Award No. 3484

Docket No. 3009

2-MP-MA-'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, AFL-CIO (Machinists)

MISSOURI PACIFIC RAILROAD COMPANY (Western and Southern Districts)

DISPUTE: CLAIM OF EMPLOYES:

1. That under the current agreement Machinist C. P. Miller was unjustly dealt with when the Missouri Pacific Railroad Company declined to compensate him for service required outside of his bulletined hours on October 22, 1956.

2. 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 8:00 A. M. and 10:30 A. M., October 22, 1956.

EMPLOYES' STATEMENT OF FACTS: Machinist C. P. Miller, 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 Coffeyville, Kansas, on the 11:00 P. M. to 7:00 A. M. shift. On October 22, 1956, the carrier summoned the claimant as a witness at an investigation of a hostler and hostler helper running a diesel engine through the roundhouse wall. The claimant reported as requested and was required to remain at the investigation from 8:00 A. M. to 10:30 A. M. (2½ hours).

The claimant, for performing this service as instructed by the carrier, turned in a service card for pay in the amount of two and one-half (2½) hours at the time and one-half rate, which the carrier declined to pay.

This claim has been handled up to and including the highest officer so designated by this carrier to handle such cases with the result that he failed to adjust the matter.

The agreement effective September 1, 1949, as subsequently amended, is controlling.

ployes contended both that the witness performed "work" and that the claim was payable under Rule 6, the court rule. The Board denied the claim saying in part

> "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, 1932, 1816, 2132, 2508, 2512.
>
> 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.'
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> For the reasons herein above set out, we are of the opinion that this claim has no merit."

Since the decisions of Special Boards are not readily available, the entire award is submitted herewith and identified as Exhibit 1 hereof and also Rule 6 of the Telegraphers' Agreement.

Again in Award 66 of Special Board of Adjustment No. 61, the same issue was before the Board. The award is short but complete in its facts and reasoning and is set forth below 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 believe the above awards confirm the statement of the carrier that the practice on this property is for employes to devote a portion of their off hours to the task of serving as witnesses when necessary without additional compensation above and beyond that received in the course of their regular occupations.

In Award 2736, the referee cited an isolated payment to contradict this statement. We do not believe that reasoning is sound. In the first place, an isolated exception to a general practice would not alter a conclusion as to what constitutes a general practice. In the second place, we believe the payment supports the statement of the carrier. The payment referred to was made by the chief mechanical officer. Prior to that time, the claim had been declined by the master mechanic and the superintendent. When one attempts to determine a practice, one ordinarily attempts to find out what is being done at the grass roots level. How is a situation being met in everyday operations. Here clearly the "practice" at the lower levels had been to deny such claims. The payment constitutes factual proof of the general practice.

The chief mechanical officer erred in allowing the claim. He is not the officer designated by the carrier with authority to interpret the agreement so the payment is not binding on the carrier as an interpretation of the agreement. Furthermore, the chief mechanical officer did not state his reasons for allowing the claim and it has been well stated that a decision is no better than the reasoning upon which it is based and therefore the payment should not be given much weight. The isolated payment does not constitute a practice and does not detract from the statement as to the practice on this property. See First Division Awards 15120, 16061 and 16262.

D. The employes have at various times cited Rules 1, 3, 4 as well as Rule 19 of the agreement. Some of the claims are on a call basis. Others are for 8 hours at the time and one-half rate. We assume the claims are based either on the basic day rule in Rule 1(a) or the overtime provisions in Rules 3 and 4(a). The rules cited are the rules governing pay for work falling within the classification of work rules performed by the various crafts and classes of employes. Unlike some agreements, the work falling within the agreement is defined in the classification of work rules and it is to this work that the pay rules apply.

