Award No. 2736
Docket No. 2561
2-MP-FT-'58

NATIONAL RAILROAD ADJUSTMENT BOARD

SECOND DIVISION

The Second Division consisted of the regular members and in addition Referee D. Emmett Ferguson when award was rendered.

PARTIES TO DISPUTE:

SYSTEM FEDERATION NO. 2, RAILWAY EMPLOYES' DEPARTMENT, AFL-CIO (Federated Trades)

MISSOURI PACIFIC RAILROAD COMPANY

DISPUTE: CLAIM OF EMPLOYES:

A. That under the current Agreement Electrician C. L. McAlister, Machinist A. I. Meredith and Laborer A. Neal were unjustly dealt with when the Carrier declined to compensate them for service required outside of their bulletined hours February 9, 1956.

B. That accordingly, the Carrier be ordered to compensate these aforesaid employes at overtime rate for the service required of them outside of their bulletined hours between 9:30 A.M. and 3:45 P.M. February 9, 1956.

EMPLOYES' STATEMENT OF FACTS: Electrician C. L. McAlister, Machinist A. I. Meredith and Laborer A. Neal, hereinafter referred to as the claimants, were regularly employed by the carrier in the diesel facilities at Alexandria, Louisiana, on the 11:00 P.M. to 7:00 A.M. shift, with work week of Friday through Tuesday, with rest days of Wednesday and Thursday.

On February 7, 1956, the carrier summoned these claimants as witnesses at an investigation of an engineer and fireman to be held on Thursday, February 9, 1956, their rest days, to determine the cause of a delay to Train No. 869 on February 4, 1956. The claimants reported as requested and were required to remain at the investigation from 9:30 A.M. to 3:45 P.M., a total of six and one quarter hours. A copy of the citation of the engineer and fireman and the instructions for the claimants to be present is submitted herewith as Exhibit A.

The claimants, for performing this service as instructed, each turned in a service card for pay in the amount of six and one-quarter hours (6¼) at the time and one-half rate, which the carrier declined to pay.

ently the employes with nothing to lose have decided to try to induce your Board to write a new rule in the agreement in the guise of interpretation contrary to the authority delegated to your Board by the Railway Labor Act. The fact that the claim is made at the time and one-half rate emphasizes the fact that this claim is nothing but an effort to impose a penalty on the carrier.

The contention advanced by the employes in this dispute is not a novel one but has been advanced by the representatives of other organizations. Two such disputes have recently been presented to Special Boards of Adjustment on this property. One of the disputes was heard by Special Board of Adjustment No. 117. The Order of Railroad Telegraphers progressed a claim to that Board which was decided by Award 54 dated August 9, 1956, with Livingston Smith as the Chairman of the Board. The award which is self-explanatory is quoted here in full:

"Claim of the General Committee of The Order of Railroad Telegraphers on the Missouri Pacific Railroad that:

1. Carrier violated the agreement between the parties when it failed to compensate V. F. Romay for services performed on his assigned rest day, January 17, 1955.

2. Carrier shall now be required to pay V. F. Romay 8 hours at the time and one-half rate for services performed on January 17, 1955.

OPINION OF BOARD: Claim is here made for 8 hours at the punitive rate for services allegedly performed on January 17, 1955, in connection with an investigation.

The claimant here was the regularly assigned occupant of a relief position with Sunday and Monday as assigned rest days. January 17, 1955, the date in question, was one of the aforesaid rest days.

The Organization contends that the claimant here performed service on this rest day when he was required by due notice to appear at the investigation and is entitled to compensation within the meaning of Rule 6, computed as provided in Rule 9, Section 1, paragraph II-A(1).

It was pointed out by the Organization that since the advent of the 40-hour week there can be no question that, within the meaning of the agreement, the service here performed by the claimant at the request of the carrier was 'work' as such.

The Carrier here took the position that the claimant was not entitled to compensation within the meaning of Rule 9, Section 1, paragraph II-A(1), since there was no work performed by the claimant on the date in question.

It was further pointed out that the claimant here was a principal at the investigation which was held to determine cause of and place individual responsibility for an incident which occurred on January 12, 1955.

The Carrier further asserted that Rule 6, here relied upon by the Organization, provides for payment only to those attending court or serving as witnesses in court proceedings, and that the investigation in question was not the type of proceeding contemplated in Rule 6.

The date in question was unquestionably a rest day for the claimant. His request that reparations be granted at the punitive rate for services performed by virtue of his requested attendance at the investigation must, of necessity, stand or fall on Rule 6 of the effective agreement. Rule 6, in essence, provides that employes taken from their assigned duties at the request of the management to attend court or to appear as witnesses for the Carrier in court proceedings will be . . . allowed compensation equal to what they would have earned upon their regular position . . .

