Award No. 2374
Docket No. 2092
2-MP-CM-'56

NATIONAL RAILROAD ADJUSTMENT BOARD

SECOND DIVISION

The Second Division consisted of the regular members and in addition Referee Edward F. Carter when the award was rendered.

PARTIES TO DISPUTE:

SYSTEM FEDERATION NO. 2, RAILWAY EMPLOYES' DEPARTMENT, A. F. of L. (Carmen)

MISSOURI PACIFIC RAILROAD COMPANY

DISPUTE: CLAIM OF EMPLOYES:

1. That under the controlling agreement and particularly Rule 7 (e), the Carrier did not properly compensate the Poplar Bluff Wrecking Engineer while in wrecking service at Okean, Arkansas during the period of February 17th to February 22nd, 1952.

2. That accordingly the Carrier be ordered to additionally compensate the Poplar Bluff Wrecking Engineer, James Johnson, the difference between pro rata and punitive rate for service on his rest days—namely, February 18th, 10 hours; February 19th, 11 hours; and for all time working, waiting and traveling after the recognized straight time hours at home station; namely: February 20th, 11½ hours and February 21st, 11 hours.

EMPLOYES' STATEMENT OF FACTS: At Poplar Bluff, Missouri, the Missouri Pacific Railroad Company (hereinafter referred to as the carrier) maintains a wrecking outfit and a regularly assigned wrecking crew composed of carmen and their helpers. Wrecker Engineer James Johnson (hereinafter referred to as the claimant) is regularly assigned as wrecker engineer and is assigned on the 11:00 P. M. to 7:00 A. M. shift with a work week of Wednesday through Sunday and rest days of Monday and Tuesday.

On Sunday, February 17, 1952, the wrecking crew, including the claimant, was called at 8:30 A. M., departing Poplar Bluff, Missouri, at 9:45 A. M., arriving at scene of derailment at Okean, Arkansas, at 12:30 P. M., working straight through until 9:00 P. M. on February 18th. He resumed work at 6:00 A. M., February 19th, and was relieved at 10:30 P. M. On February 20th he worked from 6:00 A. M. to 9:00 P. M. On February 21st, he worked from 6:00 A. M. to 9:00 P. M. On February 22nd, he worked from 6:00 A. M., completing the job at 1:00 P. M., arriving home point and released at 4:30 P. M.

He was brought on duty at 6:00 A. M., February 19, and was relieved from duty at 9:30 P. M., February 19. The time from 9:30 P. M., February 19, to 6:00 A. M., February 20 totals 8½ hours, for which he was not compensated.

Claimant was brought on duty at 6:00 A. M., February 20 and was relieved from duty at 9:00 P. M., February 20. From 9:00 P. M., February 20 until 6:00 A. M., February 21 totals 9 hours, for which claimant was not compensated.

On February 21, 1952 claimant was brought on duty at 6:00 A. M. and was relieved from duty at 9:30 P. M., February 21. From 9:30 P. M., February 21 until 6:00 A. M., February 22 totals 8½ hours, for which claimant was not compensated.

It is clear from the foregoing that there is no basis for the claim for additional compensation now made and it is apparently based upon the proposition that paragraph (b) of Rule 7 does not provide for relief time of 5 hours or more which the rule says will not be paid for.

By referring to the table contained in paragraph 4 of carrier's statement of facts, it will be noted that all time from 8:30 A. M., February 17, 1952, time called at Poplar Bluff, to 4:30 P. M., February 22, 1952, time tied up at Poplar Bluff, was paid for at the appropriate rate except the tie up time as outlined above.

The theory upon which this claim is bottomed is not entirely clear to the carrier. Efforts to induce the general chairman to clearly state the basis for the instant claim for additional compensation were not successful.

In view of the carrier's lack of information concerning the basis for this claim, it is hereby respectfully requested that the carrier be permitted to supplement or amend its submission by way of rebuttal and put into evidence any material which it may feel is warranted after it has an opportunity to read the submission of the employes.

