

Award No. 5044

Docket No. 4750

2-CRI&P-MA-'67

NATIONAL RAILROAD ADJUSTMENT BOARD

SECOND DIVISION

The Second Division consisted of the regular members and in addition Referee Howard A. Johnson when award was rendered.

PARTIES TO DISPUTE:

**SYSTEM FEDERATION NO. 6, RAILWAY EMPLOYEES'
DEPARTMENT, AFL-CIO (Machinists)**

CHICAGO, ROCK ISLAND & PACIFIC RAILROAD COMPANY

DISPUTE: CLAIM OF EMPLOYEES:

1. That the Carrier violated the controlling agreement when it denied the Committee, C. O. Borchers, L. O. Marquardt and Otis Cox, the right to function as a committee in representing an accused employe, Machinist B. D. Wright, who was given an investigation at Enid, Oklahoma, on October 3, 1963. The Carrier refused to pay them and they each suffered lost time.

2. That the Carrier be ordered to compensate C. O. Borchers, L. O. Marquardt and Otis Cox in the amount of five (5) hours at pro-rata rate at their prevailing rates of pay, three dollars and seventy-five cents \$3.75 for each claimant for meals, plus a total of \$13.60 for automobile mileage.

EMPLOYEES' STATEMENT OF FACTS: On October 1, 1963, Machinist B. D. Wright was notified that he would be given an investigation at El Reno, Oklahoma. The following day a second notice was given the claimant informing him that the investigation would be held at Enid, Oklahoma, instead of El Reno. The committee, as in the past and in conformity with the agreement, then proceeded to Enid to represent the claimant. Upon arrival at the hearing, the carrier ordered two of the committee to leave the hearing room. The carrier also refused to compensate the committee for the time away from work, thereby causing Messrs. C. O. Borchers, L. O. Marquardt, and Otis Cox, hereinafter called the claimants, to lose time.

This dispute has been handled in accordance with the agreement, but the carrier has declined to make any adjustment.

The agreement effective October 16, 1948, as subsequently amended, is controlling.

POSITION OF EMPLOYEES: On October 1, 1935, the Chicago, Rock Island and Pacific Railroad Company, hereinafter referred to as the carrier, and

would not agree. The final rule (Rule 34) agreed upon continued the singular reference to "representative" and it has not subsequently been changed. The rule does not refer to "Committee."

Rule 32, your board will note, contains the following paragraph:

"All conferences between local officials and local committee to be held during regular working hours without loss of time to committeemen, and a written record of such conference shall be made." (Emphasis added).

Although Rule 32, as it appears in the 1949 agreement, was modified to include the time limit provisions of the August 21, 1954 Non-Operating Employees' National Agreement the above cited paragraph was not changed. It, very explicitly, refers to the "local committee," and "committeemen" whereas Rule 34 refers to "duly authorized representative."

That the foregoing is the correct interpretation to be applied to such rules is clearly established in Awards No. 3260 and 4288 of the Second Division, National Railroad Adjustment Board, with Referee Hornbeck, on the property of the Reading Railroad. Involved in Award No. 3260 were similar rules and for ready appraisal by the board we here quote the findings and award of Award No. 3260, as well as the Labor Members' dissent:

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.

On the undisputed facts, although Local Chairman Dolo was notified of the hearing of Hugendubler, he was not requested or directed by the carrier to appear but attend upon the request and on behalf of Hugendubler.

The time for which Dolo makes claim is not for a period during his regular working hours.

The employees assert that Claim No. 1 should be allowed under Rule 34(a) and particularly because of the second paragraph thereof which reads:

'All conference between local officials and local committees to be held during regular working hours without loss of time to committeemen.'

The paragraph just quoted refers only to the subject matter of the first paragraph of 34(a) viz: unjust dealings by the company toward any employee of violation of any of the provisions of the agreement.

"The hearing of Hugendubler did not proceed under (a) of Rule 34, but

under (b) of the rule. Rule 34(a) has no application to the facts here developed.

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).

If this submission involved a conference Second Division Award No. 2889 holds against the contention of the employees.

Award No. 172, Second Division, cited by employees, allowed claim which covered period during claimants regular working hours while handling grievances.

Awards No. 1348 and 2736, Second Division, also cited by employees, were for time served or lost other than during their regular tours of duty but while serving as witnesses upon orders of the carrier.

AWARD

Claims 1 and 2 denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of SECOND DIVISION

ATTEST: Harry J. Sassaman
Executive Secretary

Dated at Chicago, Illinois, this 23rd day of June, 1959."

"DISSENT OF LABOR MEMBERS TO AWARD 3260

The majority's statement that 'although Local Chairman Dola (sic) was notified of the hearing of Hugendubler, he was not requested or directed by the Carrier to appear . . .' implies that it was not necessary for him to do so. The fact is, however, that Rule 34 clearly contemplates that in controversy between employees and the Carrier the employee should be represented by his duly authorized representative—in this instance the local chairman.

