

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Award Number 23509
Docket Number CL-22073

Robert A. Franken, Referee

PARTIES TO DISPUTE: (Brotherhood of **Railway**, Airline and
(Steamship Clerks, Freight **Handlers**,
(Express and Station Employee
(Chicago, Milwaukee, St. Paul & Pacific
(Railroad Company

STATEMENT OF CLAIM: Claim of the System **Committee** of the Brotherhood
(668358) that:

1) Carrier violated the Clerks' **Rules** Agreement at Milwaukee, Wisconsin on October 20, 1975 when it failed to honor **an employee's written request** and seniority rights to work a vacation vacancy **on Position** No. 09680, Airline Clerk.

2) Carrier shall **now** be required to compensate employee C. J. Conrad an additional eight **(8) hours** at the straight **time** rate of pay of **Position** No. 09680 for the following days:

Oct. 20, 21, 22, 23, 24, 27, 28, 29, 30 & 31, 1975.

3) Carrier shall now be required to compensate employee C. J. Conrad for sixteen (16) hours at the time and one-half rate of Position No. 09640 on Sundays, October 26 and November 2, 1975.

OPINION OF BOARD: This is a claim based on an alleged violation of the agreement between the parties which occurred when the carrier refused to honor claimant's request to work the vacation vacancy of employee Eolokithas. The carrier denied the request of claimant because there was no unassigned furloughed employee qualified to work claimant's position. Wad carrier honored claimant's request, it would have had to pay penalty time to fill his position.

The claimant bases his claim on the clear language of Rule 9 F **and** G and notes 1 and 2 thereto.

"RULE 9 -- BULLETINED POSITIONS

(f) Bulletined positions filled temporarily pending an assignment, shall be filled by the senior qualified employee requesting the position.

(g) New positions or vacancies of thirty (30) days or less duration shall be considered as temporary and may be filled by an employee without bulletining; if filled, the senior qualified employee requesting same will be assigned thereto.

* * * *

NOTE: 1. In ~~the~~ application of Rules 9(f) and 9(g) regularly assigned **employees** in the seniority district making request thereunder will be assigned on the basis of seniority, fitness and ability on the first day which follows the second rest day of the position to which he is regularly assigned, **except** that in connection with vacation vacancies of 5, 10, 15, 20, or 25 days duration employees may be assigned to the vacation vacancy on any work day thereof but will not be permitted to begin work on the vacation vacancy on either of the rest days of the position occupied at time of request. Such request **must be made** in writing with the officer having supervision over the position involved at least twenty-four (24) hours in advance of the ~~time~~ he expects to **commence** filling the temporary or vacation vacancy.

When a regularly assigned employee is assigned as provided herein his regular position will be considered a temporary vacancy.

2. In the application of paragraph 1 hereof a senior employee making proper request for a vacation vacancy may, during ~~the~~ first 5 days of a vacation vacancy only, displace a junior employee on a vacation vacancy, but only on ~~the~~ first work day the vacation vacancy is available to him under the provisions of ~~this~~ note. **The** provisions of this paragraph constitute an exception to ~~the~~ first **sentence** of paragraph 3 **hereof.**"

The carrier maintain:; that **12A** and 12B of the National Vacation Agreement of December 17, 1941 govern in the instant case and sanction its actions with respect to the claimant in the instant case. Specifically, the fact the **carrier** would have had to pay penalty **time** is alleged to run counter to the language " . . . a carrier shall not be required to assume greater expense because of granting a vacation . . . "

"12. (a) 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 employee were not granted a vacation and was paid in lieu **therefor** under the provision hereof. **However**, if a relief worker **necessarily is** put to substantial extra expanse over and above that which the regular **employee** on vacation would incur if he had remained on the job, the relief worker shall be compensated in accordance with existing regular relief rules.

(b) As **employees** exercising their vacation privileges will be compensated under this agreement during their absence on vacation, retaining their other rights as if they had remained at work, such absences from duty will not constitute 'vacancies' in their positions under any **agreement**. When the position of a vacationing employee is to be filled and regular relief employee is not utilized, effort will be made to observe the principle of seniority."

The organization would have us read the above-quoted provisions of the two agreements as though they **were** in conflict and that the chronology of the agreements gives superiority to the provisions of the Collective Bargaining Agreement. It is elementary to contract interpretation that it is presumed that the parties intended their various agreements to be in harmony rather than in conflict. It is presumed that the parties were aware of their various agreements and that subsequent agreements which do not repeal earlier agreements are made in full consideration of those earlier agreements and should be so interpreted.

Accordingly, in the instant matter, we must read the rules of the Collective Bargain&g Agreement together with the provisions of the 1941 Vacation Agreement. When we do so, we find that the carrier is warranted in not granting the request of the claimant when it would be required to assume a greater expense because of granting employe Kolokithas his vacation than it would have assumed had the vacation not been granted and he was paid under the Agreement.

We fail to find contractual support for the claim.

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;

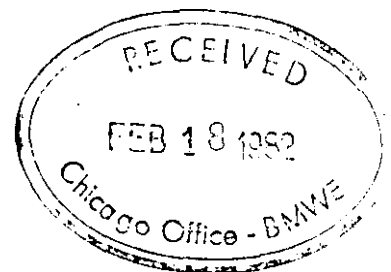
That the Carrier and the Employee involved in this dispute are respectively Carrier and Employes within the meaning of the Railway Labor Act, as approved June 21, 1934;

That this Division of the Adjustment Board has jurisdiction over the dispute involved herein; and

That the Agreement was not violated.

A W A R D

Claim denied.



NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

A. W. Paulsen

ATTEST

Executive Secretary

Dated at Chicago, Illinois, this 29th day of January 1982.

