Award No. 2440
Docket No. 1996
2-CCC&StL-BM-'57

NATIONAL RAILROAD ADJUSTMENT BOARD

SECOND DIVISION

The Second Division consisted of the regular members and in addition Referee Dudley E. Whiting when the award was rendered.

PARTIES TO DISPUTE:

SYSTEM FEDERATION NO. 54, RAILWAY EMPLOYES' DEPARTMENT, A. F. of L. (Boilermakers)

THE CLEVELAND, CINCINNATI, CHICAGO & ST. LOUIS RAILWAY COMPANY (The New York Central Railroad Company, Lessee)

DISPUTE: CLAIM OF EMPLOYES:

1. That under the current agreement Boilermaker L. Hoffman was improperly compensated for the service performed from 3:00 P. M. to 11 P. M., March 16, 1954.

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

JOINT STATEMENT OF FACTS: Boilermaker L. Hoffman, hereinafter referred to as the Claimant, is employed at the Bellefontaine (Ohio) Engine Terminal and regularly assigned on the 7 A. M. to 3 P. M. shift. Boilermaker L. L. Johns, employed on the 3 P. M. to 11 P. M. shift at this engine terminal had an assigned vacation period of March 15 through March 30, 1954. On March 16, the Claimant was changed from the 7 A. M. to 3 P. M. shift to the 3 P. M. to 11 P. M. shift to fill the job of Boilermaker Johns while he was on vacation, by instructions of the Carrier.

POSITION OF EMPLOYES: It is submitted that under Rule 10 (a) reading:

> "(a) Employes changed from one shift to another will be paid overtime rates for the first shift of each change. Employes working two or more shifts on a new shift shall be considered transferred. This will not apply when shifts are exchanged at the request of the employes involved."

The claimant is entitled to be additionally compensated the difference between the straight time compensation he was paid for services performed on the 3:00 P. M. to 11:00 P. M. shift on March 16, 1954, and the overtime compensation due him under its provisions.

The claim in the instant case is wholly without merit and should be denied in its entirety.

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 the dispute were given due notice of hearing thereon.

This claim is for time and one-half under Rule 10, Changing Shifts, where a regularly assigned employe was used to relieve an employe on another shift while the latter was on vacation. Identical claims were sustained by our Awards 1806 and 1807 and were denied by our Awards 2083, 2084, 2197, 2205, 2230 and 2243. Other identical claims are now before us for decision, so the issue will be considered upon a general overall basis.

The first National Vacation Agreement was made on December 17, 1941. Article 14 provided for a joint committee to decide disputes involving the interpretation or application of that agreement, such decisions to be final and binding upon the parties. That committee became deadlocked over a series of questions concerning the meaning and application of that contract and, on July 20, 1942, submitted the same in writing to Wayne L. Morse, as referee, agreeing that his decision upon the issues submitted would be final and binding.

Article 12 (a) of the vacation agreement, so far as pertinent, is 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 therefor under the provision hereof."

One of the issues submitted to Referee Morse thereunder is as follows:

> "(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 carriers' position that these punitive payments are not required."

That presented the identical issue here submitted. The decision of Referee Morse thereon is 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."

The Employes contend that Referee Morse, in his interpretations otherwise, recognized that he had no authority to modify existing rules but that his decision upon that issue exceeded his authority. It is obvious that the referee did not believe he was exceeding his authority although he was careful to delimit it. For example, in his interpretation of Article 10, he said (p. 87):

"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 demed 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 his interpretation of Article 12 (a) he stated that the carriers contended "that the prohibition as contained in the Vacation Agreement against the use of the vacation system to create unnecessary expense takes precedence over any schedule rule which would create such expense." In connection therewith he said (pp. 98-99):

"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. The only part of the agreement which raises any reasonable doubt as to just what the parties did intend in regard to the relationship of existing working rules agreements to the vacation agreement is the language of Article 12 (a). This referee is satisfied, however, that if he were to adopt the interpretation which the carriers seek to place on Article 12 (a), he would do violence to the basic meanings and purposes of the vacation agreement when considered in its totality. What is more, he feels that the adoption of such an interpretation would constitute in effect his amending the agreement by way of interpretation. To do that would amount to exceeding his jurisdiction, and it would cast a cloud on the validity of the award itself. Nevertheless, it must be recognized that Article 12 (a) cannot be treated as surplusage. The parties agreed to it, and when they agreed to it, they must have intended it to have a meaning consistent with and reconcilable to the other portions of the agreement.

It is the opinion of the referee that the following points set forth fair, reasonable, and equitable rulings as to what the parties must be deemed to have intended and meant by Article 12 (a):

(1) That in administering the vacation agreement and in interpreting and applying its various provisions, the parties would be guided by a ruling principle that existing working rules should not be applied in a manner which would result in unnecessary expense to the carriers."

