Award No. 8180
Docket No. CL-7645

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Howard A. Johnson, Referee

PARTIES TO DISPUTE:

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

THE PENNSYLVANIA RAILROAD COMPANY

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

(a) The Carrier violated the Rules Agreement effective May 1, 1942, except as amended, particularly Rules 4-A-2(a) (effective May 1, 1942) and 4-A-6, by compelling Clerk Adrienne M. Flanagan, to work seven consecutive days without relief and at the pro rata rate on her position of Vacation Relief Clerk in the Bureau of Information, 30th Street Station, Philadelphia, Pa., Philadelphia Terminal Division.

(b) The Claimant, Adrienne M. Flanagan, should be allowed the difference between the pro rata rate which she was paid and the punitive rate which she should have been paid for May 18, 1949, which was her seventh consecutive work day. (Docket E-885.)

EMPLOYES' STATEMENT OF FACTS: This dispute is between the Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employes as the representative of the class or craft of employes in which the Claimant in this case held a position and the Pennsylvania Railroad Company—hereinafter referred to as the Brotherhood and the Carrier, respectively.

There is in effect a Rules Agreement, effective May 1, 1942, except as amended, covering Clerical, Other Office, Station and Storehouse Employes between the Carrier and this Brotherhood which the Carrier has filed with the National Mediation Board in accordance with Section 5, Third (e), of the Railway Labor Act, and also with the National Railroad Adjustment Board. This Rules Agreement will be considered a part of this Statement of Facts. Various Rules thereof may be referred to herein from time to time without quoting in full.

The Claimant, Adrienne M. Flanagan is regularly assigned as a Vacation Relief Clerk in the Bureau of Information, 30th Street Station, Philadelphia, Pa., Philadelphia Terminal Division, and has a seniority date on the seniority roster for the Philadelphia Terminal Division in Group 1.

The Railway Labor Act, in Section 3, First, subsection (i) confers upon the National Railroad Adjustment Board the power to hear and determine disputes growing out of "grievances or out of interpretation or application of agreements concerning rates of pay, rules or working conditions". The National Railroad Adjustment Board is empowered only to decide the said dispute in accordance with the Agreement between the parties to it. To grant the claim of the Employes in this case would require the Board to disregard the Agreement between the parties thereto and impose upon the Carrier conditions of employment and obligations with reference thereto not agreed upon by the parties to this dispute. The Board has no jurisdiction or authority to take such action.

CONCLUSION

The Carrier has shown that under the facts of the instant case no violation of Rules 4-A-2(a) and 4-A-6 of the Clerks' Agreement has been proved, that the Claimant was properly compensated at the straight time rate of pay for the service performed on May 18, 1949, and that the Claimant is not entitled to the additional compensation which she claims.

Therefore, the Carrier respectfully submits that your Honorable Board should deny the claim of the Employes in this matter.

All data contained herein have been presented to the employe involved or to her duly authorized representative.

(Exhibits not reproduced.)

OPINION OF BOARD: This claim is for time and one-half for May 18, 1949, the seventh day worked, under Rule 4-A-2(a), as then in effect, which provided that regularly assigned employes "will be assigned one regular day off duty in seven, * * * and if required to work on such * * * day * * * will be paid at the rate of time and one-half."

That provision was in effect on January 1, 1942, when the Vacation Agreement of December 17, 1941, took effect, and at all times thereafter until September 1, 1949, when it was eliminated from the rule.

Claimant held one of six regularly assigned positions of "Vacation relief clerk," which were established in April, 1949, pursuant to an understanding between the parties' authorized representatives, under a bulletin stating that the successful bidders would assume the pay rate, tour of duty and rest day of each position worked while the regular incumbent was on vacation.

As such regularly assigned employe, claimant filled position F-2110 from Tuesday thru Sunday, May 10th to 15th, inclusive, except for Wednesday, May 11th, the position's regularly assigned rest day. She then filled position F-2093 from Monday thru Saturday, May 16th to 21st, inclusive, except for Thursday, May 19th, the regularly assigned rest day for that position. She therefore worked seven consecutive days between the rest days of the two positions.

