Award No. 2340
Docket No. CL-2430

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Edward F. Carter, Referee

PARTIES TO DISPUTE:

BROTHERHOOD OF RAILWAY AND STEAMSHIP CLERKS, FREIGHT HANDLERS, EXPRESS AND STATION EMPLOYES

KANSAS CITY TERMINAL RAILWAY COMPANY

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood that Mail Handlers R. L. Anderson, Ernie Johnson and H. D. Pierce should have been paid at the rate of time and one-half for the first two hours of their assignment June 16, 1942; that Mail Handler W. M. Heinis should have been paid at the rate of time and one-half for the first hour of his assignment June 16, 1942; and, that they be reimbursed accordingly.

EMPLOYES' STATEMENT OF FACTS: An extra board is maintained in the Mail & Baggage Department of the carrier, from which extra board employes are assigned in seniority order daily to fill temporary vacancies in the regular assigned force of Mail and Baggage Handlers and to augment such regular force. The claimants were extra board employes on the dates referred to in this submission.

On Monday, June 15, 1942, the claimant employes, by virtue of their seniority rank on the extra board, earned assignment to work as Mail and/or Baggage Handlers on the shift having hours 7:00 A. M. to 4:00 P. M. The following day, Tuesday, June 16, 1942, claimants Anderson, Johnson and Pierce, by virtue of their seniority rank on the extra board earned assignments to the shift having hours 5:00 A. M. to 2:00 P. M., while claimant Heinis earned assignment to the 6:00 A. M. to 3:00 P. M. shift. Thus on this date Anderson, Johnson and Pierce were assigned to start work within a period of 22 hours from the starting time of their previous assignment and Heinis within a period of 23 hours from his previous starting time.

There was an Agreement in effect between the parties on June 16, 1942, bearing effective date of February 17, 1936, governing the hours of service and working conditions of the employes of the Carrier represented by the Brotherhood, including Mail and Baggage Handlers, containing the following Rule:

> "RULE 37. OVERTIME. Except as otherwise provided in these rules, time in excess of eight (8) hours, exclusive of the meal period, on any day, will be considered overtime and paid on the actual minute basis at the rate of time and one-half."

POSITION OF EMPLOYES: It is the position of the employes that the term "on any day," appearing in Rule 37, means a 24 hour period computed from the starting time of a previous assignment; that this Board has so interpreted the term (See Awards 687 and 2030); that the Carrier has accepted

"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."

It is the Carrier's contention that until the Committee provided in the above quoted article fails to dispose of the dispute, your Honorable Board cannot assume jurisdiction.

OPINION OF BOARD: On June 15, 1942, the Claimants as extra men worked from 7:00 A. M. to 4:00 P. M. On June 16, 1942, three of them worked from 5:00 A. M. to 2:00 P. M. and the fourth from 6:00 A. M. to 3:00 P. M., all filling positions of men on vacation. Rule 37 of the Clerks' Agreement provides that time in excess of eight hours on any day will be considered overtime and paid for at the rate of time and one-half. It is agreed by the parties that the words "on any day" mean a 24 hour period from the starting time of the first assignment. See Awards Nos. 687 and 2030. The dispute arises out of the application, if any, of the Vacation Agreement of December 17, 1941, to the factual situated before us. The case appears to be one of first impression.

Unless the Vacation Agreement applies, it is clear that Claimants are entitled to an affirmative award. The nature of the Vacation Agreement is, therefore, pertinent to the issue herein involved.

On December 17, 1941, the Carrier and the Clerks' Organization involved in this claim, along with many others, entered into a collective agreement regarding vacations with pay. It was stipulated that all carriers signatory to the agreement would grant annual vacations to employes working in excess of minimum service requirements therein specified. One of the stated considerations for the allowance of annual vacations with pay, and, which the Carrier now advances as a defense to the claim, is Article 12 (a) which states:

"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. 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."

It is the contention of the carrier that under this provision of the Vacation Agreement it is not obligated to pay overtime as demanded in the present claim and, it being a dispute arising out of the interpretation of the Vacation Agreement, it should have been referred to the committee designated in Article 14 of that instrument.

It is urged by the carrier that the payment of overtime for work performed in excess of eight hours on any day as provided by Rule 37 of the Clerks' Agreement is now covered by Article 12 (a) of the Vacation Agreement and that any claim with reference thereto should have been handled in accordance with Article 14 of the latter agreement. The relationship and applicability of existing working rules to the Vacation Agreement must, therefore, be examined into.