The pertinent portion of Article 12 (b), referred to in his decision on issue (b), is as follows:

"(b) As employes exercising their vacation privileges will be compensated under this agreement during their absence on vacation,

retaining their other rights as if they had remained at work, such absences from duty will not constitute 'vacancies' in their positions under any agreement."

The "Changing Shifts" rule is as follows:

"Employes changed from one shift to another will be paid overtime 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 exchanged at the request of the employes involved."

Careful consideration of the rule involved, the applicable provisions of the vacation agreement and the reasoning of the referee shows that he had no doubt that he was within his authority in making his decision on issue (b) under Article 12. The same considerations make it very doubtful, at least, whether one can reasonably hold that he did thereby exceed his jurisdiction.

Assuming, as has been suggested, that there was some doubt as to the referee's authority to make that decision, let us examine subsequent actions of the parties. Neither of the parties then protested that he exceeded his authority. Quite to the contrary, within a few days after the referee rendered his award, the Railway Employes' Department withdrew from the Second Division, N.R.A.B., an identical claim then pending against the T and N O Railroad.

On February 23, 1945 the parties to the vacation agreement entered into a supplemental agreement, which provided in part as follows:

"Section 5. Except to the extent that articles of the Vacation Agreement of December 17, 1941 are changed by this Supplemental Agreement, the said agreement, including the interpretations thereof as made by the parties, dated June 10, 1942 and July 20, 1942 and by Referee Morse in his award of November 12, 1942, shall remain in full force and effect."

Later in 1945 a claim arose against the T and N O Railroad which was subsequently processed by the Railway Employes' Department to the Second Division, N.R.A.B. It did not seek pay under the changing shifts rule during a vacation period but, because the employe on vacation remained absent due to illness after his vacation ended, sought pay under that rule for the day after his vacation ended. That claim resulted in our Award No. 1259, wherein we held in part as follows:

"On May 18, 1945, when Carman George Parma's vacation, from May 7, 1945, to May 18, 1945, inclusive, terminated, carrier's right to shift claimant from his regular shift to that of Parma, without penalty because of the provisions of the vacation agreement, ended. Parma's continued absence thereafter was not a continuation of his vacation but a temporary vacancy under the parties current agreement to which claimant was assigned and to which Rule 10 applied."

It was not until 1953 that this organization processed further claims like this and then for the first time questioned the authority of Referee Morse to decide the issue as he did. Those claims resulted in our Awards 1806 and 1807 on July 12, 1954. Thereafter this Organization and others entered into a national agreement with the Carriers on August 21, 1954. Article I thereof amended the vacation agreement and Section 6 reads in part as follows:

"Section 6. Except to the extent that articles of the Vacation Agreement of December 17, 1941 are changed by this Agreement, the said Agreement and the interpretations thereof and of the Supple-

mental Agreement of February 23, 1945, as made by the parties, dated June 10, 1942, July 20, 1942 and July 18, 1945 and by Referee Morse in his award of November 12, 1942, shall remain in full force and effect."

Thus we find this organization acting in conformity with the particular part of Referee Morse's interpretation, which is now challenged, immediately after it was rendered and on other occasions thereafter; we find it failing to challenge his jurisdiction thereon for at least eleven years; and we find it entering into agreements in 1945 and 1954 specifically providing that his interpretations shall remain in full force and effect. Such a course of conduct effectively estops the Organization from challenging his authority collaterally in these separate proceedings before a different forum. That is the essence of our findings in our Award No. 2197 and our subsequent awards upon the subject, although not expressed in those precise words. Under the circumstances shown no other finding is possible.

In this docket another issue is presented based upon a special agreement governing procedure in appeals to this Board. In view of the foregoing general findings, determination thereof is not necessary in this decision.

AWARD

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of SECOND DIVISION

ATTEST: Harry J. Sassaman
Executive Secretary

Dated at Chicago, Illinois, this 3rd day of June, 1957.

DISSENT OF LABOR MEMBERS TO AWARDS NOS. 2240, 2441, 2442, 2443, 2444, 2445, 2446, 2447, 2448, 2449, 2450, 2451, 2452, 2453, 2454, 2455, 2456, 2457, 2504.

We are constrained to dissent from the majority findings in the above-enumerated awards for the reasons set forth in our dissents to Awards Nos. 2083, 2084, 2197, 2205, 2230, and 2243.

It is our considered opinion that Awards No. 1514, 1806, and 1807 of the Second Division should have been followed and the overtime rates embodied in the schedule agreements should have been applied.

R. W. Blake
Charles E. Goodlin
T. E. Losey
Edward W. Wiesner
James B. Zink