Award No. 3807
Docket No. 3668
2-SP&S-MA-'61

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. 7, RAILWAY EMPLOYES' DEPARTMENT, A. F. of L.—C. I. O. (Machinists)

SPOKANE, PORTLAND & SEATTLE RAILWAY (System Lines)

DISPUTE: CLAIM OF EMPLOYES:

1. That under the current Agreement Lead Machinist M. E. McClain was unjustly dealt with when the Carrier declined to compensate him for his required service outside of his bulletined hours on February 9, 1959.

2. That accordingly the Carrier be ordered to compensate the aforementioned Lead Machinist in the amount of four (4) hours' pay at the applicable hour rate for the service required of his outside of his bulletined hours on February 9, 1959.

EMPLOYES' STATEMENT OF FACTS: M. E. McClain, hereinafter referred to as the claimant, was regularly employed by the carrier in the Portland roundhouse on the third shift with the assigned hours of 11:30 P. M. to 7:30 A. M. Saturday through Wednesday. On February 7, 1959, the carrier summoned the claimant as a witness at an investigation of a fireman to be held on February 9, 1959, at 3:00 P. M. The claimant, as instructed, reported for service as a witness outside of his regularly assigned hours of service and remained at the investigation until investigation was dismissed by the carrier.

The claimant for performing this service, as instructed by the carrier, turned in a time service card for pay in the amount of four hours, which the carrier has declined to pay.

This dispute has been handled with all carrier officers authorized to handle such disputes including the highest designated officer, who failed to adjust it.

(3) That no previous contention has been raised by petitioner that this call rule is intended to cover such special services as attending an investigation as witness, or otherwise;

(4) That the majority rule of the several divisions of the Adjustment Board is that special services such as attending an investigation as witness is not considered as "work" as that term is used in the call rule;

(5) That the several divisions of the Adjustment Board hold that payments for special services is a subject for negotiation, which is not a function of the Board;

(6) That the parties here have negotiated a rule dealing with payment for special services;

(7) That the special services rule which the parties have negotiated, does not include payment for attending investigations as witness.

Respondent, therefore, submits that the instant claim is without merit and must 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 were given due notice of hearing thereon.

Claimant's duties included the calling of engine crews, and he found it necessary to report that an extra fireman had missed a call. He was therefore involved in the incident although not himself under investigation, and was called by Carrier to testify at the discipline investigation. Having theretofore completed his regular tour of duty on that day, he claims four hours pay at his applicable rate under paragraphs (b) and (c) of Rule 8, the Overtime Rule.

Although the Agreement provides (Rule 26) that employes attending courts or inquests as witness for the Carrier shall receive "pay for all time lost at home station," it does not prescribe payment for attending investigations. Under such circumstances this Division held without referee in its early Award 55, where a like claim had been made:

> "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."

Subsequent Awards 3484 and 3638 have held likewise.

Awards 1438, 1633 and 2736 of this Division are cited to the contrary. Award 2736 was based on Awards 1438 and 1633, and upon the fact that a

similar claim had been paid by the Carrier. Award 1633 was based entirely on Award 1438, which did not hold that attendance as a witness at investigations was 'work' within the meaning of the overtime rule. It held rather that the employer's request for any action by the employe "creates an implied contract" to pay its "reasonable value;" that "to supply a missing but implied term of contract" does not amount to "writing a new rule;" and that "if the overtime rule of the contract relied upon by the organization is not actually applicable it at least furnishes a most apposite analogy" for the determination of reasonable value.

That reasoning seems questionable; for in the absence of errors or omissions a written contract is conclusively presumed to constitute the entire agreement, and therefore leaves no room for implied understandings. Futhermore, rates and bases of pay, wherever mentioned in the Agreement, have been set by negotiation and not referred to the Board for determination of reasonable values. Finally, if this Board nevertheless is to assume that power, the parties' express agreement in Rule 26 concerning attendance as a witness at courts and inquests supplies a more "apposite analogy" for such attendance at investigations than Rule 8. Since the basis of compensation negotiated by the parties for attendance at courts and inquests is the maintenance of regular pay, it is not apparent why the Board should declare the overtime pay rule as a fairer basis for determination of reasonable value for such attendance at investigations, as in Award 1438.

As noted above, the record in Award 2736 showed at least one similar claim which had been paid by that Carrier. But the record in this case indicates that no such prior claim was even presented in the twenty-four years since this rule was adopted. System Federation No. 7 did not represent the employes during all that time. But the point is that as in Award 55, "the absence of rules or practices which might clearly show the intent of the parties in agreeing to the (overtime) rule herein invoked makes this dispute a subject of negotiation".

A number of Third Division awards involving other Carriers, Organizations and Agreements are cited in support of the claim, but under these circumstances are not persuasive.

AWARD

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of SECOND DIVISION

ATTEST: Harry J. Sassaman
Executive Secretary

Dated at Chicago, Illinois, this 30th day of June, 1961.

DISSENT OF LABOR MEMBERS TO AWARD NO. 3807

The majority erred in Award No. 3807 for the following reason:

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 outside his regular bulletined hour. 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 8 requires that claimant be compensated in accordance with its terms.

Edward W. Wiesner

R. W. Blake

Charles E. Goodlin

T. E. Losey

James B. Zink