Award No. 9475
Docket No. TE-8458

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

William E. Grady, Referee

PARTIES TO DISPUTE:

THE ORDER OF RAILROAD TELEGRAPHERS

CHICAGO, MILWAUKEE, ST. PAUL AND PACIFIC RAILROAD COMPANY

STATEMENT OF CLAIM: Claim of the General Committee of The Order of Railroad Telegraphers on the Chicago, Milwaukee, St. Paul & Pacific Railroad that:

1. The Carrier violates the agreement between the parties when it failed and refused to compensate telegrapher H. M. Schremp for eight hours for the calendar day of December 1, 1953, lost in transferring from second shift Mosinee, Wisconsin to the first shift at that point.

2. The Carrier shall be required to compensate Telegrapher Schremp for eight hours at straight time rate for December 1, 1953.

EMPLOYES' STATEMENT OF FACTS: There is in full force and effect a collective bargaining agreement entered into by and between Chicago, Milwaukee, St. Paul and Pacific Railroad Company, hereinafter referred to as carrier or management, and The Order of Railroad Telegraphers, hereinafter referred to as employes or telegraphers. The Agreement as amended, is on file with this division and is by reference included in this submission as though set out herein word for word.

This dispute was handled on the property in the usual manner through the highest officer designated by Carrier to handle such disputes and failed of adjustment. As provided in the Railway Labor Act, as amended, the dispute is submitted to this division for award.

This dispute concerns application of principally one rule of the agreement. This is Rule 15(a) providing as follows:

"Employes shall be paid eight (8) hours each calendar day for time lost in transferring from one station or position to another at the rate of the position from which transferred, except such time as may be lost of the employe's own accord. The word 'transferring'

towerman for amount he would have earned as a train dispatcher was denied, the Division finding that by his own free actions the Claimant had placed himself in a position to which the Hours of Service Law applied. Not so in the instant case where the telegrapher could not have refused the relief assignment with immunity. In Award 4975, conflict with the Law arose over the employe's free use of his seniority rights and the claim was denied. In Award 5538, Claimant voluntarily and in violation of orders brought himself into conflict with said Law."

The Opinion of the Board in Award 6843 contains the following statements:

"In any event, the rules cannot be interpreted nor applied in a manner that would contenance violation of any law enacted pursuant to the police powers of the Government.

The enforcement of a provision of a contract must yield to superior authority of the law. See Award 4975."

In conclusion, the carrier asserts that it should not be penalized for compliance with the Federal Hours of Service Act, nor should it be penalized by reason of the claimant making free use of his seniority rights as provided and contemplated by agreement.

The claim is entirely without merit and should be denied.

All data contained herein has been presented to the employes.

(Exhibits not reproduced.)

OPINION OF BOARD: This claim is for pay for a day on which Claimant was barred from work because of the Federal Hours of Service Law, herein called the "Law".

The Claimant, upon displacement by a senior employe, exercised his seniority rights under the Agreement to return, as of December 1, to a position formerly held at the same point. The Carrier advised Claimant that he could not start on the former assignment until the following day, December 2, because of the Law. A day's pay is claimed for December 1.

Rule 15 (a) of the Agreement, entitled "Transfers", provides:

"Employes shall be paid eight (8) hours each calendar day for time lost in transferring from one station or position to another . . ., except such time as may be lost of the employe's own accord. The word 'transferring' includes transfer in the exercise of seniority . . ."

Claimant was transferring in the exercise of seniority from one position to another, was ready to work on December 1, and did not lose time on that day of his own accord. The Carrier was barred by the Law from permitting Claimant to work on that day, absent an emergency, and no emergency existed.

The sole question, therefore, is whether Claimant is entitled to a day's pay for December 1 under Rule 15 (a), quoted above.

The Organization's position is that although the Law prohibited the Carrier from permitting Claimant to work on December 1, the Law did not forbid the Carrier to agree to pay for the time not worked on that day and that in Rule 15 (a), the Carrier has so agreed. The Carrier contends that Rule 15 (a) does not obligate it to pay. The issue, as joined, revolves around the wording of Rule 15. History is absent.