"Under what section of Rule 34 the hearing of Hugendubler proceeded has no bearing on the instant dispute. The claim is in behalf of the local chairman and therefore paragraph (a) of Rule 34 has application to the facts developed in the case. The issue is definitely whether Local Chairman Dola (sic) is entitled to compensation for the loss of time he suffered by reason of a conference (hearing held pursuant to Rule 34(b)) which he had to attend. That he is entitled to compensation is shown by Rule 34(a) which requires that all such conferences be held without loss of time to committeemen.

The majority, after stating that the claim did not arise by reason of a conference, then states 'if this submission involved a conference Second Division Award No. 2889 holds against the contention of the employees.' The majority's apparent inability to recognize what the facts are in the case may be the cause of the majority's failure to recognize that paragraph (a) of

Rule 34 is applicable. Since the carrier elected to hold the conference outside the local chairman's regular working hours he is entitled to compensation as claimed.

**James B. Zink
R. W. Blake
Charles E. Goodlin
T. E. Losey
Edward W. Wiesner"**

In Award No. 4288 which involved rules very similar to those here in dispute, your Board said:

"The Claimant argues that a hearing held pursuant to Rule 37 is to be equated with a conference as contemplated in Rule 25 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. . . . 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 employee has no application to Rule 37."

The organization here relies primarily upon Award No. 3845, which was sustained on this property in a similar dispute between the carmen and this carrier.

When Award No. 3845 was rendered the claim of the carmen under the shop crafts' agreement was sustained—without an interpretation being made by the board on the rules involved. The apparent basis for sustaining the claim in Award No. 3845 was solely on the basis of "local practice" cited by the organization.

It is the carrier's opinion that the basis for sustaining the claim in Award No. 3845 has no validity, in view of the express agreement provision to be found on Page 67 of the shop crafts agreement, which reads:

"No Local mutual Agreement will be made on these rules except on approval of the parties signatory hereto."

Immediately upon receipt of Award No. 3845, we satisfied the claims relying upon that award, but, on March 27, 1962, wrote the general chairmen of the organization as follows:

"Gentlemen:

As you gentlemen are aware, we recently received from the Second Division Award No. 3845 which dealt with the subject of pay for Committeemen attending hearings held pursuant to Rule 34 of the Shop Crafts Agreement.

That Award sustained the claim of the employees without attempting to interpret the rules at all, but apparently considered local situations cited by the Organization as constituting agreement between the parties as to the application of the rules that Committeemen should be paid while attending a hearing.

Therefore, we consider the Award patently erroneous because we have a specific rule on Page 67 of the Agreement, which reads:

“No local mutual agreement will be made on these rules except on approval of the parties signatory hereto.”

The Carrier signatories thereto are the Personnel Officer, Manager of Personnel and General Superintendent of Motive Power, and an Award bottomed on the premise that a valid local agreement existed on this subject is clearly wrong because the authorized Carrier Representatives never approved such an agreement.

Neither does Rule 34 require that Committeemen be permitted to attend Rule 34 hearings.

Therefore, while we will abide by our commitments with regard to claims aligned with Award No. 3845, from this day forth our Master Mechanics are under instructions to not permit Committeemen other than an employee's duly authorized representative to attend Rule 34 hearings.

This is for your information.

Yours very truly,

/s/ G. E. Mallery”

On April 6, 1962, we received from one general chairman involved the following letter requesting a conference:

“April 6, 1962

Mr. G. E. Mallery
Vice President, Personnel
Rock Island Lines
LaSalle Street Station
Chicago 5, Illinois

Dear Sir:

Referring to your letter of March 27, 1962, your File L-127-645, jointly addressed to certain of the Shop Craft General Chairman of System Federation No. 6, having for its subject, 2nd Division Award No. 3845.

We do not hold with your contention that Award 3845 finds its basis in Local mutual agreements but rather is bottomed on the accepted interpretation and application of the governing rules on a systemwide basis dating back to the year 1935.

Award 3845 simply affirms the long-standing interpretation and application of said rules as practiced on this property.

All of the working agreement rules find their practical application on the local level and their proper application in such instances does not make of them Local mutual agreements as you would infer.

Thus, it is our position that the instructions to your master mechanics, as indicated in the last paragraph of your above referred to letter, are in contradiction of Award 3845, Second Division, and violation of the controlling agreement.

In view of the foregoing and your above referred to letter of March 27, 1962, we respectfully request that you arrange a meeting at your earliest convenience for discussion of this matter, advising our committee of time, date and place.

In your reply I would appreciate you furnishing a copy to each of the involved General Chairmen of System Federation No. 6.

Yours truly,

/s/ D. S. Anderson

Sec'y-Treasurer
Sys. Federation #6

DSA:ff
cc/Executive Board
Sys. Federation #6"

Following conference held on May 3, 1962, the carrier advised the general chairman involved (and other general chairmen) under date of May 4, 1962, as follows:

"Gentlemen:

This refers to conference in this office on May 3, 1962, with you gentlemen, at which meeting Messrs. J. R. Osman, Gen. Supt. Motive Power, and Jack Gilkerson of my office were present, to discuss my letter to you dated March 27, 1962, expressing our view of Award 3845 of the 2nd Division which dealt with the question of pay to committeemen attending hearing.