A long line of awards hold that time spent giving depositions and statements, attending court and investigations and the like is not "work" and pay rules applicable to "work" cannot be used as a basis of pay for time so spent. The latest award so holding is Award 2251 by this Division construing the same agreement as that now before this Division. There this Division said

"We point out that the work and overtime rules were intended to apply to the work usually and traditionally performed by the craft

> of which the employe is a member. If this were not so, there would be no reason for negotiating rules dealing with special subjects such as the one dealing with attending court or appearing as a witness for the carrier. In the shop craft organizations the work contemplated by the general rules of their agreements is that set forth in the classification of work rules. When the carrier calls upon an employe to give of his time in its behalf for some other purpose, it is either covered by a special rule or treated as incidental to the employe's regular employment. When a special rule is negotiated and its subject is thereby removed from the status of an incident of the employment, the rights of the parties are limited to plain meaning of the language employed."

If it is the policy of the Board to follow precedent except where clearly untenable, then this Division must follow what was said in Award 2251. That award came before Award 2736 and would have the greater value as precedent. Furthermore, the reasoning and decision in Award 2251 is clear and precise. Not so in the case of Award 2736. In any event, Award 2736 lends no support to a claim of this nature based on the pay rules. The referee in Award 2736 did not cite a rule. The only authority cited is Awards 1438 and 1633. The referee in Award 1438 did not sustain the claim on the basis that the call rule supported the claim but rather sustained the claim on quantum meruit, implied contract or equitable principles and then turned to the call rule as a convenient means of stating the amount to be awarded the claimants. The clear pronouncement of Award 2251 is that Rules 1, 3 and 4 are pay rules for work performed and have no application here. Rule 19 covers court attendance and not investigations but, if construed to cover investigations, the claim would be denied for the reasons stated in Award 2251.

Other awards holding that attending investigations is not work are Third Division Awards 7631, 5220, 4270 and 3987. See also the First Division and Special Board awards on this property cited above to the same effect. We are on firm ground when we state that the principle is firmly established that pay rules for work performed do not apply to claims for attending an investigation.

We come then to the conclusion that the rules cited by the employes do not support the claim.

We may not confidently conclude from the points made above in the second part of this submission that the claim is not supported in the least degree by the rules or practice on this property.

3. In the absence of a rule supporting payment of the claim, this Division has no authority to sustain the claim.

We have shown that the rules do not support the claim nor does the past practice. Therefore if the claim were to be sustained, some basis beyond the agreement would have to be found. This Division early in its history declared its proper province in disputes of this kind. The identical issue was presented in Award 55 of this Division. A machinist on the third shift attended an investigation held at 8:00 A. M. The Board stated

> "The absence of rules or practices which might clearly show the intent of the parties in agreeing to the rule herein involved makes this dispute a subject of negotiation."

Note that a call rule similar to Rule 4 was relied on in that dispute. The rules before the Board in this dispute certainly do not clearly show an intent to allow the compensation requested here. In fact, there is an entire absence of any such intent. We have show that the practice does not support the claim. It follows that the proper procedure is to leave the dispute to the parties for disposition through negotiation.

This same principle was followed in Award 162 of this Division which involved a dispute between the same parties as those now before this Division. There the claim was for attending court during off hours. The employe did not lose time when required to report to company attorney. The award held that

> "The instant case is a matter subject to negotiation between the parties."

We call your attention to the fact that both of these awards were rendered without the assistance of a referee. Since the carrier members and employe members of the Board are partisan members selected by management and labor, respectively, in accordance with the Railway Labor Act, agreement between the carrier and labor members as in these awards is in the nature of an agreed upon interpretation of the agreement in dispute. In situations of the kind presented by these two disputes, the award constitutes agreement that it is not the proper province of the Board to arbitrate the dispute in the absence of an agreement, but the dispute should be returned to the parties to be resolved through negotiation.

The principles stated above were followed in Award 2251 of this Division which, as stated above, also involved the same parties as those involved here. The dispute turned on Rule 19, the court rule. This Division held that the Rule 19 was a special rule and the inclusion of provisions for compensating the employes under limited circumstances "confine(s) the rights of the parties on the subject dealt with to the scope of the language contained in it. To expand or restrict its meaning by a strained interpretation would constitute nothing less than a rewriting of the rule." For similar holdings in the First Division on other properties, see, for example, Awards 13628 and 13981.