PROTEST

As fully set forth in carrier's statement of facts, this claim was first presented to the carrier on March 3, 1952. It was progressed through the usual channels on the property during the years 1952 and 1953, and the final decision was given to the employes in carrier's letter dated December 29, 1953, quoted on pages 7 and 8 of carrier's statement of facts. This final decision followed two conferences, one on October 21 and one on December 16, 1953. In the conference on December 16, 1953, the results of the survey made by the carrier were reviewed with the general chairman and thereafter nothing further was heard from him until May 20, 1955.

Although we have fully met the issues in this case, we now desire to protest the action of the employes in delaying for more than a year and a half before taking any action following the carrier's final decision. It seems to the carrier that in view of the practice for more than twenty years under the current agreement that the employes have been dilatory in progressing this case to your Board and should now be barred from doing so by reason of such long delay. For this reason this case should be dismissed.

* * * * *

For the reasons set forth and fully discussed in this submission, this dispute should 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.

Carrier maintains a wrecking outfit at Poplar Bluff, Missouri. Claimant was assigned as wrecker engineer on the outfit. His regular assignment as car inspector was Wednesday through Sunday, 11:00 P. M. to 7:00 A. M., with Monday and Tuesday as rest days. On Sunday, February 17, 1952, the wrecker crew was called out at 8:30 A. M. and departed for Okean, Arkansas at 9:45 A. M. It arrived at Okean at 12:30 P. M. and the crew worked straight through until 9:00 P. M. on February 18, 1952. Claimant resumed work at 6:00 A. M. on February 19, 1952, and was relieved at 10:30 P. M. on the same day. On February 20, 1952, he worked from 6:00 A. M. until 9:00 P. M. On February 22, 1952, he worked from 6:00 A. M. until 1:00 P. M. and arrived home and was released at 4:30 P. M. Claimant claimed overtime for all time working, waiting or travelling on his rest days and overtime for all time working, waiting or travelling on other days except during his regularly assigned hours.

Wrecking crew service is paid for under the provisions of Rule 7, Current Agreement. Rule 7(e) provides:

> "Wrecking service employes will be paid under this rule, except that all time working, waiting or traveling on their rest days and holidays will be paid for at rate of time and one-half, and all time working, waiting or traveling on other days after the recognized straight time hours at home stations will also be paid for at rate of time and one-half."

The carrier contends that wrecker crews are generally first shift employes and that if a second or third trick employe is assigned, the change of shift rule is applicable to him. We do not so construe the agreement. A second or third shift employe used in wrecker service does not change shifts, there is no wrecker service shift to which he could be changed. Rule 10, the change of shift rule, has no application to emergency wrecker service.

It seems clear to us that claimant is not entitled to pay when he is relieved from duty for five hours or more when the conditions of Rule 7(b) have been met. His claim for compensation during relief periods in excess of five hours is without basis in the rules.

On Sunday, February 17, claimant worked 15½ hours, the last hour of which was within his assigned hours as car inspector. He is entitled to be paid 14½ hours at overtime and one hour at straight time. On Monday, February 18, claimant worked 22½ hours. It being a rest day of his regular assignment—he is entitled to be paid the overtime rate for all hours on that day. On Tuesday, February 19, claimant worked 15½ hours. It also being a rest day, he is entitled to the overtime rate for the hours worked. On February 20, claimant worked 15 hours, the first hour of which was within his assigned hours. He is entitled to 14 hours at overtime and one hour at straight time on that day. On February 21, claimant worked 15½ hours, one hour of which was within his regularly assigned hours. He should be paid 14½ hours at overtime and one hour at straight time on that day. On February 22, he worked 10½ hours. It being a holiday, he is entitled to time and one-half for the hours worked on that day. Claimant was entitled to be paid 91½ hours at time and one-half rate and 3 hours at the straight time rate. He was paid for 77½ hours at time and one-half and 17 hours at straight time. The claim is sustained for the difference. Rule 7(e), Current Agreement.

