NATIONAL RAILROAD ADJUSTMENT BOARD

Award Number 23509

THIRD DIVISION Docket Number CL-22073

Robert A. Franden, Referee

PARTIES TO DISPUTE: (Brotherhood of Railway, Airline and Steamship Clerks, Freight Handlers, Express and Station Employes

(Chicago, Milwaukee, St. Paul & Pacific Railroad Company

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood (GL-8358) that:

1) Carrier violated the Clerks' Rules Agreement at Milwaukee, Wisconsin on October 20, 1975 when it failed to honor an employe's written request and seniority rights to work a vacation vacancy on Position No. 09680, Airline Clerk.

2) Carrier shall now be required to compensate employe C. J. Conrad an additional eight (8) hours at the straight time rate of pay of Position No. 09680 for the following days:

Oct. 20, 21, 22, 23, 24, 27, 28, 29, 30 & 31, 1975.

3) Carrier shall now be required to compensate employe C. J. Conrad for sixteen (16) hours at the time and one-half rate of Position No. 09640 on Sundays, October 26 and November 2, 1975.

OPINION OF BOARD: This is a claim based on an alleged violation of the agreement between the parties which occurred when the carrier refused to honor claimant's request to work the vacation vacancy of employe Kolokithas. The carrier denied the request of claimant because there was no unassigned furloughed employe qualified to work claimant's position. Had carrier honored claimant's request, it would have had to pay penalty time to fill his position.

The claimant bases his claim on the clear language of Rule 9 F and G and notes 1 and 2 thereto.

"RULE 9 -- BULLETINED POSITIONS

(f) Bulletined positions filled temporarily pending an assignment, shall be filled by the senior qualified employe requesting the position.

(g) New positions or vacancies of thirty (30) days or less duration shall be considered as temporary and may be filled by an employe without bulletining; if filled, the senior qualified employe requesting same will be assigned thereto.

* * * *

NOTE: 1. In the application of Rules 9(f) and 9(g) regularly assigned employes in the seniority district making request thereunder will be assigned on the basis of seniority, fitness and ability on the first day which follows the second rest day of the position to which he is regularly assigned, except that in connection with vacation vacancies of 5, 10, 15, 20, or 25 days duration employes may be assigned to the vacation vacancy on any work day thereof but will not be permitted to begin work on the vacation vacancy on either of the rest days of the position occupied at time of request. Such request must be made in writing with the officer having supervision over the position involved at least twenty-four (24) hours in advance of the time he expects to commence filling the temporary or vacation vacancy.

When a regularly assigned employe is assigned as provided herein his regular position will be considered a temporary vacancy.

2. In the application of paragraph 1 hereof a senior employe making proper request for a vacation vacancy may, during the first 5 days of a vacation vacancy only, displace a junior employe on a vacation vacancy, but only on the first work day the vacation vacancy is available to him under the provisions of this note. The provisions of this paragraph constitute an exception to the first sentence of paragraph 3 hereof."

The carrier maintains that 12A and 12B of the National Vacation Agreement of December 17, 1941 govern in the instant case and sanction its actions with respect to the claimant in the instant case. Specifically, the fact the carrier would have had to pay penalty time is alleged to run counter to the language " . . . a carrier shall not be required to assume greater expense because of granting a vacation . . . "

> "12. (a) Except as otherwise provided in this agreement a carrier shall not be required to assume greater expense because of granting a vacation than would be incurred if an employee were not granted a vacation and was paid in lieu therefor under the provision hereof. However, if a relief worker necessarily is put to substantial extra expense over and above that which the regular employee on vacation would incur if he had remained on the job, the relief worker shall be compensated in accordance with existing regular relief rules.
>
> (b) As employees 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 employee is to be filled and regular relief employee is not utilized, effort will be made to observe the principle of seniority."

The organization would have us read the above-quoted provisions of the two agreements as though they were in conflict and that the chronology of the agreements gives superiority to the provisions of the Collective Bargaining Agreement. It is elementary to contract interpretation that it is presumed that the parties intended their various agreements to be in harmony rather than in conflict. It is presumed that the parties were aware of their various agreements and that subsequent agreements which do not repeal earlier agreements are made in full consideration of those earlier agreements and should be so interpreted.

Accordingly, in the instant matter, we must read the rules of the Collective Bargaining Agreement together with the provisions of the 1941 Vacation Agreement. When we do so, we find that the carrier is warranted in not granting the request of the claimant when it would be required to assume a greater expense because of granting employe Kolokithas his vacation than it would have assumed had the vacation not been granted and he was paid under the Agreement.

We fail to find contractual support for the claim.

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 not violated.

A W A R D

Claim denied.

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NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: A. W. Paulos
Executive Secretary

Dated at Chicago, Illinois, this 29th day of January 1982.

LABOR MEMBER'S DISSENT
TO
AWARD 23509, DOCKET CL-22073
(Referee Franden)

Award 23509 is in palpable error and does not correctly interpret the rules of the parties' working agreement and the articles of the National Vacation Agreement.

