Award No. 1060
Docket No. CL-1181

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Benjamin C. Hilliard, Referee

PARTIES TO DISPUTE:

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

THE SAINT PAUL UNION DEPOT COMPANY

STATEMENT OF CLAIM: "Claim of the Terminal Committee of the Brotherhood that the Carrier violated the current agreement between the parties hereto when it failed and refused to apply such agreement properly to its employes and that as a result of said violation Chas. Reider was not properly compensated and shall now be paid an additional 4 hours at rate of $4.72 per day (59¢ per hour) for each date he was required to work a total of 16 hours within a spread of 24 hours as computed from 3:30 P. M. on Monday and ending at 3:00 P. M. on Tuesday between the dates of May 9, 1938 and November 15, 1938."

EMPLOYES' STATEMENT OF FACTS: "(1) Mr. Reider was the regular incumbent of Relief Position #3, having exercised seniority displacement rights thereto on March 30th, 1938.

This relief position was created and maintained as the means of providing a regular schedule of reliefs on the assigned rest days of seven-day positions.

"The assigned hours of service on said position as recorded in Carriers' Bulletin, dated Sept. 1, 1937, when vacancy on said position was posted for seniority bids were:

Monday	6:30 A. M.—3:30 P. M.
Tuesday	6:00 A. M.—3:00 P. M.
Wednesday	6:00 A. M.—3:00 P. M.
Thursday	6:00 A. M.—3:00 P. M.
Friday	Rest Day
Saturday	6:30 A. M.—3:00 P. M.
Sunday	7:00 A. M.—3:30 P. M.

"At the time this bulletined assignment was made (September 1, 1937) the incumbent relieved regular assigned incumbents on the assigned rest days, the Monday assignment being relief on position of M. B. M. Trucker, Clerk, which position was abolished as of March 30, 1938.

"The incumbent of Relief Position #3 was on and after March 31, 1938 required and assigned to perform similar work on Mondays with no change in bulletined hours nor in rate of pay.

"Such assignment on Mondays after March 30, 1938 was made in accordance with the established handling of bulletined relief positions where 6 rest days were not available for assignment to bulletined relief positions.

is considered that Award 417 represents the weight of authority on the subject and it is consequently followed. This, of course, does not bar complaint at any time concerning a continuing violation; it merely limits retroactive reparation to ten days before complaint.'

"We also direct your attention to the fact that in that case retroactive adjustment was made only to the period covered by the time limitation in an identical rule. The principle enunciated in Award No. 595 has been followed by this Division in Awards Nos. 863 and 942. It is respectfully submitted that on the basis of the language of Rule 29 and the awards of this Division on the application and interpretation of such a rule, there is no basis for the Employes' claim prior to October 28, 1938. The Carrier has already agreed to reimburse the employe commencing October 28, 1938."

There is in evidence an agreement between the parties bearing effective date of July 1, 1921.

OPINION OF BOARD: The foregoing constitutes factual basis for detailed study. For purposes of decision the applicability of paragraphs—called rules—29 and 45 of the agreement of the parties (both quoted above), must be determined. That in the manner stated, and to the extent claimed by the employes, there was infraction by the carrier of Rule 45, apparently is conceded. Predicated so, the carrier is agreeable to making reimbursement for wage losses from and as of the time when complaint was made, and for seven days preceding that time. It would thus limit its liability on the theory that Rule 29 operates to that effect. The employes contend that Rule 29 deals with wholly different problems and is unavailing to the carrier. It is to be observed that the agreement between the parties is divided into articles, each article bearing an explanatory heading printed in emphasized type. Rule 29, cited by the carrier, is part of Article IV, and is entitled "Discipline and Grievances." Rule 45, claimed by the employes to be the only provision applicable in the premises, is found in Article VII, entitled "Overtime and Calls." The full text of Article IV indicates that the discipline contemplated there has to do with the manner in which an employe performs his duty, and his grievances, if any, with the treatment accorded him in the course of his employment by the carrier. It is altogether procedural in its scope. Article VII deals with the wage scale in exceptional instances, and Rule 45 thereof applies particularly here. Neither discipline nor grievance is mentioned in the article, nor is either presented for consideration in this proceeding. For aught that appears the employe's services have been satisfactory, and by like token the carrier has not imposed upon the employe. Concededly, at a given time, and continuing for an agreed period, the carrier made overtime use of the employe's services. The agreement provided for that very thing, and how the employe should be compensated in the circumstances appearing. In demanding pay in accordance with the agreement the employe was not preferring a grievance; indeed, he had none. It was as if in a given instance the agreement provided for a daily wage of five dollars, but in relation thereto the carrier mistakenly paid, and the employe unwittingly received, only four dollars a day. Reasonably, the error should be corrected for the period it obtained, not simply from the time the employe awakened to his rights.

