Award Number 9323

Docket Number TE-8180

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Martin I. Rose, Referee

PARTIES TO DISPUTE:

THE ORDER OF RAILROAD TELEGRAPHERS
SEABOARD AIR LINE RAILROAD COMPANY

STATEMENT OF CLAIM: Claim of the General Committee of The Order of Railroad Telegraphers on the Seaboard Air Line Railroad, that: of another relief assignment.

1. The Carrier violates the agreement between the parties when it requires or permits an employe without seniority rights in Seniority District No. 4, to perform vacation relief work at D Cabin Tower, Denmark, S. C., belonging to employes with seniority rights on District No. 4; and

2. As a consequence of the violation carrier be required to pay the following employes eight hours' pay at the time and one-half rate on each date following his name:

T. W. Morris, July 15, 22, 1952
J. C. Mack, July 16, 17, 23, 24, 1952
F. S. Holmes, July 18, 19, 25, 26, 1952

EMPLOYES' STATEMENT OF FACTS: The agreements between the parties to this dispute are by this reference made a part hereof.

D Cabin Tower, Denmark, S.C., is located on a territory designated as Seniority District No. 4 in the agreement between the parties. At the time the cause for this claim arose there were three 7-day positions at Denmark Tower occupied by four regularly assigned employes holding seniority rights in District No. 4: F. S. Holmes, regularly assigned to the 1st shift 7:00 A. M. to 3:00 P. M., rest days Friday and Saturday; J. G. Benton, regularly assigned to the 2nd shift 3:00 P. M. to 11:00 P. M., rest days Sunday and Monday; T. W. Morris, regularly assigned to the 3rd shift, 11:00 P. M. to 7:00 A. M., rest days Tuesday and Wednesday; J. C. Mack, regularly assigned to the relief position scheduled to perform rest day relief service on 1st shift Friday and Saturday; 2nd shift Sunday and Monday; and 3rd shift Tuesday. The Wednesday rest day work of the 3rd shift was performed by the incumbent of another relief assignment.

Commencing July 15, 1952, operator Benton, incumbent of the 2nd shift, was granted his vacation consisting of ten working days, and the Carrier assigned operator Clarke, an extra employe holding seniority on District No. 2 only, to work the 2nd shift during this period, as there was no extra employe holding seniority on District No. 4 available. Clarke worked the 2nd

OPINION OF BOARD: The claim of violation of the Agreement is moot. The record shows that the carrier accepted and acquiesced in the Employes' claim with respect to the rules of the Agreement when such claim was appealed on the property; and there is no evidence that the carrier has failed to abide by that determination. Since this phase of the dispute was settled by the parties, there is no reason for us to consider it.

The claim for compensation remains for consideration. It is bottomed on the contention that the carrier was obligated to apply the seniority rules of the applicable Agreement in filling the vacation absence. The record establishes beyond question that the absence involved was an absence from duty because of the employe's vacation.

By Rule 33 of the applicable Agreement the parties expressly incorporated therein and made part thereof the National Vacation Agreement of December 17, 1941. Article 12(b) of that Agreement reads as follows:

> "As employes 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 employe is to be filled and regular relief employe is not utilized, effort will be made to observe the principle of seniority."

The phrase "will not constitute 'vacancies' in their positions under any agreement" clearly removes the vacation absence from the mandatory operation of the seniority rules of the other agreement with respect to vacancies. (Award 8707; see also Awards 5192, 5461, 5976, 6874, 7773.) This is emphasized by the phrase "effort will be made to observe the principle of seniority" in the second sentence of the provision quoted above. No conflict of agreement arises because Article 12(b) of the Vacation Agreement expressly effectuates a limited exclusion from, rather than an inconsistency with, the other agreement.

It is argued that Article 12(b) of the aforementioned Vacation Agreement cannot be considered here because it involves a new issue raised for the first time on appeal to this Board. While there are matters which cannot properly be raised for the first time on appeal to this Board, this is not such a situation. Certainly, both parties are chargeable with full knowledge of the rules of the agreements which they have made binding on them. It is difficult to understand how we can ignore and refuse to give effect to relevant substantive rules of an agreement which is no file with this Board and which the parties have expressly incorporated in the agreement relied on to support the claim. Furthermore, it should be noted that the record shows that in the progressing of this dispute on the property the Carrier relied on and quoted portions of Article 12 of the Vacation Agreement.

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 item 1 of the claim is moot.

That the Agreement was not violated.

