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Form 1

NATIONAL RAILROAD ADJUSTMENT BOARD
SECOND DIVISION

Award No. 6516
Docket No. 6371
2-N&W-CM-'73

The Second Division consisted of the regular members and in addition Referee Robert A. Franden when award was rendered.

Parties to Dispute: (System Federation No. 16, Railway Employes' Department, A. F. of L. - C. I. O. (Carmen)

(Norfolk and Western Railway Company

Dispute: Claim of Employes:

1. That the Norfolk and Western Railway Company violated the Agreement on August 11, 1970, when Carman Elgin J. Clark was held off his regular assignment, first shift, Shop Track, Job No. 8, to fill vacation vacancy of Carman J. C. Farmer, beginning 11:00 p.m. same date, and August 17, 1970, he was again held off said first shift assignment to fill vacation vacancy of Carman W. C. Underwood in yard, beginning 3:00 p.m. same date. On August 22, 1970, Helper Carman Ernest Yopp was held off his regular first shift assignment on Shop Track, Job No. 4, to fill the vacation vacancy of Helper Carman B. T. Hall, third shift, beginning 11:00 p.m. same date.

2. That accordingly the Norfolk and Western Railway additionally compensate Carman Elgin J. Clark eight (8) hours at the pro rata rate for the respective dates of August 11, and 17, 1970. That Helper Carman Ernest Yopp be compensated an additional eight (8) hours at the pro rata rate of pay for August 22, 1970. That employes herein named above be paid interest of 6% per annum, to be compounded annually on the anniversary date of claim until claim is paid.

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.

Parties to said dispute waived right of appearance at hearing thereon.

Claimants allege that the Carrier violated Rule 10 of the Agreement when they were held off of their regular assignments to fill vacation vacancies commencing on later shifts. It is the contention of the Organization that under Rule 10 the Claimants had the right to work the last shift of their regular assignment prior to filling a vacation vacancy. Rule ten reads in part as follows:

"DISTRIBUTION OF OVERTIME
Rule No. 10

(a) When it becomes necessary for employes to work overtime they shall not be laid off during regular working hours to equalize the time."

We have been directed to Award 2616 of this Division with Referee J. Glenn Donaldson sitting as the neutral member. In that case dealing with the same Rule and the conflict between the vacation agreement and the basic agreement between the parties we ruled as follows: (emphasis supplied)

"Claimant, a carman helper, was regularly assigned to the day shift 7:00 AM-12 Noon, and 1:00 PM-4:00 PM, Mondays through Fridays on the repair track. He worked his regular assignment Monday and Tuesday. The foreman ordered him not to work his regular day shift, Wednesday, but to report for duty that night on the 11:00 PM train yard shift in the place of Carman Helper Ray to protect vacation period of latter employe.

The claimant alleges a violation of Rule 2(k) of the September 1, 1949, agreement, reading:

'When it becomes necessary for employes to work overtime they shall not be laid off during regular working hours to equalize the time.'

A similar claim was before this Division under an identical rule and sustained in Award 994. Similarly in Award 1266. In neither of these cases, nor in Award 1259, was the assignment made to protect a vacation leave and the Vacation Agreement, of course, did not come into issue.

One of the first disputes in which conflict between the Vacation Agreement and existing working rules occurred was in Docket 1434, subject of Award 1514, wherein this Division, sitting with Referee Parker, upheld the sanctity of the existing rules as against the Vacation Agreement, stating in part:

'* * * Where, as here, 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.'

This basic ruling was elaborated upon and documented by Referee Carter in Awards 1806 and 1807. In both of these disputes the assignment was to protect a vacation leave and the existing rule under which the premium rate was claimed was the Change in Shift rule. It is this same rule which has been pressed by the Organization in all succeeding submissions until the one at hand.

Referee Carter in Awards 1806 and 1807 did not give the scope of finality to Referee Morse's interpretation of Article 12, Vacation Agreement, posing the Change in Shift rule, as did one succeeding referee. Referee Carter said:

> '* * * The issue decided by the referee was not the one presented to him for decision. It is not, therefore, a controlling interpretation, as the carrier contends, in a case where a conflict exists between the Vacation Agreement and Schedule Agreement rules.'

In Award 2083, however, the Division sitting with Referee Douglass adopted the Morse interpretation as final and binding upon the parties in respect to Change in Shift rule, thus, overruling Awards 1806 and 1807 upon the specific issue there before the Division.

In Award 2197 (Wenke) we subordinated the Change in Shift rule to Referee Morse's interpretation of Section 12(a) of the National Vacation Agreement, but did so not through construction but through estoppel. We there recognized that Morse by warning against an act and then himself doing it had created an uncertain and ambiguous situation. We then found that the carrier had put into practice the specific holding of the referee and further found that the Organization had for eleven years, without objection, accepted the interpretation and its application. We therefore concluded that the Organization was estopped from claiming that the referee had no authority to make the interpretation in the first instance. We buttressed out findings further by quoting recitals of affirmation applying in the August 1954 National Vacation Agreement. This line of reasoning has supported denial of claims in the following subsequent awards of this Division-Awards 2205 (Wenke), 2230 (Wenke), 2243 (Wenke), and 2240 (Whiting). These later pronouncements may reflect a rejection by the Division of the earlier awards of the Division sitting with Parker and Carter in those cases where the Changing Shift or Doubling Over rules are relied upon but only in such type of cases. There is no place for the doctrine of estoppel, however, in the case before us. Referee Morse gave no interpretation of the lay-off rule upon which estoppel could be based. Therefore, the awards of the Division subsequent to Award 2083 have no application to a case of the type presented here.

In the instant case, we find that Rule 2(k) was offended by the forced lay-off of claimant by the carrier preparatory to his entering upon a relief assignment. This finding rests upon our past rulings in Awards 994 and 1266. We do not find that such awards have been nullified by the Vacation Agreement or by any interpretations or rulings since made thereunder. In his interpretation of Article 10, Referee Morse stated:

> '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 deemed 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.'

The carrier, brushes Awards 1806 and 1807 aside by stating that under the Agreement of August 21, 1954, Referee Morse's interpretations of the Vacation Agreement were negotiated into the working agreement. What interpretation can the carrier have reference to that tends to set aside the rule in question here? We find nothing except a recognition that such conflicting rules undoubtedly exist, and where existing negotiation by the parties to remove such conflicts are in order.

Let us be clear on the scope of these findings and award. We are not passing upon a claim for premium pay involved in doubling over. That situation has not occurred in this case. Whether it will be asserted by the Employes, where occurring, in face of the Vacation Agreement and cited awards is, of course, not known at this time. We cannot anticipate and presume such a claim in deciding the limited issue before us. What we are protecting by this award is merely claimant's right to work the last shift of his regular assignment at his pro rata rate where no time conflict with temporary vacation assignment is involved.

AWARD

Claim sustained."

In accordance with the findings of this Board as set out in the above quoted Award we will sustain the claim without interest.

A W A R D

Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Second Division

Attest: E. A. Killeen
Executive Secretary

Dated at Chicago, Illinois, this 18th day of June, 1973.