Award No. 3638
Docket No. 3382
2-MP-CM-'61

NATIONAL RAILROAD ADJUSTMENT BOARD

SECOND DIVISION

The Second Division consisted of the regular members and in addition Referee Wilmer Watrous when the award was rendered.

PARTIES TO DISPUTE:

SYSTEM FEDERATION NO. 2, RAILWAY EMPLOYES' DEPARTMENT, A. F. of L. — C. I. O. (Carmen)

MISSOURI PACIFIC RAILROAD COMPANY

DISPUTE: CLAIM OF EMPLOYES:

1. That under the current agreement Car Inspectors E. Q. Schaefer and Dave Eugue were unjustly dealt with when the Missouri Pacific Railroad Company declined to pay them for service rendered outside of their bulletined hours on January 7, 1958.

2. That accordingly, the Missouri Pacific Railroad Company be ordered to compensate the aforesaid employes in the amount of 4½ hours each at the time and one-half rate for service rendered outside their bulletined hours on Tuesday, January 7, 1958.

EMPLOYES' STATEMENT OF FACTS: Mr. E. Q. Schaefer and Mr. Dave Eugue, hereinafter referred to as the claimants, are regularly employed by the Missouri Pacific Railroad Company, hereinafter referred to as the carrier, as car inspectors at Lesperance Street Yards, St. Louis, Missouri. Claimant Schaefer has a work week of Sunday through Thursday, rest days Friday and Saturday, hours 4:00 P.M. to 12:00 Midnight. Claimant Eugue has a work week of Saturday through Wednesday, rest days Thursday and Friday, hours 4:00 P.M. to 12:00 Midnight.

The claimants were notified by the carrier to appear as carrier witnesses at an investigation scheduled for 10:00 A.M., Tuesday, January 7, 1958, and the employes herewith submit chief mechanical officer, Mr. L. R. Christy's letter of June 11, 1958, to substantiate the fact that the claimants were called as carrier witnesses at this investigation.

The claimants reported as instructed by the carrier and were required to remain at the investigation from 10:00 A.M. until 2:30 P.M., a total of four and one-half hours, as carrier witnesses during their off duty hours. The case involved a charge against Car Inspector J. Connors for allegedly improperly performing his duties. Neither of the claimants had any knowledge of the incident nor were either of them personally interested, but were called by and in behalf of the carrier.

When the carrier refused to pay the claims held in abeyance as indicated, they were appealed to this Division and there are now seven such claims before this Division. The carrier has fully stated its position in its submission in each of those seven disputes. Each submission runs some 22 pages.

The instant claim is similar to the seven disputes referred to, the docket numbers of which are

Docket No. 3009 MA
3010 MA
3012 CM
3017 BM
3020 CM
3021 CM
3032 SM

In those dockets the carrier states its position as follows:

"1. The carrier is entitled to a reconsideration of the issues in Award No. 2736 because new evidence has been discovered;

2. The carrier will show beyond a doubt in the light of the new evidence that the instant claim is not supported by any rule in the agreement;

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

and, therefore, the claim must be dismissed.

"It is further the position of the carrier that

4. Assuming for the sake of argument only that claimants are entitled to some compensation (which the carrier does not concede) irrespective of the absence of a rule, the amount of compensation demanded is excessive and unreasonable for the time and effort expended by claimants and therefore the claim should not be sustained as presented in any event."

Each of the foregoing points was discussed at length by the carrier. To avoid burdening your Board with a repetition of the record in the seven dockets listed above, carrier respectfully refers your Board to the carrier's submission in those dockets and adopts here the arguments which were presented in those dockets.

The carrier has shown in the dockets referred to that there is no rule in the agreement requiring the payment requested. In the absence of a rule, the subject in dispute is one for negotiation. For that reason, the claim must be dismissed in accordance with the findings in Award 55 of this Division.

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.

Claimants Schaefer and Eugue argue that they are due compensation for 4½ hours according to agreement rule 4(d) consequent to their service as carrier witnesses on off-duty hours attending an investigation in which they had no personal interest.

While making specific provision for compensating attendance at court hearings, the agreement makes no such provisions for investigations. Rule 4(d) is a general rule applicable to the work recognized in the scope and classification of work rules and cannot be extended to encompass service of the type in dispute. Rule 19—Attending Court provides "* * * will be allowed compensation equal to what would have been earned had such interruption not taken place with a minimum of one day's pay for each day held at court * * *." This specific provision does not provide pay for time in attending court; it protects the employe against a loss in his regular compensation.

The carrier extends protection against loss in regular compensation to the employes in the instance of attending investigations. It is therefore persuasive, coupled with evidence that the organization has attempted to negotiate a specific rule covering compensation for attending investigations, that the Agreement does not require the payment of compensation in the circumstances of this dispute.

No implied contract can be deemed to exist under these circumstances, since a mutuality of interest is implied in the existence of fact finding investigations as a condition for disciplinary action as established in rules 31 and 32 of the agreement.

Therefore the issue here presented is a matter for negotiation.

AWARD

The claim is denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of SECOND DIVISION

ATTEST: Harry J. Sassaman
Executive Secretary

Dated at Chicago, Illinois, this 13th day of January, 1961.

DISSENT OF LABOR MEMBERS TO AWARD No. 3638

We do not agree with the finding of the majority that the matter here presented is a matter for negotiation. Furthermore we wish to point out that if it had been a matter for negotiation the claim should have been dismissed, not denied.

That there may not be express contract provisions does not operate to curtail the elementary law of contract. The claimants rendered service on their own time when they attended the investigation at the carrier's direction and the investigation in no manner involved the claimants or their positions. The claimants' attendance at such investigation cannot be regarded as purely voluntary on their part. If they were under no obligation to attend the investigation they should have been so advised. Even though involuntary servitude is regarded as repugnant to the supreme law of the land there is little doubt that had the claimants refused to respond to the call to attend the investigation the carrier would have contended they were subject to discipline at the hands of the carrier; therefore the claimants should not be penalized by being denied compensation for what amounts to rendering "service" for the carrier.

Remedial procedure is provided in the governing agreement for processing a grievance (see rule 31) and when it is shown that employes, such as the instant claimants, have been unjustly dealt with by being denied compensation for service rendered their claims should be sustained. It is an elementary principle of the law of contract, where parties are situated as are these, i.e., employer and employes, that if the employer calls upon the employes to perform any service the employer thereby creates an implied contract to the effect that if the employes respond they will be paid for such service.

Edward W. Wiesner

R. W. Blake

Charles E. Goodlin

T. E. Losey

James B. Zink