AWARD

Item 1 of the claim is moot.

Item 2 of the claim is denied.

NATIONAL RAILROAD ADJUSTMENT BOARD

By Order of THIRD DIVISION

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 31st day of March, 1960.

Dissent to Award 9323, Docket TE-8180.

This award exemplifies one of the gravest errors that can be committed by a tribunal such as the National Railroad Adjustment Board. The decision is based not upon the single disputed issue presented by the parties, but upon a wholly artificial issue invented and improperly injected into the case by a member of the majority. Aggravation of the already serious error occurred when the referee attempted to justify his action of considering the injected "issue" by misleading reference to a portion of the record. Such actions cannot be permitted to stand unchallenged by one who is sincerely interested in serving the purpose for which this Board was created: Peaceful and just relations between railroads and their employes.

Simply stated, this dispute stemmed from action of the Carrier in utilizing an extra employe from one seniority district to relieve a regular employe on vacation in another seniority district. This action was taken because there was available no extra employe holding seniority on the district where the vacationing employe was located. However, other employes, holding such seniority, were available.

The Organization contended that such crossing of seniority district lines violated the rights of those employes who held seniority in the district where the vacancy occurred. They filed claims for three of such employes who could have been used on their rest days to provide the necessary relief.

The Carrier met this contention by agreeing that it had no right to use the extra employe from a foreign seniority district; and immediately issued instructions to its operating officials not to take such action in the future unless express agreement were first secured from the employe representatives.

At this point the parties had no dispute about the meaning of their agreement as applied to the use of an extra employe from a foreign seniority district to provide vacation relief. The logical corrollary must be a conclusion, then, that the seniority rights of employes in the home district were violated. The referee recognized the fact that the parties were in accord that the claimed violation was established. In his very first words he said "The claim of violation of the Agreement is moot."

The referee also noted, and correctly so, that the only remaining issue was the question of compensation. But immediately after noting the true issue he completely reversed the view expressed in his first paragraph, and attributed the basis for the monetary claim to the contention by the employes that the carrier was obligated to apply the seniority rules in filling the vacation absence.

That contention did, of course, underlie the entire claim. But it ceased to be an issue—or more accurately never attained the status of an issue—because the Carrier admitted its validity. In other words, the Carrier did not come to us arguing that it had a right to use the foreign extra employe because of the fact that the absence of Benton was occasioned by his taking a vacation; or that Article 12 (b) of the Vacation Agreement gave it a right under the circumstances to ignore the seniority rules. In fact, the Carrier said in its very first submission that:

> "Ordinarily the right to fill the position during Benton's absence belonged to the senior available qualified extra board employe within the Seniority District No. 4."

The spurious issue and its accompanying fallacious argument, upon which the referee clearly based his decision, did not exist until injected by the Carrier Member of this Board in panel argument to the Referee.

Such actions have been discredited and rejected so many times that there should not now be any question of their impropriety. And the Referee was fully aware of our many holdings on this subject. He was furnished with a lengthy memorandum which explored in minute detail our rejection of attempts by members of the Board to vary the issues from those considered on the property and submitted to us.

These holding are well summed up in Award 8484, where the referee first accepted a new issue injected by a Carrier member, and then reversed himself when his attention was directed to some of the same awards which I cited to the present Referee. Award 8484, after reviewing some of the earlier awards, says:

> "From the above opinions of the Board it is apparent that the Board has diligently protected the parties, both Carrier and Organization, in the presentation of their cases on appeal to the Board in limiting claims to those discussed on the property and limiting the defenses interposed so that there can be no enlargement—or in lay language, no second look after the case is concluded on the property."

The Referee, however, chose to reject that principle, basing his action upon an assertion that, "While there are matters which cannot properly be raised for the first time on appeal to this Board, this is not such a situation." The attempt to justify this view is pathetic. Certainly both parties had full knowledge of the rules applicable to the situation. They were in accord on the proposition that those rules, which include Article 12 (b) of the Vacation Agreement, did not permit the action complained of.

This Board had no right to tell the parties that their understanding of the rules was wrong. This is true even if their understanding was in fact wrong—which it certainly was not. They had no dispute about the effect of application of those rules to the facts of the case. The Referee noted that fact in the first paragraph of his Opinion, but then proceeded with disposition

of the claim precisely as if there was such a dispute. And even then reached a result diametrically opposed to the language of the rule he sought to apply.

