NATIONAL RAILROAD ADJUSTMENT BOARD

Award Number 21673
THIRD DIVISION Docket Number CL-21584

Robert J. Ables, Referee

PARTIES TO DISPUTE: (Brotherhood of Railway, Airline and Steamship Clerks, Freight Handlers, Express and Station Employes
(The Atchison, Topeka and Santa Fe Railway Company

STATEMENT OF CLAIM Claim of the System Committee of the Brotherhood (GL-8071) that:

(a) The Carrier violated the current Clerks' Agreement, its intent and past practices, when it failed to pay Clerk, M. A. Matthews, 20 hours each day during her regularly scheduled vacation October 14, 1974, to and including October 18, 1974, after requiring her to perform compensated service on October 16, 1974, a scheduled day of her vacation.

(b) M. A. Matthews shall now receive an additional 12 hours each day at the current rate of her Position 6072, Crew Clerk for October 14, 15, 16, 17 and 18, 1974.

OPINION OF BOARD: In this case, which both parties agree is one of first impression, the issue is how to reconcile two agreed rules having contrary effect. One rule is in the vacation agreement. The other rule is in the agreement concerning discipline and investigation.

It is undisputed that Claimant M. A. Matthews was properly scheduled for and actually was on vacation, starting October 14, 1974 for a vacation scheduled for five consecutive days. The Carrier however notified the Claimant to appear as a witness in an investigation concerning another employe and she did appear as a witness on October 16, 1974. Also it is undisputed that when the Carrier notified Matthews she would be required as a witness, the officer calling her did not know she was scheduled for vacation at that time. Further, there is no dispute that Claimant did not inform the Carrier that she was scheduled for vacation on October 14, 1974 when she got her notice to appear at the formal investigation.

Matthews testified for less than two hours and was paid for three hours in accordance with Rule 24 - Discipline/Investigation. This Rule provides in Section G.(2) that:

"Regularly assigned employes in active service used under this Rule as witnesses for the Company on assigned rest days, and employes so used on any day while on vacation or leave of absence, shall be paid a minimum of three hours for two hours or less actual time required to be in attendance and if in excess of two hours time and one-half will be allowed on the minute basis."

The claim is based on violation of the National Vacation Agreement, particularly that provision in Appendix No. 2, Section 1(a) which provides that:

"Effective with the calendar year 1973, an annual vacation of five (5) consecutive work days with pay will be granted to each employee covered by this agreement who renders compensated services on no less than one hundred twenty (120) days during the preceding calendar year."

Compensation requested is for five days at the time and one half rate based on authority in the National Vacation Agreement which provides that if a Carrier does not release an employe for vacation "such Employee shall be paid the time and one half rate for work performed during his vacation period in addition to his regular pay."

Thus the issue is joined: On what basis shall an employe who is actually on authorized vacation be paid if the Carrier calls such employe to return to work - in this case, to testify at an investigation? Shall it be based on the penalty provisions of the National Vacation Agreement or the minimum call pay provisions of the discipline rule?

The employes here say that the pay for the work performed shall be at the premium rate for the entire vacation period of five days. In deciding between the two contrary rules, the employes rely primarily on Section 13 of Appendix #2 which was taken from Section 13 of the National Vacation Agreement. This provides that the parties shall not enter into additional written understandings or make changes in working Rules Agreement which are inconsistent with the Vacation Agreement. The particular words in Section 13 on which the employes rely provide:

"...may make changes in working rules or enter into additional written understandings to implement the purposes of this agreement, provided that such changes or understandings shall not be inconsistent with this agreement." /National Vacation Agreement/

Since the pay provision in Rule 24 is inconsistent with the Vacation Agreement, the employes conclude that the Vacation Agreement, which is a more important rule, takes precedence over the special pay provision in Rule 24.

The Carrier, to the contrary, argues that the Claimant was properly paid for her time under Rule 24-G based on the rule of construction of contracts that a special rule supersedes a general rule. Special emphasis is placed on the argument that the rights on which petitioner bases her claim under the Vacation Agreement must be considered to have been contracted away when the provision for pay for an employe called as a witness during vacation was agreed to by the parties, at a time subsequent to the Vacation Agreement. At the least, the Carrier concludes if additional pay is to be authorized, it should not be at the punitive rate for the entire vacation but should be limited to the time and one-half rate for actual work performed.

The case is close and the parties have argued their positions persuasively.

