Award No. 4074

Docket No. 3761

2-MP-CM-'62

NATIONAL RAILROAD ADJUSTMENT BOARD

SECOND DIVISION

The Second Division consisted of the regular members and in addition Referee Carroll R. Daugherty when 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 Inspector C. F. Baisch and Car Inspector H. Emily were unjustly dealt with when the Missouri Pacific Railroad Company declined to pay them for service rendered outside of their bulletined hours on February 27, 1959.

2. That accordingly, the Missouri Pacific Railroad Company be ordered to compensate Car Inspector C. F. Baisch and Car Inspector H. Emily in the amount of six (6) hours at the time and one-half rate for service rendered outside their bulletined hours on Friday, February 27, 1959.

EMPLOYES' STATEMENT OF FACTS: Mr. C. F. Baisch and Mr. H. Emily, car inspectors, hereinafter referred to as the claimants, are regularly employed by the Missouri Pacific Railroad Company, hereinafter referred to as the carrier, in the Dupo, Illinois train yard "A". Claimant Baisch's regularly assigned hours are 11:00 P. M. to 7:00 A. M., work week Saturday through Wednesday, rest days Friday and Saturday. Claimant Emily's regularly assigned hours are 11:00 P. M. to 7:00 A. M., work week Thursday through Monday, rest days Tuesday and Wednesday.

Both claimants began their regular tour of duty at 11:00 P. M. on February 22, 1959 in Yard "A" at Dupo, Illinois. About 12:15 A. M. (February 23rd) they noticed the blue light they had placed between the ties on an auxiliary track had been knocked down and run over. Inasmuch as the Alton & Southern Railroad switch engine was the only one in the vicinity, the claimants reasonably assumed it had knocked the light over. The claimants reported the incident of the blue light being knocked down to their foreman.

Following their report of this incident, the claimants received a notice under date of February 26, 1959, signed by Assistant Superintendent F. M. Crump, ordering them to be present at joint investigation to be held in A&S

travel" from St. Louis to some other point on the system. Claimants merely commuted from their homes to the St. Louis Terminal, the same trip they make every work day. We point out claimants would never have considered making such a claim if they had been given a call to perform work outside their bulletined hours. The portion of the claim for driving between home and place of employment must be denied in any event.

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 waived right of appearance at hearing thereon.

Claimants were asked by employer carrier to attend an investigation held jointly by carrier and another railroad in respect to an occurrence the merits and substance of which are not at issue here. In complying, claimants spent six hours of their off-duty time — four at said hearing and two in travel.

Petitioner requests six hours of premium pay for said time spent by claimants. Petitioner contends that claimants were witnesses rather than principals at the investigation; performed work for carrier in connection therewith; and are therefore entitled to said compensation under the instant agreement's Rule 4 (c) and (d), as well as under the law of contract on which sustaining Award 1438 was grounded.

Carrier argues as follows: (1) claimants were principals at the investigation but were not found guilty and suffered no wage loss from their regular work for which they could properly be compensated under controlling Rule 32 (e). (2) Even if claimants had been witnesses rather than principals, they would not have been entitled to compensation for the time they spent at the hearing because (a) Rule 4 (c) and (d) applies only to work embraced in the classification of work Rule; and (b) denial Award No. 2251 controls the disposition of cases like the one here.

The Division is forced to agree with carrier that, whether claimants were witnesses or principals at carrier's investigation, there is nothing in the parties' collectively bargained agreement requiring carrier to pay claimants for attendance thereat during off-duty hours. The provisions of Rule 4(c) and (d) apply only to payment for service covered by the classification of work rules. The provisions of Rule 32 (e) apply only to payment for time spent in attending a carrier investigation held during on-duty hours.

But this finding may not be paid to dispose of the instant case. In the first place, Section 3 First (i) of the amended Railway Labor Act requires and gives jurisdiction to this Board to settle "disputes between an employe or group of employes and a carrier or carriers growing out of grievances or out of the interpretation or application" of collective agreements; and this language may properly be held to include grievances of employes over matters other than those covered by the provisions of a collective agreement. In the second place, the contractual relationship between an employer and an individual employe covers considerably more than the terms of the collective agreement. In the third place, the Division is not persuaded that, absent any pro-

vision in the collective agreement as to payment for off-duty time spent attending an investigation held by carrier, the parties to said agreement were purposely in accord that such time should not be paid for.

This second reason stated above requires elaboration. As held by the United States Supreme Court in J. I. Case Company v. National Labor Relations Board (321 U. S. 332), when an individual employe obtains a job in service covered by a union-employer agreement, he assumes rights and duties under the terms of an individual contract with the employer, and he is bound thereby as long as he works for the employer. The individual contract contains all the provisions of the collective agreement, and no provision of the individual agreement may be in conflict with any provision of the collectively bargained one. But the individual agreement almost always contains much more than is to be found in the collective contract. It contains all the proper shop rules of the employer; and in the broadest sense — and most important from the standpoint of the instant case — it contains all the relevant provisions of the law (statutory law and valid common law).