In the instant dispute, we have no agreement and we demonstrated by the new evidence presented above in the form of the exchange of correspondence that the lack of a rule was not oversight on the part of the parties to the agreement or an area in which the agreement is incomplete, but the absence of such a rule is the result of bargaining across the conference table. **If this Division writes a rule on employes attending investigations during off-hours, this Division will nullify, nay, reverse the successful efforts of the carrier to exclude such a rule in negotiations across the bargaining table.** It follows that, there being no rule upon which an award may be based, this Division has no authority to decide the dispute and therefore cannot sustain the claim but must dismiss the claim as in Awards 55 and 162.

4. Although we believe that your Board must come to the conclusion that the claim should be dismissed for the reasons stated above, we wish to point out, in the event this claim is not dismissed outright, that the money requested on behalf of claimants is excessive and unreasonable. We are confronted with the decision in Award 2736. It is the carrier's position not only that the basis for the award is not sound but the principle upon which claim is sustained was not applied properly.

As pointed out above, no rule is cited in Award 2736 as the basis for the decision. The only authority cited is Awards 1438 and 1633. Award 1438 was a radical departure from previous awards which Referee Swacker acknowledged but sought to justify on the basis of a then recent decision of the Supreme Court of the United States. We believe Judge Swacker was in error. The reasons may be stated briefly as follows:

Claims in the nature of the one under discussion are not the result of an isolated grievance of an individual employe. The claims are filed systematically in an effort to obtain an arbitrary and artificial amount of money for all employes similarly situated. Granting such requests would change the rates of pay, rules and working conditions of all the employes and jurisdiction of such disputes is reserved to the National Mediation Board by the Railway Labor Act.

Contrary to the statement of Judge Swacker, employes are free to resort to the courts for relief where the subject matter is outside of the scope of the collective bargaining agreement under the decision of the Supreme Court in Slocum vs. D. L. & W. R.R. Co. 339 U.S. 239. For example, employes may and do resort to the courts in personal injury matters. Employe witnesses are used to testify concerning matters growing out of their regular employment. If a dispute arises not out of the collective bargaining agreement, the Railway Labor Act does not restrict the employes' legal rights. This Board does have exclusive jurisdiction of disputes growing out of the interpretation or application of agreements but here we find the parties have intentionally not provided a pay provision for employes attending investigations so that the claim is beyond the jurisdiction of the Board. If Judge Swacker's theory is pursued to its logical conclusion, we would have a form of compulsory arbitration which we do not believe the employes have accepted.

But so much for the reasons for disagreeing with Judge Swacker's theory. The primary purpose of this section of this submission is to point out the errors in the application of the theory. Judge Swacker and those that followed him state that a claim in the nature of those under discussion are not covered by a rule but that the Board must supply the missing rule on the legal theory of implied contract. The theory is based on the principle that the contract does not contain an express provision covering the dispute. Yet Judge Swacker turned around and said an express provision was the missing implied provision, that is, the call rule was the missing implied provision. The application of the principle contradicts the basis of the principle. Judge Swacker took an easy way out instead of following the theory to a logical conclusion by writing the missing provision based on principles of quantum meruit.

There are many valid and just reasons for not allowing employes compensation for attending investigations during off hours. Or, if compensation is to be allowed, the amount would not be that requested here. The carriers have not prepared their submissions to meet that kind of an issue. If this carrier was arguing the question: Is an employe entitled to compensation while attending investigation as a witness during off hours? before a proper tribunal, we would say "no" and argue that, except for the restrictions placed on the carrier by collective bargaining agreements, the carrier could take disciplinary action without an investigation and the acceptance of rules requiring investigations before disciplinary action can be taken is for the benefit of the employes — to establish facts on which discipline is based or exonerate an employe charged with an offense. The investigations cannot be held without witnesses and, while it is true employe are required to attend

investigations in which they are not personally interested, on other occasions such employes may require disinterested witnesses at investigations of themselves.

