Award No. 3490

Docket No. 3032

2-MP-SM-'60

NATIONAL RAILROAD ADJUSTMENT BOARD

SECOND DIVISION

The Second Division consisted of the regular members and in addition Referee James P. Carey, Jr. when award was rendered.

PARTIES TO DISPUTE:

SYSTEM FEDERATION NO. 2 RAILWAY EMPLOYES' DEPARTMENT A. F. of L. - C. I. O. (Sheet Metal Workers)

MISSOURI PACIFIC RAILROAD COMPANY

DISPUTE: CLAIM OF EMPLOYES:

A) That under the current Agreement Sheet Metal Worker R. B. Shaw was unjustly dealt with when the Carrier declined to compensate him for service required outside of his bulletined hours on March 9, 1956 and March 15, 1956.

B) That accordingly, the Missouri Pacific Railroad Company be ordered to compensate the aforesaid employe at the overtime rate for the service required of him outside of his bulletined hours between 9:00 A. M. and 10:00 A. M. March 9, 1956 and between 9:00 A. M. and 12:30 P. M. March 15, 1956.

EMPLOYES' STATEMENT OF FACTS: Sheet Metal Worker R. B. Shaw, hereinafter referred to as the claimant, was regularly employed by the Missouri Pacific Railroad Company, hereinafter referred to as the carrier, in the diesel facilities at Kansas City, Missouri on the 12:00 A. M. to 8:00 A. M. shift, with work week of Thursday through Monday, with rest days of Tuesday and Wednesday.

On March 7, 1956, the carrier summoned the claimant as a witness at an investigation of Locomotive Foreman George L. Staley to be held on Friday, March 9, 1956. The claimant reported as requested and was required to remain at the investigation from 9:00 A. M. to 10:00 A. M., a total of one hour, after which, the investigation was postponed until a later date on 9:00 A. M. March 15, 1956 at which time the claimant was required to remain from 9:00 A. M. to 12:30 P. M. Copies of the notices instructing the claimant to be present submitted as Exhibits A and B.

The claimant for performing this service as instructed by the carrier, turned in a service card for pay at the time and one-half rate, which the carrier has declined.

tion is the total time consumed by the investigation. In each case, claimant was not the only witness or the principal at the investigation so that probably most of the time shown was spent just sitting and waiting. Waiting and traveling time is generally compensable at the straight time rate so that a claim for the punitive rate is unreasonable and excessive. So we would argue before a proper tribunal and we believe any tribunal would be convinced that no payment is justified or, at least, not the payment requested here. It is undoubtedly a realization of this fact that prompts the employes to pursue this course rather than the unsuccessful course pursued in 1947.

Sometimes the exception proves the rule and we have such an exception on this property. Signalmen are widely scattered over the property. The use of their services often requires considerable traveling contrary to the situation with the shop crafts. In Award 6374 of the Third Division, we find a claim from a signal foreman on this property for 16 hours pay at the punitive rate for giving a deposition on his off day. The rule is quoted in the award which entitled the claimant to 8 hours pay at the straight time rate. The claim was denied and payment under the specific rule approved. The carrier in course of collective bargaining agreed to the rule in view of the working conditions of signalmen. The rule illustrates a type of rule that resulted from collective bargaining in a specific situation. Note that although 16 hours of claimant's time was consumed, he was allowed only 8 hours and that at the straight time rate even though it was a rest day. It is interesting to note that the same referee sat with the Third Division in that dispute as sat with this Division in Docket 2561, Award 2736.

The same considerations would enter into a decision to determine the terms of an implied contract if Judge Swacker's theory were pursued. The facts which we have discussed immediately above are the factors which an equity court would consider. For that reason the carrier emphatically states that the doctrine of implied contract has been improperly applied if this Division should consider the doctrine within its province to apply which the carrier states is not within its province.

To summarize, we have shown that the carrier is entitled to reargue the issues in Award 2736 because of new evidence. We have shown that the agreement is intentionally devoid of a special rule covering the issue in this claim as the result of collective bargaining. We have shown that the claim is not supported by the practice on this property. We have shown that rules cited by the employes have no application to claims of this nature. It follows that this Board has no alternative but to dismiss the claims for lack of any authority upon which it can resolve the dispute.

But if the Board should not deny the claim, then the claim cannot be sustained as presented because the amount requested is unreasonable and excessive for the time and effort expended.

The carrier is firmly convinced that the proper course for this Board is to dismiss the claim because not supported by the rules.

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.

Disposition of this claim is governed by our findings in Award 3484.

AWARD

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of SECOND DIVISION

ATTEST: Harry J. Sassaman
Executive Secretary

Dated at Chicago, Illinois, this 21st day of June 1960.

DISSENT OF LABOR MEMBERS TO AWARDS 3484 TO 3492, INCLUSIVE

The majority states "We find nothing in the classification of work rules which can be said to afford a reasonable basis for allowing compensation such as is claimed here." Such reasoning, if followed to a logical conclusion, would make it necessary to define even the most minute details involving every type of service to be performed. However, there is no need for specifically defining every possible service to be performed since it is an elementary principle of the law of contract that if the employer calls upon the employe to perform any service the employer thereby creates an obligation to pay for such service if the employe responds. The claimant was called by the carrier to attend an investigation. He responded and unless he is compensated for such service he is being unjustly dealt with. The service performed lies within the scope of the collective agreement and we submit that a reasonable interpretation of Rule 4 requires that claimant be compensated in accordance with its terms.

/s/ Edward W. Wiesner
Edward W. Wiesner

/s/ R. W. Blake
R. W. Blake

/s/ Charles E. Goodlin
Charles E. Goodlin

/s/ T. E. Losey
T. E. Losey

/s/ James B. Zink
James B. Zink