NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Award Number 20422
Docket Number MW-20483

Irwin M. Lieberman, Referee

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employes
(
(St. Louis-San Francisco Railway Company

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

(1) The Carrier violated the Agreement when it failed and refused to pay Relief Foreman I. C. Mundell at the foreman's rate while on vacation from August 14 through August 25, 1972. (System File B-1091/D-7015)

(2) The Carrier now be required to pay to Relief Foreman I. C. Mundell the difference between what he should have been paid at the foreman's rate and what he was paid at the laborer's rate for his vacation from August 14 through August 25, 1972.

OPINION OF BOARD: Claimant is a regularly assigned Relief Foreman; this is a bulletined position who's responsibility it is to serve in emergency and temporary vacancies, including vacations. Claimant relieved the Foreman on District Gang 114 between July 17 through August 4, 1972 and the Foreman on District Gang No. 116 between August 7 through August 11, 1972 (vacation vacancies). The rate of pay for the two District Gang Foreman positions was identical and Claimant was compensated at the same rate of pay for both temporary assignments. From August 14 through August 25, 1972 Claimant took his vacation for which he was compensated at the Section Laborer's rate of pay.

Both parties to this dispute rely upon Referee Morse's interpretation of the December 1941 National Vacation Agreement dated November 12, 1942, which reads in pertinent part as follows:

> "As to an employee having a regular assignment, but temporarily working on another position at the time his vacation begins, such employee 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."

The sole issue before us is whether Claimant should have been paid the foreman's rate for his vacation in August of 1972. The Carrier justifies its position on the lower rate of pay on the following grounds:

1. Referee Morse, in the interpretation quoted above, used the singular instead of the plural in referring to "position" and the term "such position".

2. Award 5422 dealing with a similar issue has been followed by Carrier consistently for over twenty years without any question being raised by Petitioner. That Award supports Carrier's position in the instant dispute.

3. In Award 7772 relied on heavily by the Organization the Referee pointed out that Claimant had performed relief service for Section Foremen with a "marked degree of regularity". There is no showing in this case that there was a "marked degree of regularity" in performance of Foreman work by Claimant.

In addition to the interpretation of Article 7 (a) of the Vacation Agreement quoted above, Petitioner cites Awards 5390 and 7772 in support of its position. In Award 5390, involving the Carrier herein and the Clerks Organization, the Claimant occupied the position of Inbound Foreman, relieving successively two different men, immediately prior to his vacation. Carrier raised an argument similar to that herein with respect to the interpretation of the Vacation Agreement. We said:

> "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. Through 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.
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> Referee Morse in making his various interpretations of the vacation agreement stated:
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> > ' .... 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)
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> 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."

In Award 5422, the issue was similar except that the relief positions filled by Claimant were in two different positions, Section Foreman and Yard Foreman, with separate bulletining required, and differing rates of pay. In that case we held:

> ".....we are impelled to hold it means that an employee who is filling a temporary position at the time his vacation begins is not entitled to its rate of pay, where, in order to bring himself within the scope of the twenty day proviso, it is necessary for him to pyramid days worked on a different and independent position. In our opinion, to construe the interpretation otherwise has the effect of reading something into it that is not there."

Subsequently, in Award 7772, we dealt with a factual situation almost identical to that herein, except that the relief foreman (Claimant) performed relief service for various section foremen with a "marked degree of regularity" during the preceding year. We evaluated the reasoning in Awards 5390 and 5422 in Award 7772 and in the final paragraph came to the following conclusion:

> "Inasmuch as the very essence of a relief position which claimant admittedly was promoted to, and occupied when required, indicates that service will be performed at different locations we think that the controlling vacation rate for the claimant should be that of the positions occupied during the 20 day period, whereas here both bore the same classification and rate, a sustaining award is justified."

It is apparent that Award 5422 may be distinguished from the factual circumstances in Awards 5390, 7772 as well as those obtaining herein; that Award dealt with relief work for the twenty day eligibility period in two quite different positions bearing different rates of pay, which was not true in the other cases.

We do not agree with Carrier's position with respect to Award 7772 in that Claimant in that case had performed relief service with a "marked degree of regularity" unlike Claimant herein: such conclusion would amend Referee Morse's interpretation of the Vacation Agreement adding an additional proviso to the twenty day qualification clause. Further such conclusion would open a new Pandora's box in the determination of what constitutes a "marked degree of regularity". We choose to consider the majority's language in Award 7772 in this regard to be merely dicta.

Further, we do not accept Carrier's argument with respect to practice. Even if the application of the Agreement was as Carrier's unrefuted statement indicates, it does not bar Petitioner from asserting that the language of the Agreement, as interpreted by Awards of this Division, is controlling. We believe that Claimant was entitled to the higher rate of pay during the vacation period in question. Such an interpretation would be consistent with at least two prior Awards with closely parallel circumstances and would affirm Referee Morse's position with respect to equity, intent of the parties and a reasonable result.

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 violated.

A W A R D

Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: A.W. Paulos
Executive Secretary

Dated at Chicago, Illinois, this 27th day of September 1974.