Award No. 16799

Docket No. TE-15223

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Bernard E. Perelson, Referee

PARTIES TO DISPUTE:

TRANSPORTATION-COMMUNICATION EMPLOYEES UNION (Formerly The Order of Railroad Telegraphers)

NORTHERN PACIFIC RAILWAY COMPANY

STATEMENT OF CLAIM: Claim of the General Committee of The Order of Railroad Telegraphers on the Northern Pacific Railroad, that:

1. Carrier violated the terms and intent of the Agreement between the parties hereto when on March 13, 14, 15, 18, April 1 and 3, 1963, it failed to properly fill the third shift telegrapher's position at Elma, Washington.

2. The Carrier shall, because of the violations set out in paragraph 1 hereof, compensate the following employes in the manner hereinafter indicated:

(a) J. J. Uehling, regular assigned relief at Centralia, idle on his rest day, a day's pay (8 hours) at the time and one-half rate of the third shift position at Elma for March 13 and April 3, 1963.

(b) F. W. Pettit, third shift telegrapher at Centralia, idle on his rest day, a day's pay (8 hours) at the time and one-half rate of the third shift position at Elma for March 14, 1963.

(c) P. L. Bray, regular assigned relief at Elma, et al., idle on his rest day, a day's pay (8 hours) at the time and one-half rate of the third shift position at Elma for March 15, 1963.

(d) C. A. Burke, first shift telegrapher at Olympia, idle on his rest day, a day's pay (8 hours) at the time and one-half rate of the third shift position at Elma for March 18 and April 1, 1963.

EMPLOYES' STATEMENT OF FACTS:

JURISDICTION

There is in full force and effect, collective bargaining agreement(s) entered into by and between Northern Pacific Railway Company, hereinafter

C. A. Burke — 7:00AM–4:00PM – Tuesday through Saturday – Telegrapher – Olympia

Claims have been presented in behalf of J. J. Uehling, for payment of eight hours computed at time and one-half rate on March 13 and April 3, 1963; in behalf of F. W. Pettit for payment of eight hours at time and one-half rate on March 14, 1963; in behalf of P. L. Bray for payment of eight hours at time and one-half rate on March 15, 1963; and in behalf of C. A. Burke, for payment of eight hours at time and one-half rate on March 18 and April 1, 1963, account not filling the third trick telegrapher's position at Elma for eight hours on each of those dates. These claims have been declined.

OPINION OF BOARD: The Carrier maintains at Elma, Washington, a position, classified as 3rd Telegrapher, assigned to work 12:01 A. M. to 8:00 A. M. Monday through Friday, with rest days of Saturday and Sunday. This position is filled from the Carrier's Tacoma Division (West) Seniority Roster.

Under date of March 5, 1963, the Carrier bulletined the position as a permanent vacancy by reason of the fact that it was vacated by the former occupant of the position.

The position was awarded to one Mr. L. D. Blue under date of March 19, 1963. Mr. Blue was transferred to and occupied this position on April 8, 1963.

Prior to and pending the transfer of Mr. Blue to the vacancy in the position of third trick telegrapher at Elma, the vacancy was protected and filled by Extra Telegrapher J. A. Haakonson. Mr. Haakonson was also an extra train dispatcher.

On March 13, 14, 15, 18 and April 1 and 3 of 1963, Haakonson performed services, of rest day relief work, as an Extra Train Dispatcher, at Tacoma, Washington. On those dates, the position of third shift Telegrapher at Elma was not filled, but the work of the position was protected by the Carrier requiring employes assigned to the other shifts to work overtime and outside of their assigned hours.

On dates other than those in dispute, Haakonson would be at Elma and protect the short vacancy there.

The Claimants contend that the Carrier violated the Agreement, between the parties, by closing the position of Third Trick Telegrapher on the dates involved in this dispute at Elma; that in the absence of any available extra employes the Carrier should have covered the position with regular employes who were on their rest days: that the Claimants, named in this dispute, were on their rest days and were available, under the hours of service, to work the position.

