Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD
SECOND DIVISION

Award No. 13681
Docket No. 13451
02-2-99-2-28

The Second Division consisted of the regular members and in addition Referee Edwin H. Benn when award was rendered.

(Brotherhood Railway Carmen Division
(Transportation Communications International Union
PARTIES TO DISPUTE: (
(Grand Trunk Western Railroad Company

STATEMENT OF CLAIM:

"Claim of the Committee of the Union that:

1. That the Grand Trunk Western Railroad Company/CN violated the terms and conditions of the current Agreement on September 1, 1997, when Carman D. F. Simpson was not properly compensated for the Holiday, Labor Day, while he was on a scheduled vacation. Carman Simpson's vacation vacancy was filled by a relief Carman who worked this position on the holiday. Carman Simpson was compensated for eight (8) hours straight time vacation pay and eight (8) hours straight time holiday pay.

2. That accordingly, the Grand Trunk Western Railroad Company/CN now be ordered to provide the following relief: That Carman Simpson be compensated for an additional eight (8) hours pay at the rate of time and one-half due to the fact that his assignment worked eight (8) hours on the holiday."

FINDINGS:

The Second Division of the Adjustment Board, upon the whole record and all the evidence, finds that:

The carrier or carriers and the employee or employees involved in this dispute are respectively carrier and employee 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 were given due notice of hearing thereon.

The Claimant, a Carman at Flat Rock, Michigan, was on an assigned vacation from Sunday, August 31, through Saturday, September 6, 1997. Vacation Relief Carman P. Hildebrand filled the Claimant's position during the Claimant's vacation.

September 1, 1997 was Labor Day - a designated holiday. While filling in for the Claimant during the Claimant's vacation, Hildebrand was assigned to work on Labor Day. Hildebrand was compensated eight hours' holiday pay at the straight time rate and eight hours' pay at the time and one-half rate for working on the holiday.

For Labor Day, the Claimant was compensated eight hours' vacation pay at the straight time rate and eight hours' holiday pay, also at the straight time rate. In this claim, the Organization seeks an additional eight hours' pay for the Claimant at the time and one-half rate because Hildebrand worked the holiday as the vacation fill in for the Claimant's position.

The relevant Agreement language (taken from the December 17, 1941 Vacation Agreement) supports the Organization's position:

"VACATIONS - RULE 122

* * *

7. Allowances for each day for which an employee is entitled to a vacation with pay will be calculated on the following basis:

(a) An employee having a regular assignment will be paid while on vacation the daily compensation paid by the carrier for such assignment."

* * *

There is a June 10, 1942 interpretation for the above language:

"Article 7

Article 7(a) provides:

'An employee having a regular assignment will be paid while on vacation the daily compensation paid by the carrier for such assignment.'

This contemplates that an employee having a regular assignment will not be any better or worse off, while on vacation, as to the daily compensation paid by the carrier than if he had remained at work on such assignment, this not to include casual or unassigned overtime or amounts received from others than the employing carrier."

The Carrier, through former Director of Labor Relations D. E. Prover, interpreted its vacation pay obligations as follows:

"This has reference to the compensation due an employee in the following listed crafts when the employee is on vacation and a recognized holiday falls on one of the work days for which the employee is entitled to paid vacation.

* * *

Brotherhood of Railway Carmen

* * *

Subject to the qualifying requirements of the applicable holiday and vacation rules covering employees represented by the above listed Organizations, the vacationing employee would be compensated as follows:

* * *

If the vacationing employee's position 'is' worked by a relief employee on the holiday:

8 hours straight time holiday pay.
8 hours straight time vacation pay.

PLUS

payment for hours worked (or paid for) by the vacation relief employee, at the time and one half rate of pay.

EXAMPLE #1: John Doe has regular work days of Monday through Friday, with Saturday and Sunday rest days. John Doe was on scheduled paid vacation from Monday, February 16, 1976, through Friday, February 29, 1975. Washington's Birthday holiday was celebrated on February 16th, and was worked by a relief employee for a full 8 hours. John Doe is paid: 8 hours straight time holiday pay; 8 hours straight time vacation pay and 8 hours time and one-half because his assignment worked 8 hours on the holiday. [Emphasis added]."