In a situation of disparate or repugnant provisions in the same contract, the rules of construction and interpretation of contracts require that the interpretation which essentially requires something to be done to effect the general purpose of the contract is entitled to greater consideration than the other. Also, the clause contributing most essentially to the contract is entitled to the greater consideration. Furthermore, a subsequent clause irreconcilable with a former clause and repugnant to the general purpose and intent may be disregarded. (1)

Doubt can also be resolved by consideration of the surrounding circumstances at the time the contract was made to ascertain its meaning and the intention of the parties, although not for the purpose of changing the writing or adding a new and distinct undertaking.

Most important for purposes of this dispute, if other things are equal, an interpretation most beneficial to the promisee will be adopted when the terms of an instrument and the relationship of the parties leave it doubtful whether words are used in an enlarged or a

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(1) 17 Am. Jur. 2d, Section 240, p. 624 et. seq., particularly Section 267.

restricted sense. Conversely, it is said that everything is to be taken most strongly against the party on whom the obligation of the contract rests, or that contracts are to be construed in favor of the promisee and against the promisor.

In consideration of these rules of construction and interpretation of contracts containing conflicting clauses or provisions and priorities between them, the dispute here is best resolved by consideration of surrounding circumstances and the requirement that an interpretation should be given which will be most beneficial to the promisee.

A national agreement on vacation is entitled to great weight because of the importance of the subject matter and the expertise brought to the bargaining table to negotiate the agreement. Clearly, an agreement between the parties that the Claimant shall have five consecutive - that is, uninterrupted - days of vacation far supersedes the importance of a pay provision in a discipline rule with respect to a witness called to an investigation. If, therefore, it can be argued that the two rules are truly repugnant, the rule on the more important issue should have priority.

The rule of construction which suggests that disparate provisions in the same contract shall be interpreted in the way most beneficial to the promisee is also persuasive in this dispute.

The Claimant was entitled to uninterrupted vacation. There is no dispute about that. Claimant therefore is the beneficiary of that rule.

The provision authorizing pay for call as a witness during an investigation is also a rule for the benefit of the Claimant.

It is true that the effect of applying the pay provision in the discipline rule would adversely affect the Claimant's interest, as compared to pay for rights violated under the Vacation Agreement, but the focus of the rule remains the same: each is protection or advantage or benefit for the employe. In these circumstances, the repugnancy of the two rules should be resolved in favor of that provision most beneficial to the employe. And that provision, of course, is the Vacation Agreement.

Thus, the best construction and interpretation of the contract provisions in dispute is that the Claimant was entitled to pay under the provisions of the Vacation Agreement rather than the discipline rule.

But what shall be the remedy?

Claimant asks for 60 hours' pay as compensation for the Carrier's violation of the Agreement. Such compensation would be in addition to regular pay for the entire vacation period and the pay for three hours for the time Claimant was called as a witness. (2)

The Vacation Agreement does not provide for compensation as requested by the employes. The pay at premium rates applies when an employe is denied his vacation and must work during that period. In such circumstances, Section 13 requires that the employe be paid at the time and a half rate for "work performed." As Claimant did not perform work on October 14, 15, 17 and 18, the time and a half penalty pay provision does not apply.

As to October 16, 1974, work was performed. This work was performed on a scheduled day of vacation. And it should be paid for at the time and a half rate. Such pay is consistent with the original request of the Claimant. Also, it is consistent with the Carrier's tacit acceptance that, if Appendix No. 2 is applicable, the Claimant should be paid for the day on which she was required to perform work at the time and one half rate.

To such consideration by the Carrier of the equities of the case may be added that Claimant could probably have obviated this dispute if she had notified the Carrier at the time she received notice to appear as a witness that she was scheduled for vacation.

Although it is only an inference, the chances are that the Claimant was not substantially disadvantaged by coming in during her vacation to testify as a witness for a little over one hour. This inference can be drawn from the fact that she complained after she appeared as a witness and not before. The Claimant had some obligation under common sense and concern for the Carrier's responsibilities in managing the company, to raise the issue before the dispute arose if the matter of uninterrupted vacation truly were important to her.

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(2) At least the Organization has asked for this compensation. Claimant initially asked for pay at the time and a half rate only for the day October 16, 1974 on which she was required to appear as a witness.

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 Agreement was violated.

A W A R D

Claim (a) sustained to the extent that the Carrier violated the agreement concerning vacation.

Claim (b) sustained to the extent that Claimant shall be paid for 8 hours at the time and one-half rate for October 16, 1974, minus the amount already paid for the call.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: A. W. Paulos
Executive Secretary

Dated at Chicago, Illinois, this 31st day of August 1977.