The Carrier denies any violation of the terms or provisions of the Agreement between the parties.

An examination of the record, in this dispute, discloses that there has been presented to this Board certain issues that were not presented or discussed on the property. We have on numerous occasions held that issues not raised, discussed or considered on the property and evidence not submitted,

discussed or considered on the property, may not and cannot be considered by this Board. We will not consider them in this dispute.

Claimants allege a violation of Rules 25, 27, 28, 60 and 65 of the Agreement. We are primarily concerned with the language contained in Rule 27 and more particularly subdivision (a) of the rule. It reads as follows:

"TEMPORARY VACANCIES

Rule 27 (a). A temporary vacancy as defined in Rule 25 expected to be of less than fifteen (15) calendar days' duration will be filled either by permitting regular assigned employes working exclusively in the office where such temporary vacancy occurs changing from one position to another or by using employes assigned to the extra list, the Management to decide the manner in which such temporary vacancy will be filled. Employes permitted to so change positions will be governed by the provisions of Rule 27 (b)."

The parties are in sharp disagreement with reference to the meaning of that part of Rule 27 (a) which reads "WILL BE FILLED." The Claimants contend that the language is mandatory. The Carrier contends that the language is not mandatory but directory.

This Board follows the basic and ordinary rules of contract interpretation and construction. We are bound by the terms and provisions of the Agreement before us. We have no power or authority and likewise, we may not make new provisions, abrogate or alter the existing provisions of the Agreement. That is solely the province of the parties themselves. We do, however, endeavor to ascertain and to give effect to the intention of the parties and that intention must be deduced from the language employed by them.

In interpreting and construing the provisions of an agreement we inquire into what was the meaning of the writing at the time it was made; the main object of the agreement or the purpose which the parties sought to accomplish by the agreement. If we find that there is some ambiguous language in the agreement, but that the meaning is not uncertain, we may not and cannot make a new agreement under the guise of construction. However onerous the terms of an agreement may be, they must be enforced if such is the intention of the parties using the language. We can often ascertain the intention of the parties by their actions in carrying out the terms or provisions of an agreement or contract.

Are the words "will be filled" used in Rule 27 (a) mandatory or directory?

In determining whether the terms or provisions of an agreement are mandatory or directory, the end sought to be attained by the terms or provisions of the agreement are always important to be considered. If the end cannot be effectuated by holding the terms or provisions to be directory, they must, if it can consistently with the language, be held to be mandatory.

One test for determining whether the terms or provisions of an agreement are mandatory is whether they contain negative words which render the performance of the acts improper if compliance is not made with the terms or provisions. The absence of negative words tends to show that the terms or provisions of the agreement are directory. If the agreement imposes a penalty for the violation of its terms or provisions, it is reasonable to assume that the parties to the agreement intended that its provisions be followed, and they are considered as mandatory. The fact that the agreement is framed

in or contains mandatory words, such as "shall" or "must," is of slight, if any, importance in determining whether the act is mandatory or directory.

Rule 27 (a) does not contain any negative words.

The word "will" is defined in Webster's New Collegiate Dictionary, as follows:

> "Will — the choice or determination of one who has authority; a power coupled with an intention; arbitrary power to control, dispose or determine; the power of choosing and of acting in accordance with choice; a disposition to act according to certain principles."

If it was the intention of the parties that under the rule the Carrier was obligated to fill the vacancy then the proper wording was not inserted in the rule. It does not, in our opinion, include a mandatory direction that the position be filled, as claimed by the Claimants.

Based on the fact that Rule 27 (a) does not contain any negative words and on the definition of the word "will," we find that Rule 27 (a) is directory and not mandatory.

There can be no question but that the Carrier has the right, under the Agreement, to blank the vacancy or position. We have so held on any number of occasions. We have also held that the position may be blanked in whole or in part. See Awards 7136; 13042; 14332 among others. In the present dispute the vacancy was not completely blanked as part of the work was performed by telegraphers at the same location on a call basis.