LABOR MEMBER'S DISSENT
TO
AWARD 23509, DOCKET CL-22073
(Referee Franden)

Award 23509 is in palpable error and does not correctly interpret the rules of the parties' working agreement and the articles of the National Vacation Agreement.

The award, after citing various rules of the working agreement and articles of the vacation agreement, **states:**

"The organization would have us read the above-quoted provisions, of the two agreements as though they were in conflict and that the chronology of the **agreements** gives superiority to the provisions of the Collective Bargaining' Agreement. It is elementary to contract interpretation that it, is presumed that the parties intended their various agreements to be in harmony rather than in conflict. It is presumed that the parties were aware of their various agreements and that subsequent agreements which do not repeal earlier agreements are made in full consideration of those earlier agreements and should be **so** interpreted."

The parties were aware that their various agreements may not be in complete harmony when the National Vacation Agreement was first adopted forty years ago. This fact is noted in the 1942 Morse Interpretations to the agreement. Several times Referee Morse had the opportunity to consider the relationship between the vacation agreement and the rules agreement. In each instance he concluded that the vacation agreement cannot be administered in a fashion that places it in conflict with the rules agreement. For instance, at page 71 of the interpretation; **Referee** Morse wrote:

"Thus, the vacation agreement itself as adopted on December 17, 1941, shows that the parties recognized that existing rules agreements on the various railroad properties are applicable to the vacation agreement but that they may be changed in negotiations between duly authorized representatives of the parties.

"At the hearing on August 1, 1942, as shown by the record, a lengthy discussion took place in regard to the way that various working rules in existing rules agreements might affect the administration of the vacation plan if the **employees** should insist upon a strict enforcement of them. The record shows that all parties concerned in the hearing recognized that existing rules agreements must be taken into account in interpreting and applying the vacation agreement, although there was a marked difference of opinion between the parties as to just how some of the rules should be applied to the vacation agreement.

"At several points in the transcript, chiefly on pages 524 and 536, the referee reminded the parties **that it** was understood by them at the time of their December, 1941, negotiations on vacations 'that the working rules would remain in force and that it was not contemplated that they would remain in force either to make work unnecessarily or in order to raise technicalities,' which would work injustice and defeat the purpose of the vacation agreement. It is the duty of the referee to interpret and apply the vacation agreement in accordance with the meaning of its language, and if that results in a conflict with some working rule about which the referee was uninformed, then it is up to the parties to adjust the matter through the machinery for negotiations as provided for in Sections 13 and 14 of the agreement. However, the referee has no power to force the parties to make such adjustments in their rules, no matter how fair and reasonable such adjustments would be." (underscoring added)

And at page 86 he again stated:

"Irrespective of the problems and difficulties which apparently have arisen in connection with applying Article 10(b), this referee would not be justified in amending Section (b) of Article 10

"by way of interpretation in order to eliminate some of those problems. Sympathetic as he is with the view that any existng workrng rule which produces unjust or unreasonable results when **applied** to the **vacation** agreement should be waived or set aside insofar as admrnistering the vacation plan is concerned, the fact remains that .it does not fall within the referee's **prerogatives** and **jurisdiction** under the vacation agreement to change the working rules.

"The parties have provided in Article 13 for the procedure which is to be adopted in making any changes in the **working** rules. Hence, unless the referee can find that the vacation agreement itself constitutes a modification of some given working rule, the parties must be deemed to be bound by existing working rules until they negotiate changes in them by use of the collective-bargaining procedures set out in **Article 13.**" (underscoring added)

Thus Award 23509 is in manifest error when it concludes that it is **permissable** to violate the rules agreement when applying the vacation **agreement**. The award is also in error when the logic of its "greater expense" comment is considered. The award stated:

"... it (the Carrier) would be required to assume a **greater** expense because of granting employe Kolokithas his vacation than it would have assumed had the vacation not been granted and he was paid under the Agreement:",

Had Kolokithas not been granted his **vacation** and paid under the agreement, 'he would have been paid at **the time** and one-half rate. Thus, **even** if the argument were correct on the "greater expense" consideration with respect to the vacation agreement trumping the rules agreement, it would be incorrect with regard to any greater expense because there would be none. Had the Carrier properly filled the vacation vacancy the total cost would have been equal to that which they would have incurred had Kolokithas not taken a vacation and instead worked his **own** position.

On the same date Referee Franden's Award 23509 was adopted by the Board, a **similar** Award by Referee Roukis was adopted - Award 23510. This award correctly held:

"In reviewing this case, there are a number of interpretative considerations that we must **carefully** examine **before** proceeding to a **compara-**tive analysis of the key divisional Awards submitted vis this claim. When the applicable 1942 Morse interpretations to the **National** Agreement are evaluated, **we** find that Article 12(b) requires Carriers not to bulletin vacation positions for the purpose of filling same from the employees submitting applications and that an employee holding a regular position who is utilized to fill the position of the vacationing employee is governed by the provisions of existing rules agreements or recognized practices thereunder." (underscoring in original)

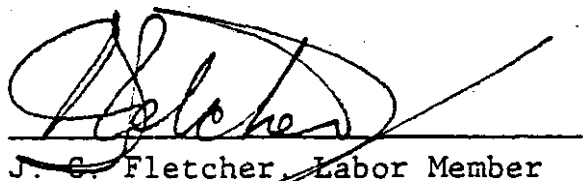
Award 23510, after exhaustively examining the working agreement, the vacation agreement and our prior awards, **cited with** favor our early Award 4626 where we held in part:

"It was the clear intention of the parties to the Vacation Agreement that the existing rules as to working conditions were to continue unless changed by negotiations."

It is clear that Award 23510 is a correct application of the agreements, while Award 23509 is not.

Award 23509 is in palpable error and requires dissent.




J. C. Fletcher, Labor Member

Date: 2-2-82