In this respect it will be noted that in June, 1942, the National Mediation Board nominated and the parties selected Wayne L. Morse to serve as referee for the purpose of deciding certain questions in dispute concerning the interpretation of the Vacation Agreement. We think these interpretations as made by Referee Morse are entitled to great weight in deciding the matter before

us and we shall refer to them freely in dealing with the Vacation Agreement itself. It is quite evident that it was the intent of the parties that existing rules and agreements were to remain in effect unless changed by negotiation. It was realized that some of the existing rules, if strictly applied to the vacation problem, would result in excessive vacation costs to the carriers. It appears to have been the understanding that the vacation plan was to be subject to the rules agreements but that the parties would negotiate adjustments in existing agreements which would produce results inimical to the purposes of the Vacation Agreement. In order to facilitate these adjustments, a plan for negotiating such changes was incorporated into the Vacation Agreement as Article 13. In other words, changes in existing rules agreements would continue to be made by negotiation only. This is evidenced by the language of Referee Morse in his interpretation of Article 6 of the Vacation Agreement wherein he says that the parties "well understood that existing rules agreements were applicable to the vacation plan unless modified in negotiations between them." Later in his interpretation of Article 6, Referee Morse quotes from the transcript of the hearing held before him to the effect "that Article 13 was placed in the Vacation Agreement for the purpose of negotiating adjustments of working rules to the Vacation Agreements." And the parties themselves apparently had this same thought in mind in providing in the second paragraph of Article 14 that "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 event committee provided in this section fails to dispose of any dispute or controversy." It seems clear, therefore, 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. No change was ever negotiated with reference to the application of overtime pay as provided in Rule 37 of the Clerks' Agreement, to the Vacation Agreement. No dispute exists, therefore, which arises out of the interpretation or application of any of the provisions of the Vacation Agreement. The matter is properly here for decision under the Clerks' Agreement. Claimants are entitled to an affirmative award.

FINDINGS: The Third Division of the Adjustment Board, after giving the parties to this dispute due notice of hearing thereon, and upon the whole record and all the evidence, finds and holds:

That the carrier and the employes involved in this dispute are respectively carrier and employes within the meaning of the Railway Labor Act, as approved June 21, 1934;

That this Division of the Adjustment Board has jurisdiction over the dispute involved herein; and

That the Clerks' Agreement with the Carrier providing for overtime pay for more than eight hours' work on any day was not modified by the Vacation Agreement of December 17, 1941, and, in the absence of a negotiated change as here, the Clerks' Agreement will be enforced in accordance with its terms.

AWARD

Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: H. A. Johnson
Secretary

Dated at Chicago, Illinois, this 22nd day of October, 1943.

DISSENT TO AWARD NO. 2340, DOCKET CL-2430

There is involved in this case a fundamental question of the jurisdiction of this Board and of the committee provided for under Article 14 of the Vacation Agreement.

This dispute comes before the Board on a claim of the petitioner that a rule of the Clerks' Agreement has been violated and upon a contention of the carrier that a provision of the Vacation Agreement Article 12 (a) is controlling. The carrier also contended that this Board has no jurisdiction to hear this case because there is involved an interpretation of this article of the Vacation Agreement.

The carrier's claim that this Board has no jurisdiction is predicated upon the provision of Article 14 of the Vacation Agreement which provides in part that—

> "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 Carrier's 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."

It is clear that all disputes involving interpretation of the Vacation Agreement are subject initially to being submitted solely to the committee set up under the Vacation Agreement. This requirement is recognized by the opinion supporting the award. The Opinion states:

> "No dispute exists, therefore, which arises out of the interpretation or application of any of the provisions of the Vacation Agreement. The matter is properly here for decision under the Clerks' Agreement."

This constitutes recognition of the fact that this Board has no jurisdiction initially if a dispute exists as to the interpretation or application of the Vacation Agreement.

The error in the reasoning of the Opinion of the Board lies in this: notwithstanding the finding that no dispute arises under the Vacation Agreement, the provisions of Article 12 (a) are actually interpreted and a conclusion is reached contrary to the position of the carrier. Having determined what they claim to be the proper interpretation of Article 12 (a), the majority of the Board proceeds to state that there is no dispute under the provisions of the Vacation Agreement and then reaches the final conclusion that this Board, therefore, has jurisdiction.

The very fact that the majority of the Board found it necessary to interpret Article 12 (a) for the purpose of finding that there was no dispute under the Vacation Agreement proves that this is a case which should have gone initially to the committee set up under Article 14.

The Vacation Agreement is a national agreement made by a committee representing the railroads and a committee representing the organizations. It is apparent on the face of the document that it was the desire of the parties who made the agreement that it be applied uniformly and in accord with the intent of the parties who made the agreement. This objective could best be obtained by the reference of all disputes arising under it to a committee composed of those who presided at its birth. The provisions of Article 14 were not inserted through caprice. The desires of the parties were laudable and the method of carrying out that purpose was a legal method. This Board must give full recognition to the desires and intentions of the parties to the Vacation Agreement and the method adopted by those parties in effectuating their purposes.

This case should be presented to the Committee set up under Article 14, and if it fails to dispose of the dispute or controversy, then, and then only, will the provisions of the Railway Labor Act be applicable.

This Board has no jurisdiction of this dispute and the award is, therefore, void.

/s/ R. H. Allison
/s/ A. H. Jones
/s/ R. F. Ray
/s/ C. P. Dugan
/s/ C. C. Cook