The case of the Claimants depends on whether the Carrier is obligated to fill the position in question. The Claimants have not cited any provision in the Agreement which mandates the Carrier to fill the position. We have held that it is within Management's and/or Carrier's prerogative to fill or not to fill a position unless some rule restricts this right.

In Award 12358, we said:

> "It is axiomatic that all prerogatives inherent in management, except to the extent circumscribed by law or contract, remain vested in a Carrier. Absent either of such circumscriptions, the determination of its manpower requirements is within the sole judgment of Carrier. Here, we have only to consider whether Carrier's right to exercise its judgment, to fill or let stand vacant a position, is impaired by the Agreement.
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> * * * The sense of the Rules is that new positions or vacancies can be filled by Carrier only in compliance with the procedures agreed upon therein. These rules, neither literally or by implication, can be construed as imposing an obligation on the Carrier to fill a vacancy. To construe the Rules as prayed for by Petitioner, 'we would have to read into (them) that which is not contained therein' — this would be beyond our power."

Having held that the provisions of Rule 27 (a) are directory, we hold that in the event that the Carrier did fill the vacancy in question on the dates in question, the Carrier would have to comply with the provisions of Rule 27 (a).

Claimants call our attention to the fact that Extra Telegrapher and Extra Dispatcher Haakonson was required to perform services as an Extra Train Dispatcher on certain days and then assume the position of Extra Telegrapher filling the short vacancy on the Third Telegrapher position at Elma on other days.

In an analogous situation, we held in Award 13769, as follows:

> "This Division of the Board, however, seems to have consistently held that such use of a telegrapher is not improper. In Award 12725 this precise question was decided contrary to the Organization's theory. And in Award 3674 it was held that service as a train dispatcher has no bearing upon the rights of an employe under the telegraphers' agreement.
>
> We are constrained, therefore, to hold that in the absence a rule to the contrary there is no violation of the telegraphers' agreement when an employe, temporarily working as a train dispatcher, is permitted to work his telegrapher assignment when he is available for such service." See also Award 16187.

The Claimants in order to sustain their position have the burden of submitting and proving all the essential elements of their claims. In Award 10950, we said:

> "At the outset the Employes advance the novel argument that Carrier has not pointed to any rule or group of rules which permit the action taken by the Carrier in this case. It is sufficient answer to say that the burden is not on the Carrier to show that its action is authorized by some provision of the Agreement. Rather the burden is upon the complaining Employes to show that the action taken violates some part of the Agreement. * * *."

This the Claimants have failed to do.

We are constrained to deny the claims.

FINDINGS: The Third Division of the Adjustment Board, upon the whole record and all the evidence, finds and holds:

That the parties waived oral hearing;

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 Agreement was not violated.

AWARD

Claims denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 22nd day of November 1968.

DISSENT TO AWARD 16799, DOCKET TE-15223

I must respectfully disagree with the reasoning by which the referee reached his conclusion that Rule 27(a) places no obligation on the Carrier to fill a temporary vacancy of less than fifteen calendar days in a permanent position as defined in Rule 25.

That conclusion was based upon a well presented exposition of text-book rules of contract construction, such as are generally used by the courts to determine the "intent" of ordinary private contracts. I have no doubt that this exposition would receive a rating of "Excellent" in a law school. I have no doubt that it would represent correct reasoning if used for the purpose to which it applies.

But it is not sufficient for the interpretation of labor agreements, particularly in the railroad industry.

As presented here, the reasoning itself has at least two defects which I consider to be fatal to the purpose sought to be achieved: (1) It does not give effect to another rule of construction requiring that the "intent" be determined by considering the agreement from its "four corners"; and, (2) it does not give effect to the equally respectable rule that the words used must be considered not merely as reasonable men would expect, but as reasonable men would expect them to be used in their setting, or surrounding circumstances.