Furthermore, the money requested is disproportionate to the relatively small inconvenience to the employe as contrasted with the cost imposed on the carrier. Many employes spend their whole career with the carrier and are never required to attend an investigation. Although we have no statistics on the matter, we know it is a rarity for any one employe to be called upon as a witness in an investigation more than once. If an employe is required as a witness it is not unusual for that to be the only time in a career of 30 or 40 years. The seven claims now before your Board are on behalf of three car inspectors, one sheet metal worker, one boilermaker, two machinists and one carman helper for a total of 8 employes involved in six separate investigations, the earliest of which was March 9, 1956 and the latest August 16, 1957, or a period of one year and five months, held at Horace and Coffeyville, Kansas, Atchison, Kansas and three at St. Louis, Missouri. It is obvious from the small number of employes involved that relatively few are inconvenienced through the years. Of course other investigations have been held during regular working hours of the witnesses required for which no claim was filed. An investigation involving some craft or class of employes is, unfortunately, not infrequent. If the employes were granted such a rule, it would place an additional drain on the resources of the company for which it would receive no benefit. The carrier must now lose the time of its officers who hold the investigations and is put to the expense of supplying a stenographer to type the transcript. The additional burden is unwarranted when the investigation is held at the instance of the employes in fulfillment of a contract obligation imposed on the carrier at the request of the employes. Furthermore, the time shown attending the investigation 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.

1. That under the current agreement Machinist C. P. Miller was unjustly dealt with when the Missouri Pacific Railroad Company declined to compensate him for service required outside of his bulletined hours on October 22, 1956.

2. 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 8:00 A. M. and 10:30 A. M., October 22, 1956.

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.

Machinist C. P. Miller, regularly assigned on the 11:00 P. M.-7:00 A. M. shift, at Coffeyville, Kansas, was requested by the carrier to attend an investigation on October 22, 1956, involving the conduct of other employes. He attended the investigation from 8:00 A. M. to 10:30 A. M. and claims compensation at overtime rate for service rendered outside bulletined hours at the direction of the carrier. The claim is based on Rule 4(d) of the Shop Crafts Agreement, which provides:

> "Employes called or required to report for work and reporting will be allowed a minimum of four (4) hours for two hours and 40 minutes (2'40") or less."

The Shop Crafts Agreement does not specifically provide compensation for time spent by an employe attending an investigation outside bulletined hours. The call rule relied on by claimant specifies minimum compensation for an employe who is called and reports for work. Attending an investigation is not work within the meaning of the rule. Award Nos. 2251 and 1632. In Award No. 2251, we held that in the Shop Crafts organizations the work contemplated

by the general rules of their agreements is that which is set forth in the classification of work rules. 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.

The employes urge that this claim should be sustained on the authority of Award No. 2736. That Award is entirely based on Award Nos. 1438 and 1633. Award No. 1438 held that the mere fact of employer-employe relationship created an implied obligation on the employer to pay the reasonable value of any service performed by the employe at the employer's request. We think that principle was not applicable to the factual situation presented in that case because the record showed that the parties had contracted with respect to the terms and conditions of employment, and in such situation the law implies that matters not mentioned in the contract are presumed to have been excluded.

In Award No. 1633, compensation was sought under a call rule for time spent attending an investigation outside bulletined hours. The Board held that as the investigation was of no personal concern to claimants the case was distinguishable from Award No. 1632 and followed the reasoning of Awards 1632 and 1438. In Award 1632, claimants sought compensation under a call rule for attending an investigation outside bulletined hours. That claim was denied on the ground that claimants did not perform work within the meaning of the call rule. The same referee assisted the Board in Awards 1632, 1633 and 2251.

We think the better reasoning, expressed in Award No. 2251, is that attendance at an investigation outside bulletined hours does not constitute work within the meaning of Rule 4(d) of the instant Agreement. It may be that in some circumstances inconvenience might be imposed on employes without adequate compensation therefor, but such possibility does not afford a proper basis for this Board to attempt to attach a meaning to a rule which is contrary to its plain terms. The question appears to be one for negotiation. Nor does the suggestion that failure of an employe to attend an investigation outside bulletined hours may involve disciplinary action warrant the Board in construing the rule to mean other than as we have herein stated. Whether discipline in such circumstances is or is not justified is not before us in this docket.

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