Award No. 9967

Docket No. CL-9808

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Harold M. Weston, Referee

PARTIES TO DISPUTE:

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

THE PENNSYLVANIA RAILROAD COMPANY

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

(a) The Carrier violated the Rules Agreement, effective May 1, 1952, except as amended, particularly Rules 4-A-1, 4-A-2, 5-A-1 and 5-E-1, when it failed to fill vacancy existing on the position of Relief Janitor, on an eight hour basis, at the Passenger Station, Toledo, Ohio, former Lake Division, on Saturday and Sunday, October 1 and 2, 1955. The Claimant, J. H. Green, was used three hours on each of these dates to fill the existing eight hour vacancy.

(b) The Claimant, J. H. Green, should be allowed the difference between the three hours' pay which he was allowed, at the punitive rate, and the eight hours' pay to which he was entitled, at the punitive rate, for Saturday and Sunday, October 1, and 2, 1955. (Docket 67)

EMPLOYES' STATEMENT OF FACTS: This dispute is between the Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employes as the representative of the class or craft of employes in which the Claimant in this case held a position and the Pennsylvania Railroad Company — hereinafter referred to as the Brotherhood and the Carrier, respectively.

There is in effect a Rules Agreement, effective May 1, 1942, except as amended, covering Clerical, Other Office, Station and Storehouse Employes between the Carrier and this Brotherhood which the Carrier has filed with the National Mediation Board in accordance with Section 5, Third (e), of the Railway Labor Act, and also with the National Railroad Adjustment Board. This Rules Agreement will be considered a part of this Statement of Facts. Various rules thereof may be referred to herein from time to time without quoting in full.

Claimant J. H. Green is regularly assigned to a position of Janitor at the Passenger Station, Toledo, Ohio, former Lake Division, tour of duty 10:00 A. M. to 12:30 P. M., and 1:30 to 7:00 P. M., Monday through Friday, rest days Saturday and Sunday. He has a seniority date on the seniority roster of the former Lake Division in Group 2. The former Lake Division is now a part of the Lake Region.

ments concerning rates of pay, rules or working conditions." The National Railroad Adjustment Board is empowered only to decide the said dispute in accordance with the agreement between the parties to it. To grant the claim of the Employes in this case would require the Board to disregard the agreement between the parties thereto and impose upon the Carrier conditions of employment and obligations with reference thereto not agreed upon by the parties to this dispute. The Board has no jurisdiction or authority to take any such action.

CONCLUSION

The Carrier has established that there has been no violation of the applicable Agreement in the instant case and that the Claimant is not entitled to the compensation which he claims.

Therefore, the Carrier respectfully submits that your Honorable Board should deny the claim of the Employes in this matter.

The Carrier demands strict proof by competent evidence of all facts relied upon by the Claimant, with the right to test same by cross-examination, the right to produce competent evidence in its own behalf at a proper trial of this matter, and the establishment of a proper record of all of the same.

OPINION OF BOARD: Petitioner contends that Carrier violated their Agreement when it compensated Claimant, a Janitor at the Toledo, Ohio, Passenger Station on a three rather than eight hour basis for work performed on Saturday and Sunday, October 1 and 2, 1955. Claimant's regular work week was from Monday through Friday with a tour of duty running from 10:00 A.M. to 12:30 P.M. and 1:30 P.M. to 7:00 P.M. Saturdays and Sundays, his rest days, were part of a regular Relief Janitor position having the same hours.

On each of the two days in question, Saturday and Sunday, October 1 and 2, 1955, the Relief Janitor failed to report for duty and Claimant was called to perform certain of the work of that position and was used for a three hour period extending from 4:00 P.M. until 7:00 P.M. Carrier maintains that Claimant was properly compensated on a three hour basis under the terms of the Agreement. It is Petitioner's contention that Carrier is required by the Rules to fill the position on an eight hour basis on each of the two days that the Relief Janitor was not available.

We are familiar with the line of awards (4550, 6918 and others) emphasized by Petitioner that that hold that an employee working even temporarily in a regular position takes all the incidents, including wages and hours, of that position. On the other hand, we are limited by the terms of the Agreement before us and are not at liberty to supplement or amend them in order to reach a result that may be more compatible with the prevailing practice in the industry.