In the instant case, the carrier submitted certain exhibits at the referee hearing numbered A-1 to A-10, inclusive, as evidence of a practice existing on the property which was in conformity with the method it employed in paying the claimant. Objections were made thereto on the basis that such exhibits could not be considered under the rules of the Division. This requires an examination of the applicable rules adopted by the Division.

Under the subject "Form of Submission" contained in Circular No. 1, adopted by the National Railroad Adjustment Board on October 10, 1934, it is provided:

> "Position of Employes: Under this caption the employes must clearly and briefly set forth all relevant, argumentative facts, including all documentary evidence submitted in exhibit form, quoting the agreement or rules involved, if any; and all data submitted in support of employes' position must affirmatively show the same to have been presented to the carrier and made a part of the particular question in dispute."
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> * * * * *
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> "Position of Carrier: Under this caption the carrier must clearly and briefly set forth all relevant, argumentative facts, including all documentary evidence submitted in exhibit form, quoting the agreement or rules involved, if any; and all data submitted in support of carrier's position must affirmatively show the same to have been presented to the employes or duly authorized representative thereof and made a part of the particular question in dispute."

Under the foregoing procedural rules each party in its original submission is required: (1) to set forth briefly all relevant facts and documentary evidence in exhibit form, (2) quote the agreement and rule provisions involved, (3) set forth all data submitted in support of the party's position, and (4) affirmatively show that the same has been presented to the adverse party or his representative. Under the foregoing provisions each party is required to observe these requirements in its original submission. Neither party may make a prima facie case in its original submission and in his answer to the other's submission bring in affirmative evidence in support of his own position in the dispute. The answers to the submissions, though apparently not provided for in Circular No. 1 and exist only as a matter of procedural practice, mean what they imply, i.e. evidence traversing the allegations and evidence contained in the original submissions. This construction is further supported by the provision in Circular No. 1 providing for oral hearings but preserving the above quoted rules by including a paragraph providing:

> "The parties are, however, charged with the duty and responsibility of including in their original written submission all known relevant, argumentative facts and documentary evidence."

By resolution adopted on March 27, 1936, the Second Division adhered to the foregoing interpretation of the rules of the Board by providing:

> "If and when a hearing is held, the Second Division will not accept any known evidence not contained in the original submissions of the interested parties."

By the same resolution, the Second Division authorized an exception to the foregoing rules by providing:

> " . . . except in extreme cases, and then only by action of the Second Division, will it be permissible to supply supplementary information or evidence after the hearing has been concluded."

The foregoing exception has no application to the present case. The carrier did not assert a practice in its original submission, nor did it allege a

practice as a defense to the allegations of the organization's original submission. The exhibits attached to carrier's written brief submitted at the referee hearing are in violation of the rules in that a practice was not previously asserted, they are not attached to the carrier's original submission or to carrier's answer to the organization's submission as a defense to the organization's original submission, and, lastly, they were not previously submitted to the adverse party. Procedural rules are necessary to expedite the work of the Division. Unless they are enforced, their purpose is wholly defeated and the presentation of disputes becomes chaotic and interminable. If the procedural rules of the Division do not adequately protect the rights of the parties, the remedy is to amend the rules to attain that end. The continual violation of rules impedes the expeditious handling of disputes and multiplies the problems with which the Division is confronted. Such results are contrary to the expressed purposes of the Railway Labor Act.

For the reasons stated, the objections of the organization to the consideration of Exhibits A-1 to A-10, inclusive, are sustained.

AWARD

The claim is sustained per findings.

The objection to submitted exhibits is sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of SECOND DIVISION

ATTEST: Harry J. Sassaman
Executive Secretary

Dated at Chicago, Illinois, this 18th day of December, 1956.