Award No. 1951
Docket No. 1813
2-CRI&P-FO-'55

NATIONAL RAILROAD ADJUSTMENT BOARD

SECOND DIVISION

The Second Division consisted of the regular members and in addition Referee J. Glenn Donaldson when the award was rendered.

PARTIES TO DISPUTE:

SYSTEM FEDERATION NO. 6, RAILWAY EMPLOYES' DEPARTMENT, A. F. of L. (Firemen & Oilers)

CHICAGO, ROCK ISLAND AND PACIFIC RAILROAD COMPANY

DISPUTE: CLAIM OF EMPLOYES:

1. That under the current agreement other than a laborer was improperly used between the hours of 8:30 A. M. and 12:30 P. M. on October 23, 24, 30 and 31, 1953 to wash and service diesel units.

2. That accordingly the carrier be ordered to additionally compensate Laborer Willie Nicks in the amount of four (4) hours at the time and one-half rate for each of the aforesaid dates.

EMPLOYES' STATEMENT OF FACTS: The carrier maintains two assignments of laborers on the day shift at Colorado Springs, Colorado.

One assignment, filled by Laborer Northup, works Tuesday through Saturday, having Sunday and Monday as the regular assigned rest days. The other assignment, filled by Laborer Nicks, works Sunday through Thursday, having Friday and Saturday as regular assigned rest days.

As a result of this arrangement there is normally one laborer on duty each day of the week.

The carrier operates Passenger Trains No. Seven (7) and Eight (8) (The Rocky Mountain Rocket) in and out of Colorado Springs seven days per week. Arriving as No. 7 at 8:35 A. M. and departing as No. 8 at 12:35 P. M.

Immediately on the arrival of No. 7 the Laborer on duty commences wiping the units at the depot and rides them to the round house at Roswell, a distance of approximately one mile, where he washes, waters, fuels, sands and otherwise services the units, completing his duties back at the depot just prior to the train's departure at 12:35 P. M.

On the dates in question, Laborer E. E. Northup, whose work week assignment included Fridays and Saturdays, was absent on vacation.

We believe this to be an attempt by the petitioning organization to forego the properly recognized channels of negotiations to the end that your Board, through an award, will create for them a restrictive scope rule. Of course, such a course is barred by your many awards expressing that your Board is not cloaked with the authority to write rules for the parties.

Your Board in Award 1596, when called upon to interpret this same rule as it pertains to the duties of engine watchmen listed therein, said of it:

> "While the agreement with the Firemen, Oilers, Helpers and Roundhouse and Shop Laborers list engine watchmen as a class of employees within the agreement, there are no defined duties of the latter class in the agreement. The record discloses that others have performed the duties of which complaint is here made throughout the years. The duties performed by engine firemen of which complaint is here made are not the exclusive duties of engine watchman by rule or practice. This being so, we cannot say, in the absence of a controlling rule, that the performance of the duties assigned to engine firemen in the present case belongs exclusively to engine watchers at outlying points where the latter are not required during the whole period of the layover. We are obliged to say the rules do not give the questioned work exclusively to engine watchmen and that the Organization has failed to establish that it belongs to engine watchmen exclusively because of any practice existing over the years."

As clearly outlined by Referee Wenke in the opinion in the above award, the rules of the laborers' agreement do not describe the duties; nor do they exclusively assign any prescribed duties to laborers. From the facts of record we know that the organization cannot establish that the laborers have the exclusive right to the work through any practice existing over the years.

Without prejudice to, or in any manner waiving our position as to the merits of the claim, it is the carrier's further position that should the claim be sustained, the only penalty that may be assessed is that at pro-rata rate of pay. (See your Board's Awards 1268, 1424, and 1601.)

Both rule and practice on this property year upon year portray the lack of merit in this claim. We respectfully request that it 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.

The carrier maintained two assignments of laborers on the day shift at this point, the men working staggered, five days work weeks. While there is some overlap, normally there is one laborer on duty each day of the week. During the ten day period following October 21, 1953, Laborer Northrup was on vacation. On the dates stated in the claim which, normally would have been in Northrup's tour of duty had he not been on vacation, Coach Cleaner Bailey or someone of the other three Coach Cleaners were used instead of Laborer Nicks, the second laborer at the point. Said dates were Nicks' rest days and he claims that he should have been called back to perform the work.

The organization contends that the work involving the wiping, washing, watering, fueling, sanding and general service of the diesel units on Trains 7 and 8 fell within the laborers' scope rule and had always been performed at this point by laborers. It cites a favorable settlement of a similar controversy on the line of this carrier at Amarillo occurring a few months earlier.

The carrier challenges this position contending that historically and traditionally coach cleaners may perform unskilled work such as that performed by laborers. It points to rule provisions in the carmen's agreement which, it states, predated the scope rule contained in the agreement applying to laborers. This Rule 93 dealing with coach cleaners provides, in part:

> "They may be assigned to any other unskilled work during their period of service."

The above quoted Rule 93, however, is an article of agreement between the carmen and the carrier and is no part of the agreement applicable to this dispute. As we pointed out in Award 1479, the rule protects the carrier against claims by coach cleaners in the performance of unskilled work, but it is wholly ineffective to protect against claims by laborers having an agreement to perform the work. We are not here deciding whether work of this type is exclusively the work of laborers under their agreement. But, we do find that under the circumstances of this case where it is uncontroverted that the work of the two positions in question have always been performed by laborers, the work likewise remains their work during periods of temporary absences such as for vacations. See Award 1825 of this Division.

The claimant seeks payment for the work lost at the overtime rate apparently on the theory that if he had been called for the work it would have been done at that rate by virtue of the fact that the claimed dates were his rest days. While there is some differences in the awards of this Division upon this point, the better reasoning would seem to support those decisions allowing simply the pro rata rate. The overtime rule has no application to time not worked. See Awards 1771, 1772, 1782, 1799 and 1825, Second Division.

AWARD

Claim sustained but at pro rata rate.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Second Division

ATTEST: Harry J. Sassaman
Executive Secretary

Dated at Chicago, Illinois, this 13th day of June, 1955.