The precedents cited and urged have had consideration. They are not altogether in harmony. Largely, although we do not pause to discuss them in detail, they are factually distinguishable. The record considered, Rule 29 is without application.

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 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 record considered, Rule 29 is without application.

AWARD

Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: H. A. Johnson
Secretary

Dated at Chicago, Illinois, this 26th day of April, 1940.

DISSENT TO AWARD No. 1060, DOCKET No. CL-1181

The award in this case develops from a theory that the subdivision of the Agreement into Articles restricts the individual rules under each Article to subject matter only as it may be identified by the brief heading of each of those respective Articles. That theory is contrary to the understanding of the various carriers and employes' organizations in their preparations and later considerations of such agreements as they appear in the records and opinions of the awards of the Third Division which either by direct statement or implication relate to the arrangement of the rules in these agreements.

The arrangement of rules is not uniform in all agreements. The St. Paul Union Depot Company grouped its rules under numbered articles with headings printed in emphasized type. Some agreements group rules under numbered articles without headings, and others list rules numerically without the use of article numbers and headings.

The title of an article is not always descriptive of all the rules and provisions contained in the article (See ARTICLE III—SENIORITY, Rules 3 to 24, inclusive), nor does the title of an article indicate that all related rules are contained in that article. As an example, ARTICLE XI is titled "RATING POSITONS," yet we find in ARTICLE III—SENIORITY, Rule 20—Change in Rates, and in ARTICLE XII—GENERAL, we find Rule 70—Rates.

The arrangement of rules by articles, headings, or numbers is a matter of form adopted by the interested parties as a convenience, and does not restrict the application of a rule solely to conditions or causes arising under the title or heading of the article in which the rule appears. In fact, though in some agreements there is neither article nor heading, the meaning is the same as in agreements where articles and headings are used; the records of cases and awards of this Division will not disclose a single exception arising from the presence or absence of articles and their headings.

To so interpret and restrict the application of Rule 29 by reason of its inclusion in ARTICLE IV—DISCIPLINE AND GRIEVANCES, brings about chaos and confusion in the application of similar or comparable rules in other agreements which are not divided into articles with explanatory headings.

Following are further statements in the Opinion in support of its expressed theory of restriction of rules to the subject of each Article:

> "Rule 29, cited by the Carrier, is part of Article IV, and is entitled 'Discipline and Grievances.' "

"The full text of Article IV indicates that the discipline contemplated there has to do with the manner in which an employe performs his duty, and his grievances, if any, with the treatment accorded him in the course of his employment by the Carrier."

"Article VII deals with the wage scale in exceptional instances, and Rule 45 thereof (Overtime) applies particularly here. Neither discipline nor grievance is mentioned in the article, nor is either presented for consideration in this proceeding." Note: (Overtime) inserted.

Rules 25 to 28, inclusive (ARTICLE IV), relate to investigation, hearing and appeals of cases involving discipline or dismissal.

Rule 29—Grievances (ARTICLE IV), applies to other types of cases, as specifically indicated by the language:—"An employe who considers himself otherwise unjustly treated * * *." (Underscoring ours.)

A review of preceding awards by this Division makes glaringly apparent the impropriety of the declaration in this Opinion, contrary to overwhelming precedent, that Rule 29, dealing with employes "otherwise unjustly treated," does not relate to causes such as the subject of this dispute. It may not in wisdom be adopted in controversion of the weight of opinion that has preceded it. Based upon the assumption of the restrictive character of the separate articles, the "Opinion" apparently holds that because Rule 29 is a part of Article IV it can have application only to the subject matter indicated by the heading of this particular Article, viz: Discipline and Grievances; and therefore Rule 29 can have no application to Rule 45—Overtime (ARTICLE VII). Such a conclusion is not only in disregard of the understood and accepted meaning of the word "Grievance" but also places undue restriction on the language of Rule 29.

