Award No. 3830
Docket No. 3645
2-MP-CM-'61

NATIONAL RAILROAD ADJUSTMENT BOARD

SECOND DIVISION

The Second Division consisted of the regular members and in addition Referee William E. Doyle 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, Carman Gus Magro was improperly compensated while engaged in emergency service from July 11 to July 18, 1958, inclusive.

2. That the Carrier be ordered to additionally compensate Carman Gus Magro for thirty-three and three-fourths (33¾) hours at the straight time rate.

3. That under the current agreement, Carman Gus Magro is entitled to be compensated for four hours at the straight time rate for each of July 19, 22 and 24, 1958.

EMPLOYES' STATEMENT OF FACTS: As a result of an emergency condition created by a flood at Atchison, Kansas, the carrier on July 11, 1958, dispatched a crew of carmen (who were regularly employed at Kansas City, Missouri), and necessary equipment, to Atchison, Kansas.

Carman Gus Magro, hereinafter referred to as the claimant, and whose regular assigned work hours and work week was 11:00 P. M. to 7:00 A. M., Friday through Tuesday, with Wednesday and Thursday as rest days, was one of those called to accompany commissary car X-2655 as cook for the emergency crew working in the flood area. The claimant was continuously engaged with cooking from the time he left Kansas City, Missouri on July 11, 1958, until 9:00 A. M., July 18, 1958, working twenty-four (24) hours a day without being relieved at any time, and was paid as follows:

July 11—9	hours	at	straight	time	rate—	8	hours	at	time	and	one	half	rate
July 12—8	"	"	"	"	"	—12½	"	"	"	"	"	"	"
July 13—8	"	"	"	"	"	—12½	"	"	"	"	"	"	"
July 14—8	"	"	"	"	"	—12½	"	"	"	"	"	"	"
July 15—8	"	"	"	"	"	—16	"	"	"	"	"	"	"
July 16—0	"	"	"	"	"	—24	"	"	"	"	"	"	"
July 17—4	"	"	"	"	"	—20	"	"	"	"	"	"	"
July 18—2	"	"	"	"	"	—							

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.

Where a carman is pressed into emergency service as a cook for a Maintenance of Way crew called out as a result of a flood during a period starting July 11, 1958 and continuing to and including a portion of July 18, 1958, and during such time was not relieved from duty (although he undoubtedly had rest periods) is he entitled to the full compensation which a carman whose service had not been interrupted would have received?

Carrier's position is that the rules of the basic agreement are inapplicable to these facts because it is not work specified in it and furthermore was not performed in the Maintenance of Equipment Department. The scope note to the agreement is relied on as restricting it's application to work performed in the Maintenance of Equipment Department.

1. It is conceded that if claimant is entitled to be treated as a carman, i.e. if Rules 7 and 11 of the agreement apply, the claim would be valid. Rule 11 declares that if required to fill temporarily the place of another employe receiving a lower rate, his rate will not be changed." Therefore if he had been called on to perform lower rate maintenance of equipment work his claim would be clearly valid. The record reveals that a portion at least of the work here performed was maintenance of equipment work. Temporary repairs to cars and other equipment had to be made and carmen were on duty at least from July 14. These men took their meals at the commissary car. In view of this circumstance we would be deciding the case on a fine and technical distinction were we to turn it on this ground. We hold therefore that claimant had not been assigned to the maintenance of way department so as to render the agreement inapplicable.

2. The remaining point posed by Carrier is that the work of a cook, not being classified, was for that reason not covered by the contract. This issue must be decided with reference to Rule 11. The manifest purpose of that rule is to prevent arbitrary reclassification of an employe by assigning him to work which pays less than that of his assigned job. It is possible that the rule when written contemplated performance of lower grade **classified** work only, but it does not say so. Consistent with the mentioned philosophy of this rule we hold that it includes non-classified work as well. An exaggerated example shows why it should be construed in this manner. If a man while working as a carman were to be temporarily assigned to other duties it could not be contended that his status changed while, for example, he was going on an errand. Similarly the temporary assignment as a cook can not operate to deprive him of his right.

3. The remaining point that claimant had rest periods is not tenable. No such rest periods of 5 hours or more were set apart.

4. Claimant's demand for pay for the completion of time cards must be rejected because the record is conflicting as to whether this time was attributable to the Carrier's demands or was a result of the efforts of organization—to obtain completion of the cards in a manner which would accord with their interpretation of the rules. Thus it cannot be determined whether he was then serving his own interests or the interests of the Carrier.

AWARD

Claim 1 and 2 sustained.

Claim 3 denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of SECOND DIVISION

ATTEST: Harry J. Sassaman
Executive Secretary

Dated at Chicago, Illinois, this 20th day of September, 1961.

DISSENT OF CARRIER MEMBERS TO AWARD NO. 3830

The undisputed facts of record established that claimant was hired by the Carrier as a cook on a maintenance of way outfit used in emergency service caused by severe flood near Atchison, Kansas, during July, 1958. It is also conclusively established in the record that neither the Agreement between the Carrier and System Federation No. 2, Railway Employes Department, AFL-CIO, applicable to shop craft employes, including carmen, nor the Agreement between the Carrier and the Brotherhood of Maintenance of Way Employes, cover cooks or the work performed by cooks under such circumstances.

Notwithstanding this record, the majority concluded that the claimant was "* * * pressed into emergency service as a cook for a Maintenance of Way crew called out as a result of a flood * * *,", and having reached this conclusion, then applied all of the pay provisions of the Agreement between the Carrier and System Federation No. 2 to the claimant, which resulted in a severe penalty to the Carrier in money to the unjust enrichment of the claimant.

Every informed individual having knowledge of the provisions of the Railway Labor Act is aware of the fact that the National Railroad Adjustment Board does not have the authority to negotiate collective bargaining agreements between a carrier and its employes; neither does it have the right to write rules for the parties by reason of imagined equity or under the guise of interpretation of the provisions of existing collective bargaining agreements clearly not applicable, as in the instant case.

The Carrier needed a cook to prepare food for other employes used in emergency service by reason of a flood and the record shows that it offered this work to the claimant and he accepted such employment which constituted

a private contract for the performance of work not subject to the provisions of any collective bargaining agreement to which this Carrier is a party.

For these reasons this award was ill conceived, is erroneous and is entitled to no value as a precedent in any other case.

For these reasons we dissent.

W. B. Jones

H. K. Hagerman

D. H. Hicks

P. R. Humphreys

T. F. Strunck