* * *

Therefore, because the Claimant was on vacation on a holiday and because a relief employee worked the Claimant's position on that holiday, under Rule 122, Article (7)(a), the June 10, 1942 interpretation, the Carrier's interpretation and the specific example used by the Carrier in its interpretation, the Claimant is entitled to the additional compensation sought by the Organization on his behalf. As the Rule has been interpreted on this property, the Claimant is entitled to be paid "8 hours straight time holiday pay; 8 hours straight time vacation pay and 8 hours time and one-half because his assignment worked 8 hours on the holiday." The Claimant did not receive ". . . 8 hours time and one-half because his assignment worked 8 hours on the holiday." He is therefore entitled to that additional compensation.

According to the Carrier, notwithstanding the above quoted language, there is a long-standing agreed upon past practice in the application of Rule 122 so as not to require payment of holiday overtime to both the vacation relief and vacationing employee.

The Carrier's argument does not change the result.

First, assuming that a past practice exists, it is a basic rule of contract construction that past practice cannot be used to attempt to vary or explain the meaning of clear language. As discussed above, under Rule 122, Article (7)(a), the June 10, 1942 interpretation, the Carrier's interpretation and the specific example used by the Carrier in its interpretation, the relevant language is clear entitling the Claimant to the additional compensation for the holiday. Because the language is clear, past practice is therefore irrelevant.

Second, and giving the Carrier the benefit of the doubt that the governing language is somehow ambiguous so as to allow the use of past practice to explain the parties' intent behind the language, in order to prevail, the Carrier has the burden to demonstrate the existence of a past practice. The Carrier has not done so.

To be a past practice, the conditions in dispute must be (1) unequivocal; (2) clearly enunciated and acted upon; and (3) readily ascertainable over a reasonable period of time as a fixed and established practice accepted by both parties. Under those requirements, the Carrier cannot satisfactorily demonstrate the existence of a past practice consistent with its interpretation.

The Carrier's interpretation that employees in the Claimant's circumstance should be paid came from a former Director of Labor Relations. Further, the Organization pointed to another similar claim on the property for a holiday - the Friday after Thanksgiving, 1996 - when, on June 6, 1997, District Superintendent Mechanical C. E. Hamilton stated that ". . . we agree completely that the Agreement was violated and that Mr. Peterson [the claimant in that case] is entitled to an additional eight (8) hrs. at the rate of time and one-half for that date." In that correspondence, the Organization states that payment as it seeks in this case ". . . is in line with the current practice on this property." While we do not pass upon the other case (the Carrier asserts that the payment was made "in error" in that claim), the point here is that as the Carrier asserts there is a past practice supporting its position in this case, the Organization in the other claim which was paid (and consistent with the plain reading of the relevant language) asserts the practice is the opposite. According to the Organization in the prior claim, "[s]ince the Claimant was on vacation, his assignment was filled by Relief Carman Dave Hayslip, this included the holiday assignment [and t]his is in line with the current practice on this property." But here, the burden is on the Carrier to demonstrate the existence of a past practice consistent with its position.

Because the assertions concerning past practice are in conflict, we cannot say that the Carrier met its burden.

Third, and contrary to the Carrier's position, because the Carrier has not sufficiently demonstrated the existence of a past practice consistent with its position, this is not the kind of case that requires the Organization to put the Carrier on notice that in the future it intends to enforce the clear language of the Agreement. Compare Third Division Award 32214 cited by the Carrier ("There is a fundamental principle of labor relations that where clear and unambiguous language and a long-standing past practice are in conflict that the clear and unambiguous language shall prevail, after timely notice. In this way, the side wishing to resort to the specific language of the Agreement may do so, but only after providing the other side with advance notice that it intends to hold to the express language of the applicable Agreement."). This doctrine is really one of fairness. Where one party has lulled the other into thinking that clear language will not be enforced, then principles of estoppel and fundamental fairness require that the language cannot be applied until notice is given that the other party intends to rely upon the clear language. Here, however, because the Carrier has not demonstrated the existence of a past practice consistent with its position, the principle set forth in Award 32214 is not applicable.

Fourth, the Carrier asserts that if the Organization is successful in this case and because of service requirements, ultimately the Carrier may have to reduce the number of Carmen allowed to take vacations during certain holiday periods. That may be and the propriety of such an action is not before us. However, that possibility also does not change the result. Our authority is limited by the clear language in this case. That language supports the Organization's position.

AWARD

Claim sustained.

ORDER

This Board, after consideration of the dispute identified above, hereby orders that an award favorable to the Claimant(s) be made. The Carrier is ordered to make the Award effective on or before 30 days following the postmark date the Award is transmitted to the parties.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Second Division

Dated at Chicago, Illinois, this 7th day of March, 2002.