We are of the opinion that the question of whether or not this rule provides for pay for attendance by an employe at an investigation within the meaning of Rule 6 was correctly passed upon in Award No. 3230 involving the parties hereto, wherein it was held:

> 'There is no rule of the agreement providing for pay for attendance by an employe at an investigation instituted by the carrier. Rule 6 provides for compensation and reimbursement for expenses when an employe at the request of the carrier attends court or appears as a witness for the carrier in court proceedings. Both sides, however, agree that this rule has no application here. To come within Rule 10(c) the attendance by this employe must be regarded as "work" as that word is used in the rule.
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> 'This question has been discussed in a number of awards, which, though not uniform, have fairly consistently held that attendance at an investigation is not "work" as that word is used in the rules. Awards 134, 1032, 1816, 2132, 2508, 2512.
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> 'The parties could have specifically provided by a special rule for payment for time spent while on such duty. The fact that there is no such rule may well indicate that they were unable to agree on this problem. Under such circumstances this Board is without power to intervene. We cannot write a rule on the failure of the parties to agree, nor should we by a forced construction apply another rule in a way in which they did not intend.'

For the reasons herein above set out, we are of the opinion that this claim has no merit.

FINDINGS: The Special Board of Adjustment No. 117, upon the whole record and all the evidence, finds and holds.

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 Special Board of Adjustment has jurisdiction over the dispute involved herein; and,

That the Carrier did not violate the effective agreement.

AWARD: Claim denied."

The same question was presented to Special Board of Adjustment No. 61. The Brotherhood of Railroad Trainmen progressed a claim to that Board which was decided by Award 66. With Mr. Francis J. Robertson as chairman, the Board made the award on August 29, 1955. Again the award is self-explanatory but is so pertinent that it is set out in full.

"**FINDINGS:** These claims are all for eight hours pay either at the punitive or pro rata rate filed on behalf of employes who were required to attend investigations on their off days.

The Agreement contains a rule providing for pay for attending court when an employe loses time from his regular assignment in so doing. When no compensable time is lost because of such attendance claims made for the time spent in attending court have been denied under that rule (see Award No. 3392). Generally speaking, in the absence of a rule requiring payment for attending investigation it is recognized that time so spent is not the equivalent of service within the meaning of the basic day rule. The fact that the parties negotiated a rule to cover pay for court attendance under certain conditions is a recognition of that principle.

This question has become more acute since the institution of the five-day work week. As a matter of good labor relations it is desirable for supervisors to set investigations so that there is a minimum of interference with the employes free time. It may well be that the parties should consider the advisability of negotiating a rule on this subject. However, insofar as this Board is concerned there is no alternative but to hold that the claims are without rule support and accordingly must be denied.

AWARD. Claims denied."

We also invite your Board's attention to First Division Awards 3392, 3405, 12275, 12491 and Third Division Award 6374, involving this carrier and the same general issue.

In the instant case, claimants attended an investigation in which a locomotive engineer was the principal involved. It is interesting to note the agreement with the Brotherhood of Locomotive Engineers likewise does not provide for any payment under such circumstances. This fact is brought out in First Division Award 12275 cited in the next paragraph above which involved this carrier and the engineers' organization.

It is crystal clear from the above awards and the practice on this carrier that the claimants are not being discriminated against but that claimants are being given the same consideration that is being extended generally to other employes. It is entirely reasonable to expect employes to devote a portion of their time off to attending investigations when needed in order to fulfill the requirements of a rule incorporated in the various agreements for their benefit. This has always been the practice on this carrier.

In conclusion the carrier repeats that the employes have not cited any rule in support of the claim. The agreement does not contain a rule calling for any payment under the circumstances present in this dispute. Since the employes have not assumed the burden of proving their case and since, as Referee Wenke said in Third Division Award 5220, "we (the Board) cannot allow payment other than has been agreed upon by the parties themselves," it follows that your Board has no authority to do anything other than to decline the claim. The social order changes and perhaps some day a changing sense of social justice will cause the parties to this dispute to reconsider the problem, but until a change occurs, the employes have no right to compensation for attending investigations on their off hours.

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.

The claimants herein were informed by investigative charges preferred by the carrier against an engineer that "The following witnesses arrange to be present." The investigation was held at a time when the claimants were supposed to be off duty. One of the claimants was on his rest day.

The docket before us discloses a similar claim which was paid by the carrier which overrides the carrier's assertion that "It has always been the practice on this property for employes to appear as witnesses at investigations * * * and be reimbursed for any wage loss, if any, sustained * * *."

Based on the cited awards, viz, Second Division Awards 1438 and 1633, the claimants' presence at the investigation under the carrier's orders, is service for which the claimants are entitled to be paid.

AWARD

Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of SECOND DIVISION

ATTEST: Harry J. Sassaman
Executive Secretary

Dated at Chicago, Illinois, this 29th day of January, 1958.