Award No. 14240
Docket No. CL-15519

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

(Supplemental)

Bernard E. Perelson, Referee

PARTIES TO DISPUTE:

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

GRAND TRUNK WESTERN RAILROAD COMPANY

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood (GL-5740) that:

1. The Carrier violated the current Agreement between the parties, effective January 15, 1955, when it failed and/or refused to properly compensate Claimants for performing service on a rest day of their assignment which also happened to fall on a recognized holiday.

2. Claimants shall now be compensated for the hours and dates listed below at the time and one-half rate of the assignment worked or the rate of their regular assignment, whichever is higher as follows:

Assignment	Claimant	Compensation Claimed	Date
6:00 A. M. Janitor	B. Kittsoff	6 hours overtime	May 30, 1964
7:00 A. M. Crew Disp.	M. Lektzian	8 hours overtime	May 30, 1964
7:00 A. M. PMC	R. Dextrom	5 hours overtime	May 30, 1964
8:00 A. M. Janitor	J. Hester	2 hours overtime	May 30, 1964
8:00 A. M. Janitor	R. Fox	2 hours overtime	May 30, 1964
11:00 P. M. East End	J. Campbell	8 hours overtime	May 30, 1964
6:00 A. M. Janitor	B. Kitsoff	6 hours overtime	July 4, 1964
7:00 A. M. Crew Disp.	M. Lektzian	8 hours overtime	July 4, 1964
7:00 A. M. Desk	C. Gibson	8 hours overtime	July 4, 1964
8:00 A. M. Janitor	J. Campbell	2 hours overtime	July 4, 1964
8:00 A. M. Janitor	J. Hester	2 hours overtime	July 4, 1964
11:00 P. M. East End	J. Campbell	8 hours overtime	July 4, 1964

3. The Carrier shall also compensate all other employes that may be involved or affected by this Agreement violation subsequent to the date of this claim until said Agreement violation is corrected.

EMPLOYES' STATEMENT OF FACTS: The Claimants were required, pursuant to Carrier's notice or call, to work on their assigned rest days, which were also recognized holidays. For this rest day service the Carrier paid them under the provisions of Rule 51(e) and Rule 44, but refused to pay them for work performed on the legal holidays, Decoration Day and Fourth of July, at the rate of time and one-half as provided in Rule 53(c).

Claim was filed with the Local Trainmaster (Employes' Exhibit 1) on behalf of Claimants by Local Chairman Lektzian citing a violation of Rules 51(e) and 53(c) of the Clerks' Working Agreement. Claim was declined by the Terminal Trainmaster. (Employes' Exhibit 2).

Appeal was filed by the Local Chairman with Mr. E. T. Rose, Superintendent (Employes' Exhibit 3). The Superintendent declined claim (Employes' Exhibit 4), stating Claimants were properly paid time and one-half rate for work on the rest days and it was his opinion that inasmuch as they were paid time and one-half rate for work on their rest days, they were properly paid under Rule 44 of the Clerks' Agreement regardless of the Organization's contentions to the contrary.

Appeal was next taken with Mr. H. A. Sanders, Vice President and General Manager, the highest officer of the Carrier to whom appeals may be made, by the General Chairman under date of September 1, 1964. (Employes' Exhibit No. 5.)

Mr. Sanders denied the appeal in his letter of October 20, 1964 (Employes' Exhibit 6), stating additional payment is not supported by the Clerks' Working Agreement or the past practice in effect on this property.

Under date of November 2, 1964, the General Chairman requested a conference for discussion of said claims. (Employes' Exhibit 7, 8 and 9.)

Conference was held on November 20, 1964 (Employes' Exhibit 10). After a full discussion of the claims Carrier advised the Organization that there would be no change and declination of these claims was reaffirmed.

(Exhibits not reproduced.)