In the present situation, Rule 4-A-1 requires an eight hour day unless otherwise provided in the Agreement. One exception is provided for by Rule 4-A-2 (b) which specifically covers the matter of an employe called to perform work on his assigned rest day. In its first sentence, it provides that in such an instance, the employe's work shall be governed by the provisions of Rule 4-A-6

which in turn prescribes that "Regularly assigned employes called to perform work between their regular work periods and not continuous therewith will be allowed a minimum of three hours at the pro rata rate for two hours work or less; time held on duty in excess of two hours to be paid for at the rate of time and one-half."

The second sentence of Rule 4-A-2 (b) provides that "When an employe is used on his assigned rest day to relieve an employe regularly assigned to work on such day, he shall not after reporting for duty be released before the end of the regular tour of duty of the position filled."

Rules 4-A-2 (b) and 4-A-6 are controlling for they deal specifically with the situation where work is performed by an employe on his rest day. They clearly indicate that it is not necessary to pay a minimum of eight hours in that situation. What they do prescribe is that a minimum of three hours be paid with the additional guaranty, for those employes actually used to "relieve" regularly assigned employes, that they will not be released before the end of the regular tour of duty.

Accordingly, as the Carrier contends, even if it could be established that Claimant relieved the Relief Janitor on October 1 and 2, 1955, the eight hour guaranty would not apply. In our opinion, a contrary holding would do violence to the plain language of Rule 4-A-2 (b) and render it meaningless from a practical standpoint. If the purpose and intent of that provision were as Petitioner urges, it would have been an easy matter for the parties to have provided in its second sentence that the employe be compensated for the full day rather than that he merely not be released "before the end of the regular tour of duty". Petitioner's contention would rest on a firmer foundation if the final clause of the second sentence of Rule 4-A-2 (b) had been omitted. As it stands, the language of that clause can not be reconciled with Petitioner's theory of the claim, although we recognize that the first portion of the sentence does lend some measure of support to the interpretation it advocates.

Awards 4550, 6918, 7034, 7255 and others cited by Petitioner are not helpful to its claim since they do not concern the Agreement provisions that are critical here. Rules 4-A-2 (b) and 4-A-6 are controlling and the situation is not affected by Rules 5-A-1 and 5-E-1 (d).

If the applicable Agreement incorrectly expresses the intent of the contracting parties and is truly out of line with the better practice, the proper remedial action is by way of collective bargaining rather than through strained and artificial contract interpretation.

In our view, Claimant was properly compensated under the terms and within the limitations of the applicable Agreement.

The claim will be denied.

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

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois this 9th day of June, 1961.

LABOR MEMBERS' DISSENT TO AWARD NO. 9967, DOCKET NO. CL-9808

The Referee commits grievous error here by placing a strained and artificial interpretation to Rule 4-A-2 by taking a phrase from context of the rule, that prohibits a certain act, and makes it an exception to the Rule. He also fails to give to other terms used their common and proper meaning. Rule 4-A-2 reads, as follows:

> "Work performed by an employe on his assigned rest day shall be governed by the provisions of Rule 4-A-6. **When an employe is used on his assigned rest day to relieve an employe regularly assigned to work on such day, he shall not after reporting for duty, be released before the end of the regular tour of duty of the position filled."** (Emphasis added)

Realizing the force and effect of the above emphasized sentence of the Rule, Carrier took the positive position that Rule 4-A-2 (b) had no application, that the Notified or Called Rule (4-A-6) was controlling. Apparently, the Referee rejected this contention, but accepted Carrier's negative argument that: "even if it could be established that Claimant relieved the Relief Janitor on October 1 and 2, 1955, the eight hour guaranty would not apply."

It is, therefore, self-evident that the Refree failed to take under consideration the clear meaning and intent of the second sentence of Rule 4-A-2 (b), when he stated that a contrary holding to that proposed by the negative proposition stated by Carrier "would do violence to the plain language of Rule 4-A-2 (b) and render it meaningless from a practical standpoint." That this conclusion is far-fetched, is clear from his failure to give any consideration to other provisions of the Rule by basing his entire decision on a prohibitive phrase. In other words, he took out of context "he shall not after reporting for duty, be released before the end of the regular tour of duty", and bases his decision thereon. This provision cannot be interpreted in a vacuum, nor can a prohibitive term be used as an exception to positive requirements of a rule. It is clear that it is the Referee who has done violence to the Rule and created unnecessary controversy.

