Award No. 2712
Docket No. CL-2680

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Ernest M. Tipton, Referee

PARTIES TO DISPUTE:

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

THE TEXAS MEXICAN RAILWAY COMPANY

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

(a) The Carrier violated the Clerks' Agreement at Corpus Christi, Texas, in September 1943, by refusing to pay Messrs. Salinas, Black and Plant at the agreed upon rate of pay for the positions they actually worked. Also,

(b) Claim that Messrs, Salinas, Black and Plant now be paid the difference due them because of having been paid a rate of pay lower than that agreed upon for the positions they actually worked. Also,

(c) Claim that the Carrier be required to pay all other employes under like circumstances and facts who have been required to work one position and who were paid at the rate of pay applicable to an entirely different position.

EMPLOYES' STATEMENT OF FACTS: In September 1943, Mr. F. L. Lewis, Jr. was regularly assigned to position of Assistant Chief Clerk, rate $195.40 per month.

Mr. Salinas was regularly assigned to position of Car Report Clerk, rate $155.40 per month.

Mr. Black was regularly assigned to position of Collector, rate $120.40 per month.

Mr. Plant was not working any position at the time this claim arose, as he had just been released from military service. At the time Mr. Plant entered military service, he was assigned to the position of Yard Clerk, rate $133.58 per month.

Mr. Lewis, the Assistant Chief Clerk, took his vacation the first part of September 1943 and, of course, was carried on the payroll and paid at his regular rate of $195.40 per month. When Mr. Lewis, Assistant Chief Clerk, went on his vacation, Mr. Salinas, regularly assigned to position of Car Report Clerk, was placed on the position of Assistant Chief Clerk. Mr. Black, regularly assigned to position of Collector, was placed on the position of Car Report Clerk when Mr. Salinas went on the position of Assistant Chief Clerk.

A Mrs. Chastian, who was not then working for the Carrier, was placed on the position of Collector that had been vacated by Mr. Black.

Due to the death of his mother, Mr. Salinas had to be absent after working the Assistant Chief Clerk's position only five days and Mr. Plant, who had just returned from military service, was then placed on the position of Assistant Chief Clerk.

and until this claim was filed, have construed and applied Rule 56 so as to refute rather than support this claim. The Board can adopt no safer guide that the one which the parties have mutually adopted and applied in the past. By their own actions, the parties have shown that under Rule 56 employes are not entitled to additional compensation under circumstances similar to those prevailing here, and the Board should find that said prior construction of the rule is the proper one.

Carrier submits that this claim is wholly without merit, and should be in all things denied.

OPINION OF BOARD: During the first half of September, 1943, occupant of the position of Assistant Chief Clerk, rate $195.40, was absent on vacation. Mr. Salinas, occupant of position of Car Report Clerk, rate $155.40, handled the position of Assistant Chief Clerk for a period of five days. Mr. Black, Collector, rate $120.40, handled the Car Report desk. Mrs. Chastain, unemployed, was hired by the Carrier to take over the duties of collector, rate $120.40. After working five days, Mr. Salinas was absent due to the death of his mother. Mr. Salinas was relieved by Mr. Plant, who took over the work of Assistant Chief Clerk during the remainder of Mr. Lewis' vacation period.

It is the Petitioner's contention that these employes should have been paid the rate of pay of the various positions they held while Lewis was on his vacation under Rules 48 and 49 of the current Agreement. There is no doubt but that these rules sustain the Petitioner's contention if Lewis had been absent for any other reason than on a vacation or sickness. This seems to be conceded by the Carrier in its Rebuttal Brief. But the Carrier contends that Rules 48 and 49 have no application when the employe is absent from work on account of sickness or vacation because of the following part of Rule 56, which reads:

> "Employes and their representatives will cooperate with the management to the end that as far as possible, work of employes on vacations and sick leaves will be performed by other employes without expense to the company."

This rule contemplates that when an employe is on a sick leave or vacation the other employes will perform that work at no expense to the carrier if that is possible. In other words, the remaining employes will retain their positions and also do the work of the position held by the employe on vacation or sick leave. But evidently it was not possible to perform the work as shown in this record without putting on a new employe. The Carrier hired a new employe to help do work while Lewis was on his vacation leave and promoted the remaining employes to higher rated positions. Under these circumstances, the Petitioner contends that Rule 56 is not an exception to Rules 48 and 49. There is some merit in the Petitioner's contention since the Carrier promoted the employes named in the claim to higher rated positions.

Petitioner cites fourteen instances where the Carrier paid the employes who did the work of a higer rated employe while he was on sick or vacation leave the higher rate of pay. Since the Carrier has in the past put that construction on this rule, it should now be bound by that construction.

The Carrier cites as an exhibit a letter signed by three clerical employes stating that its contention of the construction of these rules is correct. However, that letter was dated subsequent to the date of this claim. Moreover, these three clerical employes were not signatories to the Agreement, and we doubt if their interpretation would be binding upon the Petitioner.

It follows that the claims should be sustained except as to Claim (c) that which shows on its face that it is a claim that might not arise in the future. It may be the state of facts or similar state of facts might not arise again and is too speculative to pass on now.

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 Carrier violated the agreement as alleged by the Petitioner.

AWARD

Claims (a) and (b) sustained. Claim (c) dismissed.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: H. A. Johnson
Secretary

Dated at Chicago, Illinois, this 7th day of December, 1944.

DISSENT TO AWARD 2712, DOCKET CL-2680

The error in this Award is found in its failure to properly construe Rule 56.

Rule 56 is a special rule and provides the conditions governing the granting of vacations and sick leave.

As a rule, where in an agreement there are general and special provisions relative to the same thing, the special provisions control. When the parties express themselves in reference to a particular matter, the attention is directed to that, and it must be assumed that it expresses their intention, whereas a reference to some general matter, within which the particular matter may be included, does not necessarily indicate that the parties had the particular matter in thought.

The last paragraph of Rule 56 is controlling in application of the Agreement to the circumstances of this case. As recited in the Opinion of Board, it was the absence of the Assistant Chief Clerk on vacation which occasioned the assignment of the claimants so "that as far as possible work of employes on vacations * * *," as specified by Rule 56, would "be performed by other employes without expense to the Company."

Rule 56 states its objective to be that by cooperation of the parties the work of employes on vacation, so far as possible, will be performed by other employes without expense to the Company.

The facts of this case are that the Management did so arrange its forces to cover the work, and in addition found it necessary to hire a new employe whose compensation was 60% of that of the absent employe enjoying full compensation while away on vacation.

It is a wholly unwarranted and improper application of the Agreement to write into the rule, as does this Opinion, that which does not there appear, i. e., that other employes "will retain their positions and also do the work of the position held by the employe on vacation." (Underscoring added.)

It was equally as improper to punish the Carrier with the suggestion that its contribution to the requirements of Rule 56 by re-assignment of force and its assumption of payment of full compensation to the absent employe, plus

an additional 60% of that compensation to a newly hired employe, constituted evidence that the employes, obligated under the rule to cooperate so as to relieve the Carrier of all expense, were nonetheless entitled, as found by this Award, to burden the Carrier with the whole expense of the absent employe's vacation.

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