CARRIER'S STATEMENT OF FACTS: The claimants held regular assignments covered by the Clerks' Working Agreement, in the Yard Office at Pontiac, Michigan, and had assigned rest days of Saturday and Sunday. The claimants for the respective dates of Saturday, May 30, 1964 and Saturday, July 4, 1964, were called either to fill one day vacancies on regular assignments or to perform unassigned work, on their Saturday rest day. For their services on the claim dates involved, the claimants received payment of the time and one-half rate of pay. The time worked on May 30, 1964 and/or July 4, 1964, by each of the claimants is correctly indicated in the Statement of Claim. In addition to being a rest day of the claimants regular assignments, May 30, 1964, and July 4, 1964, were also recognized national holidays.

Copies of the Clerks' Working Agreement, effective January 15, 1955, are on file with the Third Division.

OPINION OF BOARD: The Claimants held regular assignments covered by the Clerks' Working Agreement at Pontiac, Michigan, and had assigned rest days of Saturday and Sunday. The Claimants were called by the Carrier to perform work on their Saturday rest day which day was also a recognized holiday. For their services on the claim dates involved, the Claimants received payment of time and one-half rate. Claim was then made for additional compensation for performing service on a rest day of their assignment which also happened to fall on a recognized holiday, i.e., Decoration Day and Fourth of July. The claim for additional compensation was denied by the Carrier. The Carrier admits that the time worked on May 30, 1964 and/or July 4, 1964, by each of the Claimants as set forth in the Statement of Claim is correct.

The Organization in support of its position cites the provisions of Rule 44, Rule 51(e) and Rule 53(c) of the Agreement.

"RULE 44.

NOTIFIED OR CALLED

Except as provided in Rule 46, employes notified or called to perform work not continuous with, before or after, their regular work period, or on their assigned rest days and specified holidays, shall be allowed a minimum of three hours for two hours' work or less, and if held on duty in excess of two hours, time and one-half will be allowed on the minute basis."

"RULE 51. OVERTIME

(e) Service rendered by an employe on his assigned rest day or days shall be paid for under Rule 44 unless relieving an employe assigned to work such day who does not work any portion of his assignment, in which case the relieving employe will be paid at the rate of the position occupied or his regular rate, whichever is higher, with a minimum of eight (8) hours at rate of time and one-half, unless relieved at own request."

"RULE 53.

SUNDAYS AND HOLIDAYS

(c) Work performed on the following legal holidays — namely, New Year's Day, Washington's Birthday, Decoration Day, Fourth of July, Labor Day, Thanksgiving Day, and Christmas (provided that when any of the above holidays fall on Sunday, the day observed by the state, nation, or by proclamation shall be considered the holiday), shall be paid at the rate of time and one-half."

The Carrier refused payment on the ground that the Claimants had already been paid for the service rendered in accordance with the terms of

their Agreement and accepted past practices and, therefore, were not entitled to duplicate payment for the single day service rendered.

The basic issue to be determined by this Board is whether these Claimants are entitled to receive the payments claimed for the work performed by them on their rest day, which happened to fall on a recognized holiday pursuant to and in accordance with THEIR agreement with the Carrier.

This Board has consistently held by a long line of awards that the function of this Board is limited to the interpretation and application of Agreements as agreed upon between the parties. Award 1589. We are without authority to add to, take from, or write rules for the parties. Awards 4763, 10581, 10588, 10238.

In Award 2436 (Carter) we said:

> ". . . The conduct of the parties to a contract is often just as expressive of intention as the written word, and where uncertainty exists, the mutual interpretation given it by the parties as evidenced by their actions with reference thereto, affords a safe guide in determining what the parties themselves had in mind when the contract was made."

In Award 12367 (Seff) we said:

> ". . . where language in a contract is ambiguous, the intention of the parties can best be ascertained by the past practice of the parties, and this becomes conclusive when such past practice has continued for a long time and has not been objected to by the Petitioner. . . ."

In Award 13991 (Dolnick) we said:

> "In interpreting the rules of a collective bargaining agreement, it is the primary function of the Board to ascertain and effectuate the substantial intent of the parties. In the absence of evidence of mutual understanding or past practice, words in the agreement will be given their ordinary and common meaning. . . ."