Although the differences were fully explained to the Refree between a call to perform extra or unassigned "work" and a call to "relieve" another and "fill" a position, he peremptorily rejects such distinctions by holding that Awards covering such matters had no bearing on the instant dispute. Even the common dictionary definition of the words "relieve" and "fill" would have given the clear intent and meaning of the second sentence to Rule 4-A-2 (b), had he been interested in giving meaning to the entire Rule, instead of a portion thereof. Webster's New International Dictionary definition follows:

"relieve. * * * 3. To release from a post, station, or duty; to put another in place of, or to take the place of, in the bearing of any burden, or discharge of any duty; * * * ."

"fill. * * * 1. To make full; to supply with as much as can be held or contained; to put or pour into, till no more can be received. * * * 3. * * * , to occupy the whole of; * * * . 9. To possess and perform the duties of; to officiate in, as an incumbent; to occupy; hold; as a king fills a throne; * * * ."

Therefore, the word "relieve" in Rule 4-A-2 (b) means that employe called to perform such service will be put in place of the employe he is relieving, except as otherwise provided in Rule 4-A-6 relative to the punitive rate of pay.

It is academic that each position is assigned eight consecutive hours, exclusive of the meal period, as a work day. Therefore, to "relieve" an employe regularly assigned to work on such day would mean that the employe performing the relief service must take the "place" of such incumbent by relieving him during his "regular tour of duty". That this conclusion is proper, is clearly manifested by the requirement that such employe will not be released before the end of the regular "tour of duty" of the "position filled."

The term "position filled" is written in the past tense and raises the question "when is the position filled"? It would follow that the position was not filled by working three hours on an eight hour assignment. You cannot fill an eight gallon container by pouring in three gallons of water. A position could only be filled by working an employe thereon for the full eight hours, which constitutes "the regular tour of duty of the position filled." Having rejected Carrier's contention that claimant did not relieve on the vacant position, the Referee had no alternative under logic than to hold that the position was not "filled" on the dates in dispute and sustain the Employes claim. This conclusion is inescapable from the common dictionary definition of the terms "relieve" and "fill". That these terms have been so construed by this Board, is clear from a review of Awards 4550, 6918, 7034, 7255, which the Referee peremptorily disregards. In Award 7034, Referee Carter ruled:

" * * * A temporary vacancy may be blanked or filled under Article II, Section 10 (a). If it is blanked, no one works it; if it is filled, it is worked under the conditions that Nisely would work it, which would include his eight hour assignment. It seems clear to us that the temporary vacancies were in fact filled by doubling over the Claimants and that they are entitled to a full eight hours' pay for each day they were so used."

It will be observed that the first sentence of Rule 4-A-2 refers to "work" performed and the second sentence refers to an employe used to "relieve" another regularly assigned to work on such day and provides that the employe shall not after reporting for duty, be released before the end of the "regular tour of duty of the position filled." The latter is not an exception to the eight hour guarantee rule. It modifies the two hour minimum call of Rule 4-A-6 by requiring that the position be filled the full eight hours.

However, the question for determination here was not whether Rule 4-A-1 guaranteed a work day of eight hours under these circumstances, but whether a position had been "filled" by working an employe thereon for three of the regular eight hour assignment. That the position had an assignment of eight hours, was not in dispute.

This is a foolish Award and does not constitute a persuasive or controlling precedent.

It is so obviously erroneous, that I dissent.

/s/ J. B. Haines
J. B. Haines
Labor Member

ANSWER TO DISSENT TO AWARD NO. 9967 - DOCKET NO. CL-9808

Rule 4-A-2 makes Rule 4-A-6 controlling over work performed on rest days, with the proviso that, after reporting for work on such days, an employe relieving an employe assigned to work thereon shall not be released before the end of the regular tour of duty of the position filled.

In distinguishing between the ending and beginning of the tour of duty, Rule 4-A-2 evidences that no other distinction was intended or implied by the parties.

The dissenting Labor Member's confusion arises over his unwillingness to accept the fact that, as the rules make clear and Award 9967 confirms, an employe's position may be "filled" under the rules by his being "relieved" for but a portion of an eight-hour work day. "Time" is an essential factor governing pay for work performed, and it is not affected by Webster's definitions of the terms "relieve" and "fill".

/s/ R. A. Carroll

/s/ P. C. Carter

/s/ W. H. Castle

/s/ D. S. Dugan

/s/ J. F. Mullen