This latter concept — lacking in the award — points up the reasons why labor agreements are things apart from other contracts. They have long been so considered both by this Board and the courts, notably the Supreme Court. A few quotations from official decisions of these bodies will serve to illustrate my point:

> "The rigid application of legalistic principles of contract construction to agreements collectively bargained by management and labor to meet the realities of modern industrial life is, in our opinion, open to question as a consistent, unvarying practice. This is especially true of labor-management agreements in the railroad industry where the language used and the technical idiom employed are not always susceptible of either easy or quick understanding. Resort to custom, usage and practice in this business more often than not is necessary to gain an understanding of what the parties intended to accomplish." (Third Division Award 11329, Referee Coburn.)

> "The parties conceded that the District Court properly refused to review the merits of the arbitration award. To be valid, however, an arbitrator must draw the essence of the award from the collective bargaining agreement. An arbitrator should not dispense his own brand of industrial justice, but must confine himself to the interpretation and application of the collective bargaining agreement. He may, nevertheless, 'look for guidance from many sources.'
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> The Supreme Court has said:
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> 'The labor arbitrator's source of law is not confined to the express provisions of the contract, as the industrial

common law — the practice of the industry and the shop — is equally a part of the collective bargaining agreement although not expressed in it.' "

(Porter v. United Saw, File and Steel Products Workers – 33 F 2d. 596.)

". . . In the commercial case, arbitration is the substitute for litigation. Here arbitration is the substitute for industrial strife. Since arbitration of labor disputes has quite different functions from arbitration under an ordinary commercial agreement, the hostility evinced by courts toward arbitration of commercial agreements has no place here. For arbitration of labor disputes under collective bargaining agreements is part and parcel of the collective bargaining process itself.

The collective bargaining agreement states the rights and duties of the parties. It is more than a contract; it is a generalized code to govern a myriad of cases which the draftsmen cannot wholly anticipate. . . . The collective agreement covers the whole employment relationship. It calls into being a new common law — the common law of a particular industry or of a particular plant. As one observer has put it:

'. . . it is not unqualifiedly true that a collective bargaining agreement is simply a document by which the union and employes have imposed upon management limited, express restrictions of its otherwise absolute right to manage the enterprise, so that an employe's claim must fail unless he can point to a specific contract provision upon which the claim is founded. There are too many people, too many problems, too many unforeseeable contingencies to make the words of the contract the exclusive source of rights and duties. One cannot reduce all the rules governing a community like an industrial plant to fifteen or even fifty pages. Within the sphere of collective bargaining, the institutional characteristics and the governmental nature of the collective bargaining process demand a common law of the shop which implements and furnishes the context of the agreement. We must assume that intelligent negotiators acknowledge so plain a need unless they stated a contrary rule in plain words.' "

(United Steelworkers of America v. Warrior and Gulf Navigation Company – 363 U. S. 574.)

". . . A collective bargaining agreement is not an ordinary contract for the purchase of goods and services, nor is it governed by the same old common-law concepts which control such private contracts. **John Wiley & Sons v. Livingston**, 376 U. S. 543, 550; cf. **Steele v. Louisville & NR Company**, 323 U. S. 192. '. . . (I)t is a generalized code to govern a myriad of cases which the draftsmen cannot wholly anticipate. . . . The collective agreement covers the whole employment relationship. It calls into being a new common-law — the com-

mon law of a particular industry or of a particular plant.' **United Steelworkers of America v. Warrior & Gulf Nav. Company,** 363 U. S. 474, 578-579. In order to interpret such an agreement it is necessary to consider the scope of other related collective bargaining agreements, as well as the practice, usage and custom pertaining to all such agreements. . . ." (Transportation-Communication Employees Union v. Union Pacific Railroad Company., 17 L ed. 2d. 264.)

All of this points clearly to the often repeated truism that labor agreements should be liberally interpreted so as to give effect to the intent as expressed by the words used, considered in their setting surrounded by tradition, custom, usage and practice.

If that reasoning had been followed here, so that the "common law" of the Northern Pacific — telegraph service employes' community had been applied, we would have found that the "intent" of Rule 27(a) and those others having a bearing on the case, was that temporary vacancies of less than fifteen days should positively be filled by one or another of the means provided.

J. W. Whitehouse
Labor Member

Keenan Printing Co., Chicago, Ill. Printed in U.S.A.