Familiar principles of construction have been advanced pro and con. For example, the Organization argues that subdivision (a) of Rule 15 constitutes a commitment to pay unless the time is lost of the employe's own accord and that since there is this express exception, no other exception may be implied. It reinforces this argument by pointing to subdivision (c) of the same Rule which provides that an employe transferred to accept a bulletined position shall be furnished transporation "when not in conflict with State or Federal laws". Had a similar exception been intended in subdivision (a), so the argument goes, it would have been expressly set forth. The Carrier argues that an assumption of liability for time not worked must be clear; that subdivision (a) must be read in the light of the Law and that in order to have a valid claim for "time", an employe must be not only ready but also able to lawfully work.

Two Awards have been given special emphasis, No. 242 and No. 4975.

In Award No. 242, the rule required payment for time lost ". . . transferring from one station or position to another . . . in the exercise of seniority". A joint statement of facts was submitted. It declared that the claimant's position had been abolished; that he had exercised displacement rights to a position at another point as of October 15; that he had not reached the new location because transportation had not been available; and that if transportation had been available, he could not have been allowed to work on October 15 because of the Law. A day's pay was claimed for October 15. The Carrier contended that if the claimant's position had not been abolished he would not have worked on October 15 because that day was his rest day; that since there was no earning expectancy on October 15, claimant had suffered no loss of time. The claim was upheld.

In Award No. 4975, the claimant upon displacement by a senior employe, bid in another position at the same point as of May 4. He was barred from working on that day by the Law. The claim for time lost on that day was denied.

Article 29 (b) of the agreement there involved, provided: "When employes are transferred or accept a bulletined position, they will be furnished free transporation . . . if lawful, and will be allowed pay for time lost while in transit and making transfer . . .. This will also apply in case of displacement." Parenthetically it will be noted that the agreement there, as here, made express reference to lawfulness in connection with free transportation.

Award No. 4975 is persuasive that this claim should be denied. In Award No. 242 the question here presented, lurked in the joint statement, but, in view of the Carrier's reported argument, the question does not appear to have been brought into focus or necessarily passed upon.

By contrast, in Award No. 4975, the question was squarely presented and passed upon. The holding was that since the Carrier was forbidden by the Law to work the claimant on the day for which the claim was made

". . . the claimant did not lose time to which he had a valid right under the contract".

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 Employe involved in this dispute are respectively Carrier and Employe 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.

AWARD

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois this 28th day of June, 1960.

DISSENT TO AWARD 9475, DOCKET TE-8458.

This award, adopted by a majority consisting of the Carrier Members and the Referee, reflects either a complete misunderstanding of the question involved or an inclination to favor the carrier. In either event the award is improper and should not have been adopted.

The claimant lost time — a day's pay — in transferring from one position to another. The transfer was occasioned by exercise of seniority of a senior employe and thus the time lost was not "of the employe's own accord", the only exception to the provision of Rule 15 that payment will be made for loss of time in transferring.

The only question to be decided was whether the parties' agreement should be applied, as written, to the admitted facts, or whether the Federal Hours of Service Act nullified the rule when the law was involved.

The very fact that such a question arose makes the Carrier's position and motives suspect. All men who are even casually familiar with railroad operation, and the handling of employes who communicate messages or orders relating to train movements, know that loss of time suffered by such employes in transferring is nearly always caused by operation of the Hours of Service Act.

The Hours of Service Act was adopted by Congress at 11:50 A. M., March 4, 1907. It contained, as a proviso to Section 2, the language which restricts the hours of service of telegraphers. This law, as everyone knows, was designed to promote safety on the railroads. The language referred to has remained unchanged for more than half a century.

The agreement between the parties to this dispute, which contains the rule in question, was negotiated in 1947 — forty years after the effective date of the Hours of Service Act — and revised in 1949.

Obviously, Rule 15 (a) was agreed to, in the orderly process of collective bargaining, for the purpose of protecting these employes, who are peculiarly vulnerable to loss of time when required to transfer jobs, from having to bear the financial burden which necessarily results from a law designed for safety, and restricting the hours of service of such employes.

The law, it should be kept in mind, is directed to the carriers. The carriers must not require or permit these named communication employes to work beyond the prescribed hours.

It was clearly because of these facts that rules like Rule 15 (a) were negotiated. And yet the majority here says in its Opinion that "History is absent". History is not absent. It was simply ignored by the majority.

During argument of this case in panel with the Referee a number of prior awards were discussed. The majority, in its Opinion, says that special emphasis has been given to Awards 242 and 4975.