After fully discussing all aspects of the question, and evaluating your position, we were unable to arrive at any reason for varying our position from what was stated in my letter dated March 27, 1962.

Yours truly,

/s/ G. E. Mallery

cc - Mr. J. R. Osmann"

The Carrier feels it is apparent in Award 3845 that the Board did not even attempt to interpret the rules involved but bottomed the award solely on the citations of local past practice cited by the carrier's organization. The carrier feels the findings of Award 3845 were erroneous, in that the board in that case erroneously construed local practice as evidently constituting agreement as to application of the rules, because the carrier has a specific rule (hereinbefore cited) which says "no local mutual agreement will be made on these rules except on approval of the parties signatory hereto." The carrier's signatories are the:

Personnel Officer
Manager of Personnel
General Superintendent of Motive Power

and an award bottomed on the premise that a valid local agreement existed

on this subject is clearly wrong, because the authorized carrier representatives never approved such an arrangement.

The interpretation of the rule is what is in dispute—unclouded by any local practice—as no agreement in behalf of local practice exists, and the carrier feels it is entitled to an interpretation from the board on the rules involved, absent any other factor. The interpretation of the carrier is exactly the same as that of the carrier in Award 3260 under similar rules. The board in that case did interpret the rules, as should have been done in Award 3845—but which was not done.

Your board will further note the statement of claim in Award 3845 read, in part:

“1. That under the controlling Agreement Carmen Committeemen F. A. Gragg, O. B. Robertson and B. W. Rollins were unjustly denied pay while attending investigation during working hours on July 2, 1958.”

while the statement of claim in the instant dispute reads:

“1. That the Carrier violated the controlling agreement when it denied the Committee, C. O. Borchers, L. O. Marquardt and Otis Cox, the right to function as a committee in representing an accused employe, Machinist B. D. Wright, who was give an investigation at Enid, Oklahoma, on October 3, 1963. The Carrier refused to pay them and they each suffered lost time.

2. That the Carrier be ordered to compensate C. O. Borchers, L. O. Marquardt and Otis Cox in the amount of five (5) hours at pro-rata rate at their prevailing rates of pay, three dollars and seventy-five cents \$3.75 for each claimant for meals, plus a total of \$13.60 for automobile mileage.”

Your board needs no reminder that it is unable to rewrite the rules of the agreement, but this is what the employees would ask your board to do.

Rule 32, which by its nature and design is not applicable in this dispute, covers conferences between local officials and local committeemen. Rule 34 pertains to an employee's representation by his duly authorized representative.

The employees under part 1 of their claim ask your Board to say that these two different words be enforced as equal. Such a change can be made only through the processes of negotiation, mediation, arbitration, etc. As pointed out already, the Employes have not been able to secure what is here asked through negotiation with management.

Furthermore, under Award 3845 the claimants attended the investigation but were denied pay. Here two of the claimants did not attend the investigation and were not required by Carrier to lose time. Mr. Borchers attended the investigation solely to represent the principal.

The carrier feels the foregoing is most conclusive to the fact that the position of the employees is totally without Agreement support and the claim 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.

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

The Carrier refused to permit the local committeemen, other than the local chairman, who represented the employe under investigation, to be present. It is stated in the Employes' submission and not denied, that the Carrier "refused to compensate the committee for the time away from work, thereby causing Messrs. C. O. Borchers, L. O. Marquardt, and Otis Cox, hereinafter called the Claimants, to lose time." The remedy demanded is that each be compensated for five hours at pro rata rate, plus \$3.75 for meals, and that a total of \$13.60 be allowed them for auto mileage.

This is claimed under Award 3845, in which this Division said that for many years "* * * both the Carrier and the Organizations have recognized that the local committees were entitled to represent employes in the handling of disputes, controversies and investigations with local officials during their working hours, without loss of time. Without denial by the Carrier they cite forty such instances of discipline hearings at four points in Arkansas, Kansas and Illinois between 1941 and 1958, and state that it is only a partial list. In view of this record the claim must be sustained."

There, as in this case, there was a showing of a widespread established practice on Carrier's system that local committeemen had been "present with no loss of time while attending investigation," but with no reference to their representation of the employee under examination, or of any right on his part to be represented by all of them. Therefore Award 3845 is in error in its reference to the representation of employes under investigation, but is correct as to the established recognition of local committeemen's right to attend investigations during their working hours, without loss of time.

We follow Award 3845 to that extent here, and hold that as the three committeemen presented themselves at the hearing they were entitled to attend without loss of time, and should be compensated for any pay deduction made on that account, not exceeding the five hours claimed.

There is no showing of any rule or established practice for payment for meals or travel expense in that connection, or even that any such expenses were incurred by the Claimants; therefore those items of the claim cannot be sustained.

AWARD

Claim sustained to the extent indicated in the Findings.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of SECOND DIVISION

ATTEST: Charles C. McCarthy
Executive Secretary

Dated at Chicago, Illinois, this 3rd day of February, 1967.

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