The question is of the relationship and applicability of existing work agreements to the Vacation Agreement; specifically whether the seven day rule, 4-A-2(a), applies to this instance resulting from the Vacation Agreement.

Article 5 of the Vacation Agreement provides as follows:

> "If a carrier finds that it cannot release an employe for a vacation during the calendar year because of the requirements of the service, then such employe shall be paid in lieu of the vacation the allowance hereinafter provided."

Article 7 of the Vacation Agreement provides as follows:

> "Allowances for each day for which an employe is entitled to a vacation with pay will be calculated on the following basis:

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

Under those provisions, if the employe had worked instead of taking his vacation he would have received, in addition to his vacation pay, only the regular pay of his position, since he would not have worked on the seventh day.

Article 12(a) of the Vacation Agreement provides as follows:

"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. * * *."

No provision in the Vacation Agreement has been cited or found in which an exception to the rule is "otherwise provided." Therefore, under the above three articles, the Carrier should not be required to pay the vacation relief clerk more than the regular rate for any part of her work in position F-2093.

But Referee Morse's interpretations of the Vacation Agreement, which by prior consent were made binding on all parties (Awards 2340, 2484, 2537, 2720 and 3022, Third Division, and 1514 and 1806, Second Division) require a conclusion directly contrary to the express words of the contract.

Referee Morse said (Vacation Agreement of December 17, 1941, and Interpretations of November 12, 1942, page 96):

"* * * The carriers further contend 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. * * *"

The Organization's argument, as outlined by the referee, did not expressly contest that contention, but merely argued that "the carrier is not privileged to utilize this provision of the article to deny an employe a vacation earned and pay him in lieu thereof, merely because greater expense would be incurred."

The referee's decision on the point was in part as follows (pp. 98-103):

"It is a well-established rule of contract construction that if a literal interpretation of the words of a certain part of a contract will produce a result inconsistent with the controlling intention of the parties and the primary purpose of the contract, such a literal interpretation must give way to the doctrines of equitable construction. As the referee has stated elsewhere in this decision, throughout the negotiations which led up to the vacation agreement, it was definitely understood by the parties that the vacation plan should not be administered independently of existing working rules, but rather, that in those instances in which existing working rules, if strictly applied, would produce unjust results, they should be modified through the processes of collective-bargaining negotiations conducted between the parties or, if necessary, through those procedures of the Railway Labor Act which provide for the settlement of disputes.

"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.
>
> "'(2) That is was understood that requests for adjustments of specific working rules, the strict application of which would result in unnecessary expense, should be made through the procedure provided for in Article 13.
>
> "'(3) That the parties, in considering and weighing requests under Article 13 for changes in working rules in those instances in which it is alleged that special conditions on a given road would make the application of a specific working rule unnecessarily costly, should conform to the objective of keeping the costs of granting vacations practically the same as they would be if the carriers granted an employe extra pay in lieu of a vacation.'
>
> "* * * * *

"The referee is frank to admit that the foregoing rulings constitute a very liberal construction of Article 12(a), but he is convinced that a narrow or literal construction such as that proposed by the carriers would do violence to the purposes of the vacation agreement and in the long run would prove to be a disservice to the parties. * * *

"Furthermore, the referee rejects the literal interpretation of Article 12(a) as proposed by the carriers because its adoption would mean in effect that the carriers would have the sole right of determining the application or the non-application of any given working rule to the vacation agreement under the guise of determining its cost effects.