The Carrier (page 14 of the record) refers to past practices on the property and lists a number of instances wherein employes working on an assigned rest day which also happened to be a recognized holiday were allowed a single payment at time and one-half rate pursuant to and in accordance with the provisions of Rule 44, Rule 51(e) and Rule 53(c) since the effective date of the agreement between the parties.

The Organization (page 44 of the record) does not deny the assertion of the Carrier with respect to the past practice, but states "If that is a fact, then it has improperly withheld payments due employes under the plain and unambiguous language of Rules 51(e) and 53(c)." It makes no mention of Rule 44, which is very important to the issue in this dispute.

Awards 10541, 10679, 11454, 11899 and 12471 cited by the Organization in support of its claim are clearly distinguishable from the material facts in this case. An examination of these awards discloses that they were ALL made in cases involving another craft, to-wit, TELEGRAPHERS, and based on the terms of the Agreement between the craft and the Carriers involved.

A reading of the pertinent rules of the Agreement between the parties to this dispute discloses that the language, while somewhat similar to that in the Telegraphers' Agreement, yet is substantially different in several respects.

In the Telegraphers' Agreement we find the following language:

"RULE 7. SECTION 1.

(m) Service On Rest Days.

1. This paragraph (m) is for the sole purpose of determining the compensation for employes who are required to work on their assigned rest days. IT IS NOT TO BE USED TO CREATE, ENLARGE OR TAKE AWAY ANY RIGHTS OR OBLIGATIONS WHICH THE CARRIER OR THE EMPLOYES MAY HAVE BY VIRTUE OF OTHER RULES IN THIS AGREEMENT. . . ." (Emphasis ours.)

We infer from the above language that the parties agreed that in addition to the employe being paid for work performed on his assigned rest day, he was also entitled, in addition thereto, to receive any and all rights and/or benefits that may be due to him "by virtue of other rules in this agreement."

We do NOT find similar language in the agreement before us.

The Agreement between the parties to this dispute, with reference to payment for services on an assigned rest day, is covered by Subdivision "e" of Rule 51 (Overtime). It reads as follows:

"(e) Service rendered by an employe on his assigned rest day or days shall be paid for under Rule 44 unless relieving an employe assigned to work such day who does not work any portion of his assignment, in which case the relieving employe will be paid at the rate of the position occupied or his regular rate, whichever is higher, with a minimum of eight (8) hours at rate of time and one-half, unless relieved at his own request."

Rule 44, referred to in Subdivision "e" of Rule 51, reads as follows:

"RULE 44.

NOTIFIED OR CALLED

Except as provided in Rule 46, employes notified or called to perform work . . . on their assigned rest day and specified holidays, shall be allowed a minimum of three hours for two hours of work or less, and if held on duty in excess of two hours, time and one-half will be allowed on the minute basis." (Emphasis ours.)

The primary rule in the construction of contracts is that we must ascertain and give effect to the intention of the parties and that intention is to be deduced from the language employed by them. In construing a written contract, the words employed will be given their ordinary and popular accepted meaning, in the absence of anything to show that they were used in a different sense.

It is evident that the parties to this dispute are in disagreement on what is meant by the language ". . . employes notified or called to perform work . . . **on their assigned rest days and specified holidays,** shall be allowed a minimum of three hours for two hours' work or less, and if held on duty in excess of two hours, time and one-half will be allowed on the minute basis." (Emphasis ours.)

The interpretation of the word "and" in a contract has been passed upon by the Courts in several jurisdictions on any number of occasions.

In the case of **Nicholas v. Steffan**, 299 S.W. 2nd, 417 at 420, the Court held that the word "and" is a conjunction.

In the case of **Rapid Central Railway Company v. Missouri Pacific Railroad Company**, 25 So., 2nd, 828 at 834, the Court held that the word "and" is a conjunction used to connect words, phrases and clauses, and is accepted as binding together and as relating one to the other.