Cases in which both reparation and rules similar or comparable to Rule 29 were involved were decided by Awards 417, 595, 771, 863 and 942. In fact, in one of these awards (Award No. 771) where reference was made to ARTICLE IV, Rule 29 (b), which rule is under the article of identical heading as in the instant case (ARTICLE IV—DISCIPLINE AND GRIEVANCES), whereunder also appears Rule 31, Grievances, identical with Rule 29, Grievances, in the instant case, the Opinion of Board dealing with the same character of a claim as in the instant case, i. e., an alleged violation of the Agreement including claim for reparation (not involving, as the Referee here says, "the treatment accorded him in the course of his employment by the carrier") contained this declaration:

"The Carrier, however, fails to show that when the senior applicant's bid was rejected that she took any appeal, which under Article IV, Rule 29 (b) she was required to do within twenty days."

That construction of the obligation of the employes under the appeal rule of the identical ARTICLE IV—DISCIPLINE AND GRIEVANCES and of the Carrier to thus recognize an appeal on such a complaint was in harmony with the previous overwhelming and logical construction by this Division of this rule relating to unjust treatment. In none of these awards was it held that the claim was not a "Grievance." The awards above cited either limited or barred reparation in accord with the provisions of the contract; none of them, and not any other award of the Division, found Rule 29 or its equivalent inapplicable because of its isolation under a particular Article and heading. See also Award 876, involving reparation under Rule 31 (ARTICLE IV—DISCIPLINE) of the agreement there involved.

The Opinion, continuing on this thought, says: "In demanding pay * * * the employe was not preferring a grievance; indeed, he had none." Such limitation placed upon the word "Grievance," irrespective of its technical use and position in the Agreement involved in this case or in any of the Agreements between the organizations of employes and carriers, is in con-

flict with opinions expressed in connection with the efforts which resulted in the enactment of the Railway Labor Act, Amended, and with presentation of previous disputes and arguments to this Division. See the following testimony of Mr. G. M. Harrison, President of the Clerks' Organization, made before Congress when urging the adoption of the amended Railway Labor Act. Mr. Harrison was at that time Chairman of the Railway Labor Executives Association and was the spokesman for all the organizations in that association. His expressions are quoted from a previous award, No. 42, by this Division:

> "Now, as a brief explanation of the character of those disputes, they might very well concern a man's seniority, whether or no his date is the proper date; might very well concern whether or no he has been paid the proper amount of compensation for a particular class of work performed, as the contract provides shall be paid. It may very well concern the separation of an employe from the service, whether or no he has been unjustly dismissed. It very well may concern the promotion of a man, whether he should have been accorded promotion, in accordance with his ability and his seniority in keeping with the rules of the contract; whether or no he was laid off in his seniority order; if he had not been taken back in his seniority order."
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> "* * *.
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> "So, out of all of that experience and recognizing the character of the services given to the people of this country by our industry and how essential it is to the welfare of the country, these organizations have come to the conclusion that in respect to these minor grievance cases that grow out of the interpretation and/or application of the contracts already made that they can very well permit those disputes to be decided, if they desire to progress them, to be decided, by an adjustment board."

If a claim for reparation is not a "grievance," then the long accepted and understood meaning of the word, as used in the railroad industry, and the testimony of this competent witness, Mr. Harrison, the chief executive of the proponents of the legislation, are worthless.

Again, if such a claim is not a grievance, Committees of Employes are not, under the provisions of Rule 35 of ARTICLE IV, entitled to transportation and leave of absence to handle the case, because Rule 35 provides such grants for the investigation and adjustment of **grievances.**

In brief, there is here an award so unprecedented in its attribution of meaning to nominal headings of conventional articles as to confound the general acceptance by the parties of such headings and articles as mere matters of form and convenience not having the restrictive purpose as to substance which this award suggests. Such attributed meaning, fraught with the danger of misunderstandings by these parties, and by parties to other agreements upon whom it may be urged, may not be permitted to go unchallenged. It stands alone in that respect in conflict with the preponderating weight of opinion in preceding awards of this Division which by reference or inference relate to the arrangement and titling of rules in these agreements. To that overwhelming weight of opinion as well as to the indisputable general understanding of those who have negotiated and operated in accord with the terms of such agreements, this award must succumb.

(s) R. H. Allison
(s) R. F. Ray
(s) C. P. Dugan
(s) A. H. Jones
(s) C. C. Cook