"However, as the referee has pointed out elsewhere in this decision, the parties specifically provided in Articles 13 and 14 for a joint and cooperative determination of such matters through the machinery of collective-bargaining. The referee is satisfied that the parties should proceed to make much greater use of the machinery of Articles 13 and 14 than they have to date. It is only through the use of such machinery and the bringing of it to bear upon the facts

of specific cases that reasonable and necessary adjustments of some of the working rules can be made in a manner which will meet some of the special needs and problems arising under the vacation agreement. At least it is certain that such a desirable result will not be accomplished by the adoption of the literal interpretation of Article 12(a) which the carriers propose. The referee is convinced that the adoption of such an interpretation not only would be contrary to the over-all meaning of the agreement but would create many more problems that it would solve.

"Although the carriers' interpretation is rejected, it is only fair to say that the referee does not believe that some of the contentions of the employes as to the application of existing working rules to vacation relief are either fair or reasonable. In fact, he feels that the position of the employes as set forth in the record on this point is too technical, and, in many respects, is justifiably subject to the criticism that the employes tend to apply the rules in ways which increase costs unnecessarily and unfairly. Throughout their arguments in the record the employes state that the procedures of negotiation for making any adjustments in the working rules that may be necessary in light of the special conditions created by the vacation agreement are open to the carriers. They imply—in fact, definitely state—that the carriers have not pressed for such negotiations. This referee believes that it is probably true that there have been few negotiations under Article 13, but at the same time he entertains some doubts as to what would be accomplished by such negotiations, if the representatives of the employes held out for the same technical and strict application of the working rules to vacation problems as they contended for in the record of this case.

"He respectfully suggests that in all fairness there undoubtedly are adjustments and modifications of the working rules which should be made when applying them to vacation problems. Negotiations over the same should proceed on a 'give-and-take' basis, and not on the basis that no exception to a full application of a rule can be made because to do so would weaken the rule when its modification is demanded in other situations not involving vacations.

"In the statement of their position on Article 12(a) the carriers submitted the following illustrations:

"'(a) * * *.'

"* * * * *

"'(b) A shop craft employe on the third shift is allowed a 6 day vacation. It is necessary to fill his position and an employ 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.'

"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."

"* * * * *

"On the basis of the theories of interpretation which the referee has applied to other articles of the agreement in the foregoing portions of this award, it is clear that the carriers' position on this question cannot be sustained. * * *"

Referee Morse's opinion concerning the above hypothetical case pointedly applies to the present claim. He was "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." We need only substitute "last" for "first".

Article 13 of the Vacation Agreement provides as follows:

"The parties hereto having in mind conditions which exist or may arise on individual carriers in making provisions for vacations with pay agree that the duly authorized representatives of the employes, who are parties to one agreement, and the proper officer of the carrier may make changes in the working rules or enter into additional written understandings to implement the purposes of this agreement, provided that such changes or understandings shall not be inconsistent with this agreement."

The parties' agreed interpretations of July 20, 1942, included the following (p. 16):

"* * * It is agreed that under Article 13 of the Vacation Agreement it may be desirable to negotiate special arrangements and rates for the establishment of regular relief positions to relieve certain employes while on vacation."

That interpretation strongly suggests that the proposed "changes in the working rules" or the "additional written understandings" were, as Article 13 said, merely "to implement the purposes" of the Vacation Agreement, namely, "to give practical effect to and ensure of actual fulfillment by concrete measures; * * * to provide with an implement or implements" (Webster's New Collegiate Dictionary, G. & C. Merriam Co., 1949); in other words, to supply the machinery, as "by the establishment of regular relief positions to relieve certain employes while on vacation."

Nevertheless, under Referee Morse's authoritative interpretation of Article 13 we must perforce hold that the apparently clear and self-executing provision of Article 12(a) could not become effective as against the seven day rule, until that rule was abolished by the parties' agreement, effective September 1, 1949. Since Referee Morse's interpretations had been made long prior to May 18, 1949, the date of the incident giving rise to this claim, the Carrier had full prior knowledge of it.

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 for the reasons stated the claimant is entitled to be paid pursuant to the provisions of Rule 4-A-2(a) as in effect on May 18, 1949.

AWARD

Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: A. Ivan Tummon
Executive Secretary

Dated at Chicago, Illinois, this 17th day of December, 1957.