NATIONAL RAILROAD ADJUSTMENT BOARD

Award Number 20057

THIRD DIVISION Docket Number CL-20037

Irving T. Bergman, Referee

PARTIES TO DISPUTE: (Brotherhood of Railway, Airline and Steamship Clerks, (Freight Handlers, Express and Station Employes
(Pacific Fruit Express Company

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood (GL-7276) that:

(a) The Pacific Fruit Express Company violated the current Clerks' Agreement between the parties when it failed and refused to compensate employes Frank Grandinetti and Glenn Thompson in accordance with the terms of Rules 18 and 31 thereof; and,

(b) The Pacific Fruit Express Company shall now be required to compensate Mr. Grandinetti and Mr. Thompson the difference between the time and one-half rate of $28.41 and $28.66 per day September 12, 1970 and September 19, 1970, respectively.

OPINION OF BOARD: The Organization has objected to acceptance of the Carrier's Submission and requests that the claim be sustained on technical grounds. Reliance is placed upon Circular No. 1 (1934), N R A B Rules of Procedure, "Position of Carrier." This paragraph requires that: "---all data submitted--must affirmatively show the same to have been presented--." It has been a practice at the conclusion cf a submission for the party to declare, in substance, that all of the material was presented on the property. The Carrier has not made this statement.

The language of the rule includes the word, "show." It would be a subversion of the rule to make the statement urged by the Organization if the record did not actually contain material to confirm the statement. It is not form which is required but content which must be shown. Examination of the correspondence between the parties attached to the record as Carrier's Exhibits A through E, affirmatively shows that the arguments contained in the Carrier's Submission were presented to the Petitioner's representatives on the property.

The Carrier has asserted that the claimants volunteered on their rest days for the day's work created by Carrier permitting a clerk to be absent to go on a camping trip. We reject this assertion because there is no evidence that the absent employe and the claimants arranged among themselves with the approval of the Carrier to have claimants act as substitutes to fill in for the day at the lower rate of pay.

The Carrier has argued logically and persuasively, supported by various rules of the Agreement and early Awards favoring its position, that employes who make themselves available for work on their rest days are actually volunteering their services. It is contended that as a result, the employes accept the rate as well as the conditions of the vacant position which they elect to fill on their rest day.

The Organization has argued that any past practice and the earlier Awards argued by the Carrier have been overcome by more current Awards of this Division which have rejected the "volunteer" theory of "rest day" availability.

The facts and the Rules of the Agreement are clear. The real issue is the status of a regular employe on his rest day.

The assignment of a regular employe, not on furlough for any reason, provides for his days of work and stipulates the hours and which shall be his days of rest.

The Carrier's contention may be arguable, that any work accepted by the employe on his off time might be considered as voluntary at the rate of pay for the other work.

This logic has, however, been erased by agreements which have provided for calling employes on their rest days, in this case, according to seniority. The alleged disadvantage to employers of the strict application of seniority has been often debated. The right to work protected by scope rules and seniority leaves no room for equity or imagination. Unless exceptions are specifically set forth, such rules must be followed literally. There is no exception set forth in the Rules of this Agreement which specifically supports the Carrier's contention. If we were to accept the interpretation that the Carrier has spelled out, no matter how logical, we would be required in this case to add language. We have no authority to do so.

Petitioner's insistance upon literal application of the Rule in this case has support in the generally accepted industrial concept that a higher rated employe temporarily performing the work of a lower rated employe retains the higher rate of pay. This general concept has been limited and qualified by agreements which provide exceptions under varying circumstances. On the other hand, employers have contractually negotiated machinery to protect against excessive absenteeism and absences for personal reasons which are detrimental to the operation or work to the disadvantage of the employer. During the term of an agreement there are occasions when the parties may accomodate each other with the clear understanding that no practice or precedent is thereby created. A day for camping or succumbing to the "call of the wild" during the hunting or fishing season, in the life of a worker is often helpful to the relations between the parties.

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 has been violated.

AWARD

Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: A W Paulos
Executive Secretary

Dated at Chicago, Illinois, this 14th day of December 1973.