

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Alex Elson, Referee.

PARTIES TO DISPUTE:

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

ST. LOUIS-SAN FRANCISCO RAILWAY COMPANY

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood that:

- (1) Mr. V. P. Gerwitz should have been paid at the rate of Foreman while on vacation, August 1st to 13th, 1949, and
- (2) That Mr. Gerwitz shall now be paid the difference between the amount actually received and what he would have received if paid at the rate of Foreman.

EMPLOYES' STATEMENT OF FACTS: As of July 1, 1949, Mr. V. P. Gerwitz was regularly assigned as check clerk at Seventh Street Freight Station, St. Louis Mo. Beginning July 5, he was used as a relief Foreman, relieving Foreman Burton July 5 to 18, inclusive, and relieving Foreman Robinson from July 19 to 31st, inclusive. Mr. Gerwitz started his vacation on August 1, immediately following his release from the temporary position of Foreman, which position he occupied from July 5 to 31, inclusive. He was paid for vacation at the rate of his regular position of check clerk, \$9.96 per day. The rate of the position occupied immediately before going on vacation was \$11.05 per day. This dispute arising in connection with the application of the Vacation Agreement of December 17, 1941, was jointly submitted by the Carrier and the Brotherhood to the Committee established by Article 14 of that agreement at a meeting held in Chicago on April 19, 1950, and the Committee was unable to agree.

POSITION OF EMPLOYES: Employees contend that Mr. Gerwitz should have been paid at the Foreman's rate while on vacation and base this contention on Article 7 (a) of the National Vacation Agreement as interpreted by Referee Morse. This interpretation reads:

"As to an employe having a regular assignment, but temporarily working on another position at the time his vacation begins, such employe while on vacation will be paid the daily compensation of the position on which actually working at the time the vacation begins, provided such employe has been working on such position for twenty days or more."

There is no dispute regarding the facts in this case. Carrier admits that Mr. Gerwitz worked as Foreman from July 5 to July 31, both dates inclusive,

Following Mr. King's denial of the claim, General Chairman Andereck wrote to him on October 31st, as follows:

"Springfield, Missouri
October 31, 1949
8-93-7(e)

Mr. C. P. King,
Director of Personnel,
St. Louis, Mo.

Dear Sir:

Your letter October 18, file D-146, vacation claim V. P. Gerwitz, 7th Street Freight Station, St. Louis.

We would like very much to see you pay this claim without any further handling and think that it is in line with the intent of the Vacation Agreement, due to the fact that Mr. Gerwitz did work this higher rated position for more than 20 days.

I have heard of the O.R.T. case you refer to but of course as to why they withdrew it is unknown to me.

If you are still not agreeable to paying this claim, we will have to submit it to the Vacation Committee for a decision, as we think that it is just.

Yours very truly,

(s) C. J. Andereck"

It is the Carrier's position decision of Referee Morse on Article 7, and Section (a) thereof, of the Non-Operating Employees' Vacation Agreement does not support the Gerwitz claim and that he was properly compensated for his two weeks (12 working days) of vacation, beginning August 1, 1949, at \$9.96 per day, the established rate of his regular check clerk position, for two reasons:

(1) He had completed the temporary assignment (such position) before his vacation began and was not actually working on this temporary assignment at the time his vacation began.

(2) He had not been working on one temporary vacancy (such position) 20 days or more prior to the time his vacation began.

OPINION OF BOARD: In this case we are called upon to apply an interpretation of Section 7(a) of the National Vacation Agreement. The Claimant occupying Check Clerk Position, rate \$9.96 per day, when the 1949 clerical vacation schedule was prepared at the beginning of the year was assigned a vacation of 12 working days effective August 1, 1949. Beginning July 5 and continuing through the 18th, he was assigned to fill the position of Inbound Foreman, rate \$11.05 per day, and worked that position for 14 consecutive days until July 19, whereupon he was temporarily assigned to fill the position of Inbound Foreman, rate \$11.05 per day, from July 19 to 30, inclusive, a period of 13 consecutive days. He thereupon started immediately on his own vacation of 2 weeks or 12 working days for which he was paid \$9.96 per day, the rate for his position of check clerk.

Article 7(a) reads as follows:

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

The meaning and intent of the words "an employe having a regular assignment" was interpreted by Referee Morse as follows:

"As to an employe having a regular assignment, but temporarily working on another position at the time his vacation begins, such employe while on vacation will be paid the daily compensation of the position on which actually working at the time the vacation begins, provided such employe has been working on such position for twenty days or more."

The carrier justifies its position on two grounds:

- (1) The position on which the Claimant was working at the time his vacation began was his own position and not that of foreman.
- (2) The Claimant did not work at the position of foreman for 20 days or more.

In effect what the first ground amounts to is that an employe filling a temporary position cannot claim the rate for that position unless in fact he would have occupied that position had he not gone on vacation. This proposal was advanced by the carrier at the time of the hearing leading to the above interpretation and was rejected by the representatives of the employes. It was not accepted by the referee. The background leading to the interpretation is set forth by the referee as follows:

"As pointed out on page 628 of the transcript, the carriers proposed the following rule:

'As to an employe having a regular assignment but is temporarily working on another position at the time his vacation begins, such employe while on vacation will be paid the daily compensation of the position on which actually working at the time the vacation begins provided such employe had been working on such position for 30 days or more.'

During the hearing counsel for the carriers suggested to the employes by way of compromise that they add the following language to their proposal 'and which he would have occupied during his vacation period had he not gone on vacation.' However, the representatives of the employes rejected the suggestion. The transcript of the record also shows on page 635 that just before the negotiations in which the parties attempted to compromise their differences broke off the carriers offered to reduce the thirty days' period in their proposal to twenty days. The referee is satisfied that the carriers' above-quoted proposal with the thirty days' period changed to twenty days provides a fair and reasonable settlement of the dispute over the interpretation and application of Section (a) of Article 7, and he hereby approves and adopts it. Thus it will read as follows:

'As to an employe having a regular assignment, but temporarily working on another position at the time his vacation begins, such employe while on vacation will be paid the daily compensation of the position on which actually working at the time the vacation begins, provided such employee has been working on such position for twenty days or more.' (Vacation Agreement—pp. 81-82)

An employe cannot be actually working a position and be on vacation at the same time. In view of the referee's failure to accept the Carrier's suggestion that the language "and which he would have occupied during his vacation period had he not gone on vacation", it is clear that the interpretation in question considers the controlling rate to be that of the position occupied immediately preceding the vacation. In this case this position was the position of Inbound Foreman, rate \$11.05 per day.

The second basis for the carrier's position involves an interpretation as to what is meant by "position" as used in Referee Morse's interpretation. Throughout the 27 days that he worked prior to his vacation, Claimant was a relief foreman. He relieved successively two men occupying the position of Inbound Foreman.

Referee Morse in making his various interpretations of the vacation agreement stated:

" . . . this award is not based upon any strict or literal interpretation of any section of the agreement when in the opinion of the referee such an interpretation would have done violence to the purpose of the agreement or would have produced an unfair, inequitable, and unreasonable result." (Vacation Agreement, p. 25)

We hold that under the circumstances of this case, and in particular where the employe has relieved two employes doing the same work at the same rate of pay for more than 20 days, that the spirit and purpose of the interpretation in question would require the payment of the higher rate.

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 Employe involved in this dispute are respectively Carrier and Employe 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 Carrier did not correctly apply the interpretation of Section 7(a) of the Vacation Agreement.

AWARD

Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: A. I. Tummon,
Acting Secretary.

Dated at Chicago, Illinois, this 11th day of July, 1951.