Award 4975 was emphasized by the Carrier member, and I replied to the effect that this is the only award, of the many mentioned, which denied a claim similar to the present one. I also expressed by opinion that the award is erroneous and gave as my reasons substantially what I have said here.

Unfortunately, no precise record was kept of the awards discussed. My notes, however, do not show that Award 242 was discussed at all. It certainly was not "given special emphasis". It was barely mentioned in the record, and then only as a citation among others in a letter by the General Chairman during local handling of the claim.

The Referee took care to distinguish the facts in Award 242 from those here. He would have been quite correct in so doing if the award had been the chief support of the Employes' position, or if it had in fact been given special emphasis. I stated at the adoption session that I resent the implication that I have so little understanding of my job as to give special emphasis to an award which is not directly in point, and I repeat that statement now for all to hear.

I did give special emphasis to several other awards. I cited Award 1422 for the purpose of showing that a carrier cannot escape the plain obligation of a rule because of the Hours of Service Act. In that award this Division, with Referee Bushnell, said:

> ". . . the carrier cannot escape its obligation to properly compensate its employes under the terms of the prevailing Telegraphers' Agreement because of the Hours of Service Act."

I cited Award 1468 as being directly in point. There the carrier made an even more impassioned argument about the Hours of Service Act than did the Carrier in the present case. For example, there, in its "Position" the carrier said:

"In prosecuting this claim the employes are attempting to force the carrier to violate the Federal Act by permitting, or rather requiring, the employe to remain in service sixteen hours within a twenty-four hour period. The sustaining of this claim would without question force the carrier to violate the Federal Hours of Service Act each time a case of this kind arose . . .".

The referee there so easily detected the fallacy of such an argument that he did not even mention it in his Opinion. The claim was sustained by applying the transfer rule to the facts.

There is no question of violation of law involved in any such case. The question is always, as it was here, shall the carrier make the payment provided by the rule.

In support of my argument that rules such as Rule 15 (a) are negotiated for the purpose of preventing a carrier from shifting the financial burden of compliance with the law to the employes, I cited Award 2273, which in turn quotes from a decision of the Supreme Court relative to the Hours of Service Act as follows:

"It admits of no supplement; it is the prescribed measure of what is necessary and sufficient for the public safety **and of the cost and burden which the railroad must endure** to secure it." (My emphasis).

I cited Award 4258 as an example of the correct application of a transfer rule to a situation affected by the Hours of Service Act. I cited several other awards dealing with various aspects of the Hours of Service Act.

None of these awards was mentioned in the Opinion of Board. Apparently, they were given little consideration. Instead, Award 4975, a clearly erroneous decision, was seized upon as being "persuasive that this claim should be denied."

Under such circumstances I certainly have a right to criticize this award, and in view of my duties as a representative of the employes and my responsibility to the public under the Railway Labor Act, I have no hesitancy in doing so.

Award 9475 is completely erroneous in its conclusions, and should not for a moment be considered as a proper interpretation of Rule 15 (a) of these parties' agreement. Instead of interpreting the rule and applying it to the facts, this award seeks to write the rule out of the agreement. We have no such authority to rewrite agreements.

For these reasons I hereby register my most emphatic dissent to this fallacious award.

J. W. Whitehouse,
Labor Member.

REFEREE'S COMMENTS RE DISSENT BY LABOR MEMBER, J. W. WHITEHOUSE, TO AWARD NO. 9475

I respect the right of dissent. I disdain the wrong of personal attack.

Award No. 242, not discussed "at all" according to Mr. Whitehouse, is on the desk before me. Mr. Whitehouse handed it to me on panel argument and it bears his office name stamp. A copy of the front page is annexed. (The ink marks are mine.)

Unlike Mr. Whitehouse, who, to quote him, kept "no precise record," I did. My notes list all Awards submitted by Mr. Whitehouse and by the Carrier Member, Mr. Mullen, and reflect the arguments advanced. The fact is that Mr. Whitehouse gave special emphasis to Award No. 242. So much for the "who dunnit" innuendos of the dissent.

The imputation of bias in favor of the Carrier is unworthy of comment.

As to substance, Mr. Whitehouse argued his case ably and his arguments had merit. The arguments advanced by the Carrier had greater merit. Hence my decision.

William E. Grady

Referee