Award No. 4288
Docket No. 3891
2-CRRofNJ-CM-'63

NATIONAL RAILROAD ADJUSTMENT BOARD

SECOND DIVISION

The Second Division consisted of the regular members and in addition Referee Charles W. Anrod when the award was rendered.

PARTIES TO DISPUTE:

SYSTEM FEDERATION NO. 72, RAILWAY EMPLOYES' DEPARTMENT, A. F. of L. - C. I. O. (Carmen)

THE CENTRAL RAILROAD COMPANY OF NEW JERSEY

DISPUTE: CLAIM OF EMPLOYES:

1. That the Carrier violated the rules of the current Agreement by refusing to pay Local Chairman Dean Guididas for attending hearing and investigation during the regular working hours on October 29, 1959, and

2. Accordingly, the Carrier be instructed to pay claimant one day's pay for October 29, 1959 for his loss of earnings.

EMPLOYES' STATEMENT OF FACTS: Local Chairman D. Guididas hereinafter will be identified as claimant, and The Central Railroad Company of New Jersey will be identified as the carrier.

On October 22, 1959 notice was sent to Car Inspector Daniels to attend hearing and investigation at Long Branch, N.J. No copy of such notice was furnished to Local Chairman Guididas.

On October 28, 1959 claimant notified his supervisor that it was necessary for him to be off duty the following day to attend a hearing and investigation at Long Branch, N.J.

On October 29, 1959 claimant drove by automobile to Long Branch, N.J. to attend the hearing and investigation, commencing at 10:00 A.M. It was necessary to travel by automobile because of untimely train connections. Claimant left at 8:30 A.M. returning home at 2:30 P.M. His hours of service on regular assignment are 7:00 A.M. to 3:00 P.M., Monday to Friday.

On October 30, 1959, claimant submitted time card for October 29, 1959 which was denied.

The agreement effective March 16, 1937 and revised October 1, 1947, is controlling in the instant case.

The Referee in his findings also stated:

> "There is then no issue whether Dolo is to be compensated for the loss of time he claims to have suffered because it did not arise, as he claims, by reason of a 'Conference between local officials and local committeemen' as provided in Rule 34(a)."

Local Chairman Guididas on October 29th, 1959, was not prevented from performing his work by the carrier, and it was through his own request that he elected to be absent from his assigned duties as car inspector to fulfill an obligation he has assumed as a representative of the organization when so requested by an employe. He was not instructed or requested to be present, nor was his presence in any way required by the carrier. There is then no issue whether claimant is to be compensated for the loss of time he claims to have suffered, because it was not at the carrier's direction that he abandoned his obligation to perform his assigned work as Car Inspector, and because it did not arise by reason of a conference between local officials and local committeemen, as provided for in Rule #35. Furthermore, nowhere in Rule #37 are there any provisions for pay to duly authorized representatives for attending investigations. The time so spent by Local Chairman Guididas was not compensable to him by the carrier, as the services being rendered by him were for Car Cleaner Daniels and not for the carrier. In fact, the carrier was penalized by having to pay the punitive rate to fill his position in his absence.

Carrier submits that it has conclusively established there is no rule contained in the current carmen's agreement to support the payment requested by the Employes; therefore, the claim in this docket is without basis or merit and, should be denied in its entirety. To do otherwise, would be tantamount to writing a new rule which this Board does not have the authority to do. (See Awards of the 2nd Division 3087 and 3305). The Board consistently held that penalties may not be awarded upon implication, but only under express contract provisions. (See Second Division Award 1638).

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.

Parties to said dispute waived right of appearance at hearing thereon.

Under date of October 22, 1959, the Carrier served a written notice upon car cleaner L. H. Daniels to report for a hearing and investigation at Long Branch, New Jersey, on October 29, 1959, to determine his responsibility for the delay of a train. A copy of said notice was sent to the local committeeman of the Organization. The hearing started at 10:00 A.M. and ended at approximately 12:00 Noon.

Upon Daniel's request, the Claimant, D. Guididas, who is the Local Chairman of the Organization and who is employed by the Carrier as a car inspector at its Elizabeth (New Jersey) Avenue Yard, represented him at said hearing investigation. The Claimant left his home at about 8:30 A.M. and returned at about 2:30 P.M. As a result, he was unable to work during his regular working hours (7:00 A.M. to 3:00 P.M.). He received no pay for this day.

He filed the instant grievance in which he contended that the Carrier violated the applicable labor agreement by refusing to pay him for October 29, 1959. He requested compensation in the amount of one day's pay. The Carrier denied the grievance.

