NATIONAL RAILROAD ADJUSTMENT BOARD

Award Number 24845
THIRD DIVISION Docket Number CL-23946

T. Page Sharpe, 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 (BL-9362) that:

a. Carrier violated the provisions of the current Clerks' Agreement at Amarillo, Texas, on April 13, 1979, when it failed to properly compensate C. L. Cook for Good Friday Holiday, while observing his annual vacation on Demurrage Clerk Position No. 6038, and

b. C. L. Cook shall now be compensated seven (7) hours' pay at the time and one-half rate of Demurrage Clerk Position No. 6038 for April 13, 1979, in addition to any other compensation he may have already received on that day.

OPINION OF BOARD: Claimant was observing his annual vacation on April 13, 1979, which day was also the Good Friday Holiday. His position was worked on that day for a total of seven hours. Claimant claims pay for that day for eight hours of vacation pay at straight time, eight hours of holiday pay at straight time and seven hours of pay at time and one-half for the work performed on the holiday, a total pay of twenty six and one-half hours for the day. Claimant has been paid for his vacation day and his holiday.

Claimant does not claim that the Holiday Agreement has been violated. He states that the Carrier has violated Paragraph 7 of Appendix No. 2 of the Agreement between the parties. That paragraph states:

> "7. Allowances for each day for which an employee is entitled to a vacation with pay will be calculated on the following basis:
>
> (a) An employee having a regular assignment will be paid while on vacation the daily compensation paid by the Carrier for such assignment."

It is admitted that paragraph 7(a) was taken verbatim from the provisions of Article 7(a) of the December 17, 1941 Vacation Agreement. This provision has an agreed to interpretation dated June 10, 1942. Referee Morse interpreted this paragraph as follows:

> "This contemplates that an employe having a regular assignment will not be any better or worse off, while on vacation, as to daily compensation paid by the Carrier, than if he had remained at work on such assignment, this not to include casual or unassigned overtime or amounts received from others than the employing Carrier."

Initially the claim had been denied by a Superintendent of the Carrier in his letter of June 6, 1979. He denied the claim on the grounds that the hours worked on the position on Good Friday were casual overtime. In a response letter of July 14, 1979, the Local Chairman of the Petitioner refuted the statement by claiming "Position No. 6038 Demurrage Clerk works most every holiday and always works on Good Friday.... This was not casual overtime". Another letter of August 2, 1979, from the Organization to the Carrier, denies that the work performed was casual or unassigned overtime. When the claim was progressed to the second-step by Claimant the response stated the grounds for denial as "The determining factor in this dispute is whether Claimant works holidays in a 'regular fashion or casual fashion'. Since it has been determined that Position No. 6038 is not required to work holidays, such would be considered 'casual overtime'." In a letter dated July 30, 1980, the Organization rejected the casual overtime defense in its entirety. It states that pay for time worked on a holiday is "premium pay" and does not fall within the "casual and unassigned" exception.

The crux of the problem which has troubled the Board in the past is the harmonious blending of the mandates of the Vacation Agreement and the Holiday Agreement in situations as this. Even if the individual national agreements were clear on their face, this Board sees considerable ambiguity when they are read together.

The Oram-Lowry letter, reprinted in numerous awards, and cited as the definitive pronouncement by Claimant, is one view of the meaning of the relevant blend of provisions (although none are cited) and has lead some Boards to an absolutist position on the matter. In response to Mr. Lowry's inquiry Mr. Oram stated that a vacationing employe whose position was worked would be entitled to eight hours pay for the vacation, eight hours pay for the holiday, and eight hours pay at time and one-half for a total of twenty eight hours pay. This correspondence is no doubt of value in determining what one of the parties to the Holiday Agreement perceived the meaning to be. This Board does not believe that the correspondence is determinative of the issue. As one recent award succinctly stated, "The interpretation contained in these letters is not expressly binding as a matter of agency law upon Carrier since Mr. Oram represented the Eastern Carriers Conference Committee, and, further, in any event the National Railway Labor Conference was delegated authority to negotiate but not necessarily to interpret the contracts". (Public Law Board 2006, Award No. 5, Case No. 5.)

Based upon the Oram-Lowry correspondence, Petitioner would have the Board take an absolutist position and not consider whether or not the position was normally required to be worked on a holiday. In effect such an interpretation would equate "daily compensation paid" of paragraph 7(a) to a standard eight hour day. Such an interpretation would allow an employe called on a holiday pursuant to Rule 32-I of the Agreement to receive the hours of pay provided by that Rule, which could be less than eight, and would give the vacationing employe an eight hour day at time and one-half. This reading would negate that portion of the Morse interpretation that states that such vacationing employe should be no better or worse off than if he himself had remained at

work (had been called). The Board will not negate a long standing (agreed upon) interpretation without being shown some provision(s) in the June 24, 1968 Agreement, signed by Mr. Oram, which would require that result. Such a provision(s) has not been shown.

In view of the lack of clarity of the relevant provisions of the Agreement, the Board must consider the past practice of the Organization and Carrier as to payment of employes in similar circumstances. If the provisions were unambiguous past practice would not be relevant to the interpretation, but considering the uncertainty, the past practice of the parties and any third party interpretation between the same is of aid to the Board.

The Carrier cites an award between the parties, SBA No. 174, Award No. 14, which considered the "casual or unassigned" overtime issue. That Board stated:

> "*** The essential question presented by the claim is whether the overtime was 'casual or unassigned' within the meaning of the interpretation.
>
> SECOND. It is well settled by a number of Third Division awards that overtime is casual when, regardless of regularity, its duration depends upon service requirements which vary from day to day and the assignment, whether verbal or written, does not specify regular fixed periods of overtime (Awards 4498, 4510, 5001 and 6731). The overtime worked by this position has occurred with impressive if not complete regularity but, under the tests laid down by the foregoing awards, the overtime was casual because it depended entirely upon fluctuating daily service requirements."

The Petitioner distinguished that award as being inappropriate because it concerned work outside the regular assigned hours of the position. If the distinction is meant to say that only casual or unassigned overtime above the standard work day is the subject of the Morse exception, such a position completely negates the "not be any better or worse off" provision of the agreed upon Morse interpretation.

Carrier has stated that it has been the custom, practice and tradition, system-wide that when a position does not normally work on holidays, but may work an occasional holiday, such service is considered casual or unassigned overtime which is not to be included in vacation pay. Mere assertions are not evidence, but taken with the facts that the petitioner rebutted the "casual and unassigned" defense in two letters of correspondence and in SBA No. 174 the Board accepted that defense, this Board finds that the past practice between Carrier and Petitioner has been not to pay the vacationing employe pursuant to Section 7(a) if the position does not regularly work the holiday. This past practice establishes the interpretation between these parties.

Initially Petitioner rebutted Carrier's assertion that position No. 6038 is not assigned by bulletin to work on designated holidays and that the position is not normally worked on designated holidays by asserting that the positions works almost all holidays and always works Good Friday. Mere assertions are not proof and no proof was offered to the Board to establish which of the totally contradictory positions is true. Since the burden of proof is on the Petitioner and has not been met, the Board must hold that regular work for position No. 6038 on the Good Friday holiday has not been established.

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.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: Nancy J. Dever - Executive Secretary

Dated at Chicago, Illinois, this *8th day of June, 1984*