Award No. 1438
Docket No. 1337
2-StLSW-CM-'51

NATIONAL RAILROAD ADJUSTMENT BOARD

SECOND DIVISION

The Second Division consisted of the regular members and in addition Referee Frank M. Swacker when award was rendered.

PARTIES TO DISPUTE:

SYSTEM FEDERATION NO. 45, RAILWAY EMPLOYES' DEPARTMENT, A. F. of L. (Carmen)

ST. LOUIS SOUTHWESTERN RAILWAY COMPANY

ST. LOUIS SOUTHWESTERN RAILWAY COMPANY OF TEXAS

DISPUTE: CLAIM OF EMPLOYES: 1—That under the current agreement Car Inspectors W. B. Fielder, George Reece and Daniel Hughes were unjustly dealt with when the carrier declined to compensate them for their required service outside of their bulletined hours on October 12, 1948.

2—That accordingly the carrier be ordered to compensate these aforesaid employes at overtime rates for the service required of them outside of their bulletined hours between 9:00 A. M. and 12:00 Noon on October 12, 1948.

EMPLOYES' STATEMENT OF FACTS: Car Inspectors W. B. Fielder, George Reece and Daniel Hughes, hereinafter referred to as the claimants, were regularly employed by the carrier in the train yard at Jonesboro, Arkansas, on the third shift from 11:00 P. M. to 7:00 A. M.

On October 6, 1948 the carrier summoned these claimants as witnesses at an investigation of switchmen held on October 12, 1948, to determine the cause of the damage which occurred to Car SHPX 21930 in switching operations in the Jonesboro Yard on the night of September 17, 1948. Claimant Fielder was ordered to report for interrogation at this investigation at 9:00 A. M., Claimant Reece at 9:30 A. M. and Claimant Hughes at 10:00 A. M. These claimants, as instructed, reported for service as witnesses outside of their regular assigned hours of work. The carrier utilized the services of these claimants and released them upon having served the purpose for which the carrier required their presence at said investigation, the last one, Claimant Hughes, at 12:00 Noon, on October 12, 1948.

These claimants, for this service required of them by the carrier between 9:00 A. M. and 12:00 Noon on October 12, 1948, each turned in a service card for pay in the amount of four (4) hours at straight time and to date the carrier has declined to pay them anything therefor.

resumed 9:00 A. M. and adjourned 5:55 P. M., June 16; resumed 9:30 A. M. and completed 2:30 P. M., June 17, 1943. The claim was not for payment of hours outside of bulletined hours but only for time lost during assigned hours June 15, 16 and 17, 1943.

Conference was held with System Federation No. 45, March 5, 1945, to discuss the payment to be made to employes attending investigations. At this conference, carrier reaffirmed its policy that:

> "Likewise, witnesses, either for the employe or the Carrier, will be paid for attending the investigation provided it is held during their working hours and they are not laying off."

and agreed to continue paying the one employe representative on the basis outlined in carrier's letter March 7, 1945, (Exhibit No. 31).

Thus, in lieu of its request for a rule requiring payment to an employe appearing as a witness for the carrier, System Federation No. 45 accepted an interpretation whereby employes, appearing as witnesses for the employes as well as for the carrier, and the employe representative, on the basis outlined, would be paid time lost, if any.

In Second Division Award No. 55, decided without referee, the Board stated:

> "The parties who negotiated the agreement in effect on this property did not make it plain, either in the rules or interpretation thereof, whether employes should be paid for special service such as is involved in this dispute."

The carrier respectfully submits that the facts clearly show that subsequent to decision rendered in Award No. 55 and prior to the instant claim, the parties to the agreement on this property interpreted the rules as not requiring payment to employes attending investigations outside bulletined hours. The employes are now asking the Board to place a contrary interpretation on the rules, which the carrier respectfully submits is contrary to the provisions of the Railway Labor Act.

The claim is not supported by the rules nor justified for any reason, and the carrier, therefore, respectfully requests that it be denied.

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

The carrier or carriers and the employe or employes involved in this dispute are respectively carrier and employe within the meaning of the Railway Labor Act as approved June 21, 1934.

This Division of the Adjustment Board has jurisdiction over the dispute involved herein.

The parties to said dispute were given due notice of hearing thereon.

Claimants were called as witnesses to attend an investigation wherein they were not parties, and on their own time, that is outside their working hours. The defense of the carrier to the claim is that there is no rule in the schedule specifically providing for pay for such service. It is an elementary principle of the law of contract, that where parties situated as are these, i. e., employer and employe, that if the employer calls upon the employe to perform any service the employer thereby creates an implied contract to the effect that if the employe responds he will be paid for such service. If nothing is said about the amount of compensation they will be paid, the law then implies the rest of the contract to be that the employer will pay the reasonable value of such service. Some decisions by Divisions of the Board have held in cases of this type that in the absence of an express pro-

vision in the schedule specifying the compensation, the Board is without jurisdiction of the claim, and has dismissed it; in other cases, they have held it amounted to an application to write a new rule and that it was beyond its jurisdiction, and the claim was dismissed. Of course, such dismissal did not mean a claimant was remediless; it was considered he could go to a common law court and recover on quantum meruit, but the Adjustment Board apparently considered that course not open to it. However, in the light of recent decisions of the Supreme Court of the United States in Slocum vs. D. L. & W. R. R. Co. 339 U. S. 239, 70 S. Ct. 577; O. R. C. vs. Sou. Ry., Co. 339 U. S. 255, 70 S. Ct. 585, holding in substance that the Adjustment Board has exclusive jurisdiction over grievances and disputes concerning contracts governing wages and working conditions, expressly excluding any jurisdiction in the common law courts as to such disputes, it becomes necessary to reconsider the course heretofore followed, and to adjudicate cases of implied contract where the schedules do not particularly specify the work or the compensation. That there may not be express contract provisions does not operate to curtail the elementary law of contract. It cannot be said properly that to supply a missing but implied term of contract amounts to writing a new rule. It does not follow that a quantum meruit ascertained as a judicial function necessarily becomes a fixed price applicable to some other or future case. It may be said in passing, concerning the relationship of employer and employe here involved, that it is well understood that the employe is under his contract under a duty to perform any work ordered to whether the contract mentions such work or not, and on refusal to obey such instruction that he is subject to discipline, extending even to discharge. If the employe thinks the orders given him are outside his duties imposed by his contract, it is his duty to perform them and then follow specified procedure of grievance concerning the matter. Some cases may involve considerable difficulty in ascertaining the reasonable value of a service not specifically mentioned or provided for, but in the instant case the Division is confronted with no difficulty whatsoever for if the overtime rule of the contract relied on by the organization is not actually applicable it at least furnishes a most apposite analogy; consequently, it is found that the agreed value of the service performed (whether specifically under the overtime rule or upon an implied contract) is as for a call, i. e.—four hours at straight time rate—the time involved not exceeding the minimum of two hours and forty minutes stipulated by the call rule.

AWARD

Claim sustained for four hours at straight time rate.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Second Division

ATTEST: Harry J. Sassaman
Executive Secretary

Dated at Chicago, Illinois, this 27th day of March, 1951.