These things being so, it must follow that an employer is not free to violate any provision of his entire agreement with an individual employe any more than he is free to violate that portion of the individual agreement which is the collective agreement.

Then the issue in the instant case broadly must be, Did carrier's refusal to pay claimants for off-duty time spent at carrier's request in connection with carrier's investigation violate any non-collective provision of carrier's individual contracts with claimants?

To determine this issue, it is necessary for the Division first to make a finding of fact on the question, Were claimants witnesses or principals at carrier's investigation? This is necessary because, as will become clear below, the determination of the broad issue will be different and opposite, depending on whether claimants were witnesses or principals.

The answer to this question of fact can come only from a study of the case record in request to (1) carrier's notice of investigation sent to and received by claimants; (2) the conduct of the investigation by carrier's hearing officer; and (3) carrier's post-hearing treatment of claimants.

Carrier's notice requested claimants to attend the hearing "to determine the cause of and your responsibility in connection with A. & S. engine No. 38 failing to comply with blue flag indication . . ." In itself this notice is the same as most railroad notices involving investigation of incidents where accused employes have no doubts that they are principals. Carrier's notice as such must be held to have treated the instant claimants as principals.

As to carrier's conduct of the investigation, it is first to be noted that two carriers (the A. & S. and the Missouri Pacific) and two sets of employes (the A. & S. switch crew and the two instant claimants) were involved. At said joint hearing the switch crew members were questioned mainly by an A. & S. hearing officer, the claimants mainly by an M.P. hearing officer. Second, at the outset, the A. & S. officer told each of the switch crew members what they were charged with and asked each if they plead guilty or not guilty. None of the accused switch crew members could have doubted that he was a principal. The M.P. officer did not employ this procedure. He used the much more usual one of asking each of the instant claimants the common introductory questions about understanding the purpose of the investigation, their representation,

and their possible witnesses. But none of his introductory or, for that matter, later questions could properly be construed as treating claimants as anything but principals in the M.P. portion of the hearing. Moreover, claimants' answers to the introductory and later questions establish that claimants clearly understood that they were on notice to explain their actions as of a specific time and place during their tour of duty. The Division must find that the transcript of the hearing supports carrier's contention that claimants were not just witnesses.

Finally, the record shows merely that after the hearing carrier imposed no discipline on claimants. It does not reveal any written or oral statements by carrier, thanking them for serving as witnesses or otherwise. There is no post-hearing evidence that carrier regarded claimants as witnesses rather than principals.

Having found that claimants were in fact principals rather than witnesses at carrier's investigation, the Division proceeds to determine the issue of whether carrier's refusal to pay claimants as principals violated any terms of the individual employment contracts, i.e., any term thereof other than those in the collective agreement.

Unfortunately, said issue cannot be clearly settled without contrasting said settlement with the determination that would issue if the Division had found that claimants were witnesses and not principals. If claimants had been found to have been merely witnesses at carrier's investigation, they would have performed service for carrier solely at carrier's request and solely in carrier's interest. Claimants would have had no self-interest under those circumstances yet would have been compelled to serve because carrier might have disciplined them if they had refused. Under these conditions valid common law, which is part of claimant's individual contracts with carrier, would have required carrier to pay claimants for such service.

The ruling must be different when claimants were principals. Here claimants attended carrier's investigation in their own interest and protection as well as in carrier's interest. Here, in the absence of a collectively bargained requirement, the legal principle of mutuality of interest, which is also part of claimants' individual contracts with carrier, operates to preclude any obligation by carrier to compensate claimants for off-duty time so spent.

In the light of all the above the Division holds that the instant claim must fail.

AWARD

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of SECOND DIVISION

ATTEST: Harry J. Sassaman
Executive Secretary

Dated at Chicago, Illinois, this 15th day of November 1962.

DISSENT OF LABOR MEMBERS TO AWARD 4074

The referee has gone far afield in his emphasis on individual contracts; the very Supreme Court decision upon which he relies stresses the fact that

the individual contract is subsidiary to the terms of the collective agreement and may not waive any of its benefits. Under the collective agreement the only issue involved is whether the claimants are entitled to compensation for service rendered outside their regular bulletined hours on February 27, 1959. The record discloses that the investigation was held in the offices of the Superintendent for another railroad and that the subject matter of the investigation was of no personal concern to the claimants. The claimants' presence at the investigation under the carrier's order is service for which the claimants were entitled to be paid under the terms of the governing agreement.

C. E. Bagwell

T. E. Losey

E. J. McDermott

R. E. Stenzinger

James B. Zink