The award, after citing various rules of the working agreement and articles of the vacation agreement, states:

> "The organization would have us read the above-quoted provisions of the two agreements as though they were in conflict and that the chronology of the agreements gives superiority to the provisions of the Collective Bargaining Agreement. It is elementary to contract interpretation that it is presumed that the parties intended their various agreements to be in harmony rather than in conflict. It is presumed that the parties were aware of their various agreements and that subsequent agreements which do not repeal earlier agreements are made in full consideration of those earlier agreements and should be so interpreted."

The parties were aware that their various agreements may not be in complete harmony when the National Vacation Agreement was first adopted forty years ago. This fact is noted in the 1942 Morse Interpretations to the agreement. Several times Referee Morse had the opportunity to consider the relationship between the vacation agreement and the rules agreement. In each instance he concluded that the vacation agreement cannot be administered in a fashion that places it in conflict with the rules agreement. For instance, at page 71 of the interpretation, Referee Morse wrote:

"Thus, the vacation agreement itself as adopted on December 17, 1941, shows that the parties recognized that existing rules agreements on the various railroad properties are applicable to the vacation agreement but that they may be changed in negotiations between duly authorized representatives of the parties.

"At the hearing on August 1, 1942, as shown by the record, a lengthy discussion took place in regard to the way that various working rules in existing rules agreements might affect the administration of the vacation plan if the employees should insist upon a strict enforcement of them. The record shows that all parties concerned in the hearing recognized that existing rules agreements must be taken into account in interpreting and applying the vacation agreement, although there was a marked difference of opinion between the parties as to just how some of the rules should be applied to the vacation agreement.

"At several points in the transcript, chiefly on pages 524 and 536, the referee reminded the parties that it was understood by them at the time of their December, 1941, negotiations on vacations 'that the working rules would remain in force and that it was not contemplated that they would remain in force either to make work unnecessarily or in order to raise technicalities,' which would work injustice and defeat the purpose of the vacation agreement. It is the duty of the referee to interpret and apply the vacation agreement in accordance with the meaning of its language, and if that results in a conflict with some working rule about which the referee was uninformed, then it is up to the parties to adjust the matter through the machinery for negotiations as provided for in Sections 13 and 14 of the agreement. However, the referee has no power to force the parties to make such adjustments in their rules, no matter how fair and reasonable such adjustments would be." (underscoring added)

And at page 86 he again stated:

"Irrespective of the problems and difficulties which apparently have arisen in connection with applying Article 10(b), this referee would not be justified in amending Section (b) of Article 10

"by way of interpretation in order to eliminate some of those problems. Sympathetic as he is with the view that any existing working rule which produces unjust or unreasonable results when applied to the vacation agreement should be waived or set aside insofar as administering the vacation plan is concerned, the fact remains that it does not fall within the referee's prerogatives and jurisdiction under the vacation agreement to change the working rules.

"The parties have provided in Article 13 for the procedure which is to be adopted in making any changes in the working rules. Hence, unless the referee can find that the vacation agreement itself constitutes a modification of some given working rule, the parties must be deemed to be bound by existing working rules until they negotiate changes in them by use of the collective-bargaining procedures set out in Article 13." (underscoring added)

Thus Award 23509 is in manifest error when it concludes that it is permissable to violate the rules agreement when applying the vacation agreement. The award is also in error when the logic of its "greater expense" comment is considered. The award stated:

"... it (the Carrier) would be required to assume a greater expense because of granting employe Kolokithas his vacation than it would have assumed had the vacation not been granted and he was paid under the Agreement."

Had Kolokithas not been granted his vacation and paid under the agreement, he would have been paid at the time and one-half rate. Thus, even if the argument were correct on the "greater expense" consideration with respect to the vacation agreement trumping the rules agreement, it would be incorrect with regard to any greater expense because there would be none. Had the Carrier properly filled the vacation vacancy the total cost would have been equal to that which they would have incurred had Kolokithas not taken a vacation and instead worked his own position.

On the same date Referee Franden's Award 23509 was adopted by the Board, a similar Award by Referee Roukis was adopted - Award 23510. This award correctly held:

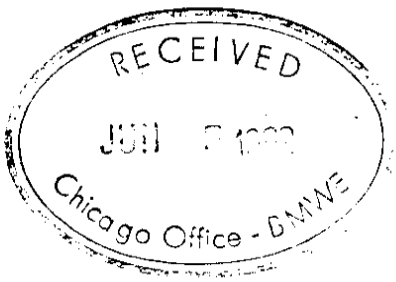
> "In reviewing this case, there are a number of interpretative considerations that we must carefully examine before proceeding to a comparative analysis of the key divisional Awards submitted vis this claim. When the applicable 1942 Morse interpretations to the National Agreement are evaluated, we find that Article 12(b) requires Carriers not to bulletin vacation positions for the purpose of filling same from the employes. submitting applications and that an employe holding a regular position who is utilized to fill the position of the vacationing employe is governed by the provisions of existing rules agreements or recognized practices thereunder." (underscoring in original)

Award 23510, after exhaustively examining the working agreement, the vacation agreement and our prior awards, cited with favor our early Award 4626 where we held in part:

> "It was the clear intention of the parties to the Vacation Agreement that the existing rules as to working conditions were to continue unless changed by negotiations."

It is clear that Award 23510 is a correct application of the agreements, while Award 23509 is not.

Award 23509 is in palpable error and requires dissent.




J. C. Fletcher, Labor Member

Date: 2-2-82