The word "conjunction" is defined in Funk & Wagnall's Dictionary as meaning "The state of being joined together, combination."

The word "and" is defined in Webster's Dictionary as "A particle expressing the general relation of connection, used to conjoin word with word, phrase with phrase, clause with clause."

In the case of **Heald v. City of Cleveland,** 19 Ohio NPNS, 305, the Court held that the word "and" is a particle without an exact synonym in English, but is expressed approximately by "along with", "together with", "also", the elements connected being grammatically coordinate.

In the case of **Cincinnati Enquirer, Inc. v. American Security and Trust Co.,** 160 N.E. 2nd, 392 at 397, the Court held that the word "and" means "along with, also, as well as, besides, in addition to, together with and with."

In the case of **Hailey v. County Board of School Trustees of Razewell County,** 2 Ill. App. 2nd, 105, the Court held that the word "and" in its common meaning expresses a relation, in addition and whether used to connect words, phrases or sentences, it must be accepted as binding together and as relating the one to the other.

In the case of **Bohlen v. Allen,** 89 S.E. 2nd, 99-103, the Court held that the word "and" connotes something in addition to that which has preceded it.

The language contained in Subdivision "e" of Rule 51 and Subdivision "c" of Rule 53 must be read together and in conjunction with Rule 44 in construing the Agreement between the parties.

Both parties contend that the rules in the Agreement before us are clear and unambiguous. This contention and/or conclusion must be erroneous; otherwise, how can it be explained that both parties to this dispute interpret the rules differently? It is an elementary rule of law and a rule followed by this Board in previous awards that where two different interpretations can be made of language in a contract that interpretation will be applied which agrees with reason and logic. Based on the record and facts in this dispute, we find that the Carrier's position is both reasonable and logical.

As was said in First Division Award 14328 (Weeks):

". . . Where the terms of a contract are clear and unambiguous and set forth the intent of the parties, there is no need to look elsewhere. However, where a contract or agreement is susceptible of more than one meaning the conduct of the parties over a period of time is evidence of their intent. . . ."

That it was the practice in the past that an employe working on his assigned rest day which also happened to fall on a recognized holiday received one day's pay is borne out by the testimony adduced at the hearing before Emergency Board No. 66 held in October of 1948. At page 4349 of the transcript we find the following:

"THE CHAIRMAN: This man whose relief day falls on Wednesday, and Wednesday turns out to be a holiday, if you work him, you pay him time and a half for that day?

THE WITNESS: Yes.

THE CHAIRMAN: And then you give him another day off in place of that?

THE WITNESS: No; the agreement doesn't cover it. If he works, he doesn't get another day off in place of it.

BY MR. SCHOENE:

Q. Now, with respect to any holidays worked, you pay them time and a half for work on that holiday now, don't you, Mr. Perry, whether it is his relief day or not?

A. You are talking about the clerks?

Q. Yes.

A. Yes.

* * * * *

Q. As I understand it, such rules exist only in the shop craft agreements?

A. Oh, I think in various clerks' agreements. There are different sorts of arrangements, as I described, whereby overtime would be given in some instances to the man who was covering the job and in other instances to the senior man, or, in cases where there are extra boards, to extra men.

It all depends on what either the agreement or the practice may be on the individual line."

In arriving at the intention of the parties, where the language of a contract is susceptible of more than one construction it should be construed in the light of the circumstances surrounding them at the time it is made so as to judge the meaning of the words and the correct application of the language of the contract.

It is not now, nor has it ever been, the province of this Board to change the terms of a contract which has been entered into, even though it may be a harsh and an unreasonable one. Its terms, however onerous they may be, must be enforced if such is the meaning of the language used, and the intention of the parties using that language. There is provision in the law setting forth the method whereby one may endeavor to amend and/or renegotiate an agreement.

FINDINGS: The Third Division of the Adjustment Board, upon the whole record and all the evidence, finds and holds:

That the parties waived oral hearing;

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 did not violate the Agreement.

AWARD

Claim is denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 11th day of March 1966.

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