Article 12 (b) of the Vacation Agreement requires Carriers to make an effort to observe the principle of seniority if a position is to be filled during the absence of a vacationing employe. The Carrier readily admitted that Benton's position had to be filled during his absence. One of the cardinal factors constituting "the principle of seniority" is that all work of a craft arising in a seniority district established by agreement belongs to employes whose seniority is also by agreement confined to that district.

Knowledge of these facts obviously led the Carrier to make no defense against the claim of agreement violation.

Furthermore, at no time during the handling of this claim on the property, nor during its presentation to the Board, did the Carrier so much as mention Article 12 (b) of the Vacation Agreement, much less rely on it as a defense against any part of the claim. The Referee's last statement, referring to citation by the Carrier of certain portions of Article 12 of the Vacation Agreement is grossly misleading; whether through lack of comprehension or deliberate intent I cannot say, but in any event improper.

That sentence refers to a document reflecting the first handling of the case by the local officers of both the Carrier and the Organization. The Superintendent there quoted paragraphs (a) and (c) of Article 12, and contended that those two paragraphs permitted the action taken by the Carrier. Paragraph (b) is conspicuous by its absence. Furthermore, the Carrier's higher officials in effect overruled the Superintendent and tacitly admitted the violation. The highest officer designated by the Carrier to handle such disputes had this to say as his final decision:

"* * *

"Confirming advice extended to you in conference, it is my position that in view of the extenuating circumstances prevailing in this case the claim must be further denied and in doing so I do not consider I am doing harm or injury to your agreement because of the fact such handling will not again happen except by agreement as indicated in the penultimate paragraph of my letter of December 2, 1952."

The only true dispute between the parties, and the only issue presented to us for decision, centered around a contention by the Carrier to the effect that notwithstanding the admitted violation of applicable seniority rules the Employes were estopped from asserting a valid claim for reparation because of their alleged acquiescence in similar use of extra employes from other seniority districts in the past. The Carrier stated there had been forty such incidents in the past where no claims had been filed. The Organization challenged that statement and asked the Carrier to produce evidence in support of its assertion. No such evidence was produced.

On the other hand the General Chairman submitted documentary evidence showing that the Carrier had allowed precisely similar claims in the past. Furthermore, the General Chairman showed that on two occasions within two months of the dates of the present claims employes at D Cabin, the same place here involved, had been used to provide relief of absent employes. Some of those so used are claimants in the present case. The Carrier made no effort to refute the showing made by the General Chairman.

The record which resulted in a deadlock of the Division, and which was presented to the Referee, clearly showed the dispute to be as set forth in the preceding two paragraphs. The Referee, however, did not mention the circumstances of the real dispute in his opinion. Instead, he accepted the wholly foreign "issue" and argument of the Carrier Member and rendered an erroneous decision on a question that was not properly before him.

It is high time that the strong light of justifiable indignation be turned upon such improper actions of referees who are trusted with the highly important task of rendering impartial decisions upon issues contained in the records of disputes submitted to them, in order to accomplish the purposes expressed by Congress in the Railway Labor Act. That task does not include any requirement to give carriers relief from obligations arising from admitted violation of their agreements with the employes.

The claimants here were entitled to be paid as claimed. Award 9323 deprived them of a vested right, and is thus contrary to the basic purposes for which the Railway Labor Act was conceived and adopted. I take this means of registering my most vigorous dissent thereto.

J. W. Whitehouse,
Labor Member.

Reply to Labor Member's Dissent to Award No. 9323, Docket No. TE-8180

As Petitioner sets forth in its Statement of Claim, determination of the issue involved in Part 1 of the claim was controlling over the compensation requested for the specific dates listed in Part 2 of the claim. Obviously, discontinuance of past practice by the Carrier for the future did not retroactively affect the issue insofar as the claim dates were concerned; hence, Carrier continued to deny the claim for compensation.

The issue controlling the compensation claimed was whether or not Carrier violated the Agreement between the parties on the claim dates; consequently, the Agreement necessarily was before us for interpretation in its entirety. Article 12(b) is a part of the Agreement between the parties, and, as set forth in the final paragraph of Opinion of Board, it was essential to a determination of the single issue involved in this case on the merits.

Furthermore, Award 9323 is consistent with precedent awards cited and followed by the majority in denying the claim for compensation.

/s/ W. H. Castle

/s/ J. E. Kemp

/s/ R. A. Carroll

/s/ C. P. Dugan

/s/ J. F. Mullen