In support of his claim, the Claimant primarily relies on Rules 35 and 37 of the labor agreement which read, as far as pertinent, as follows:

> Rule 35: "Should any employe . . . believe he has been unjustly dealt with, or any of the provisions of this agreement have been violated, the case shall be taken to the foreman, general foreman, master mechanic or shop superintendent, each in their respective order, by the duly authorized local committee or their representative. . . . If the result still be unsatisfactory, the duly authorized general committee, or their representatives, shall have the right of appeal . . . to the higher officials designated to handle such matters in their respective order, and conference will be granted within ten (10) days of appeal.
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> "All conferences between local officials and local committees to be held during regular working hours without loss of time to committeemen."
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> Rule 37: "No employe shall be disciplined without a fair hearing by designated officer of the carrier. . . . At a reasonable time prior to the hearing, such employe and his duly authorized representative will be apprised of the precise charge and given reasonable opportunity to secure the presence of necessary witnesses . . ."

1. A basic rule generally observed by the courts and industrial arbitrators in the interpretation of a labor agreement is, as far as feasible, to ascertain the mutual intent and aim of the parties for the purpose of determining the true meaning of the agreement. See: Frank Elkouri and Edna E. Elkouri, **How Arbitration Works,** Rev. Ed., Washington, D. C., BNA Incorporated, 1960, p. 203; Clarence M. Updegraff and Whitley P. McCoy, **Arbitration of Labor Disputes,** Second Ed., Washington, D.C., BNA Incorporated, 1961, p. 225, B, 2. Applying that principle to this case, we have reached the following conclusions:

The Claimant argues that a hearing held pursuant to Rule 37 is to be equated with a conference as contemplated in Rule 35 and thus must be held without loss of time to committeemen. We disagree. A thorough analysis of the two Rules has convinced us that they deal with two entirely dissimilar situations. The First Paragraph of Rule 35 prescribes certain progressive steps to be taken in case an employe initiates a grievance because of his belief that he has been unjustly dealt with or that a provision of the labor agreement has been violated by the Carrier. The clear and unmistakable aim and intent of such procedure, like any grievance adjustment machinery, is to bring about out-of-court settlements of minor disputes through discussion and consultation which constitute a "conference". In order to facilitate such conferences, the Second Paragraph of Rule 35 provides that they must be held during regular working hours and without loss of time to committeemen.

The aim and intent of Rule 37 are distinctly different. This Rule contains a limitation on the Carrier's right to discipline an employe. It prescribes certain procedures to be initiated by the Carrier before an employe may be disciplined. Specifically, the Rule requires a formal hearing as a prerequisite to

any disciplinary action so as to assure the employe of due process of law. The purpose of the hearing which is unilaterally scheduled and conducted by an official of the Carrier is not to bring about a settlement through discussion and consultation but solely to investigate the matter under consideration and to establish all the facts surrounding it. Hence, the hearing is a fact finding procedure. It is not a conference within the purview of Rule 35. It follows that the Second Paragraph of Rule 35 which provides for compensation of committeemen who attend a "conference" for the purpose of settling a grievance filed by an employe has no application to Rule 37.

It is correct as submitted by the Claimant that in our Award 1035 involving a comparable factual situation we reached a different conclusion. We have carefully re-examined our previous Award but no longer adhere thereto.

In summary, we hold that Rules 35 and 37 of the labor agreement do not sustain the claim at hand.

2. In his rebuttal brief, the Claimant has called our attention to some 14 instances in which the Carrier allegedly compensated local representatives for the time spent in attending hearings and investigations held under Rule 37 during regular working hours. He also asserts that this is only a partial list. In doing so, he seems to rely on a well established rule of labor law, namely, that an unwritten practice involving a specific benefit of personal value to an employe may establish a working condition which becomes a part of the labor agreement although not explicitly expressed in it. See: United Steelworkers of America v. Warrior and Gulf Navigation Co., 363 U. S. 574, 582; 80 S. Ct. 1347, 1352 (1960); Arbitration Awards in re Union Asbestos & Rubber Co., 39 LA 72, 75 (1962); Darling & Co., 39 LA 964, 974-976 (1962); Award 3845 of the Second Division.

No mention of said practice was made in the Claimant's submission brief and the Carrier has had no opportunity to reply to the Claimant's assertion. Hence, the record is inconclusive and does not permit us to pass upon the question as to whether a binding practice has existed at the Carrier's property as asserted by the Claimant. We, therefore, return this case to the parties so that they can discuss and determine whether such a practice has, in fact, existed. In the event that they cannot reach an agreement, each party shall be entitled again to refer this case to us solely for a decision regarding said practice.

AWARD

Dispute remanded in accordance with the above Findings without prejudice to the right of re-submission to this Division.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of SECOND DIVISION

ATTEST: Harry J. Sassaman
Executive Secretary

Dated at Chicago, Illinois, this 31st day of July. 1963.