrived at by our Awards 2197 and 2205 which are herein referred to as controlling.

For the reasons hereinbefore set forth we come to the conclusion this claim must be denied.

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. 2243

We wish to call attention to the fact that the majority in Award No. 1807 found as follows:

> "The claim in this case is controlled by the same principles announced in Award No. 1806."

In Award No. 1806 the majority stated, "It is argued that the incorporation of that part of Rule 141, Memorandum of Agreement dated July 25, 1949 (Rule 14, schedule agreement dated September 1, 1949 in the instant case) making the vacation agreement a part of the schedule agreement, has the effect of nullifying conflicting agreement rules." The majority in Award No. 1806 then went on to find as follows:

> "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."

The majority in the instant case states that it agrees with what was said in Award No. 1806 but the findings of the majority in the instant case are diametrically opposed to the principles announced in Award No. 1806.

In Award No. 1806 the majority states, "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 estoppel as to past claims." The majority in the instant case attempts to apply the principle of estoppel by finding that ". . . for almost eleven (11) years after the vacation agreement and Referee Morse's interpretations thereof came into existence the employes accepted straight time payments in such cases without protest." There is no evidence in the record in the instant case to support such a finding, unless the mere assertion of the carrier is considered by the majority to be evidence. Not only is there no evidence to support the carrier's assertion but the instant finding of the majority is refuted by the fact that the identical question here involved was resolved in Award 1807, issued in July 1954, in favor of the employes covered by the instant schedule agreement between the Illinois Central Railroad Company and System Federation No. 99. Furthermore, even though the record had shown acquiescence in the practice, the 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 is Rule 14 of the schedule agreement.

It is our opinion that one need only review Awards 1806 and 1807 to realize the erroneousness of the findings and award in the instant case.

George Wright

R. W. Blake

C. E. Goodlin

T. E. Losey

E. W. Wiesner