Award No. 4805
Docket No. 4752
2-PRR-MA-'66

NATIONAL RAILROAD ADJUSTMENT BOARD

SECOND DIVISION

The Second Division consisted of the regular members and in addition Referee Francis J. Robertson when award was rendered.

PARTIES TO DISPUTE:

SYSTEM FEDERATION NO. 152, RAILWAY EMPLOYES' DEPARTMENT, A. F. of L.-C.I.O. (Machinists)

THE PENNSYLVANIA RAILROAD COMPANY

DISPUTE: CLAIM OF EMPLOYES: (1) That the Carrier violated Rule 3-B-1 of the controlling Agreement by assigning mechanical inspection and repairs of diesel locomotives in the Oil City-Chautauqua Branch Seniority District, to employes from the Ebeneezer Enginehouse Seniority District.

(2) That the Carrier be ordered to compensate Claimants Lee, Barrett and Swires respectively eight (8) hours at the Lead Machinist overtime rate, plus seven (7) hours travel time, for every Monday, Wednesday and Friday, beginning April 5, 1962, and to continue until the proper assignment of the inspection and repair work is made in this territory.

(3) That the Carrier be ordered to stop and desist in this improper work assignment, and violation of the Seniority District of the Oil City-Chautauqua Branch employes.

(4) That the Carrier violated the time limits of Rule 4-O-1, in the handling of this claim at the Superintendent-Personnel's level on the property, and that:

(5) Accordingly the Carrier be ordered to allow the claim as originally presented because of the violation of Rule 4-O-1.

EMPLOYES' STATEMENT OF FACTS: G. L. Lee, Frank Barrett and D. Swires, hereinafter referred to as the claimants, are employed by the Pennsylvania Railroad Company, hereinafter referred to as the carrier, at the carrier's oil city enginehouse, Oil City, Pennsylvania. The claimants are regularly employed and assigned to machinists' positions in the Oil City-Chautauqua Branch Seniority District. G. L. Lee has a machinist seniority date of 1-1-40; Frank Barrett has a machinist seniority date of 6-6-52 and D. Swires has a machinist seniority date of 4-17-50.

Claimant Lee held a first trick assignment, with rest days of Monday and Tuesday.

violation of Rule 4-O-1, contemplates payment for only those fifteen days referred to above.

Notwithstanding the foregoing, if payment should be ordered for every Monday, Wednesday and Friday on account of a violation of Rule 4-O-1, such payment would cease as of August 21, 1962, the last date an employe from Ebenezer was used on the Chautauqua Branch, as tacitly agreed to by the employes. However, in no event could the payment extend beyond September 19, 1962, the date the claim was denied by the Superintendent. Such a decision would be in accordance with Second Division Award 3298 (Referee D. Emmett Ferguson) where it was held:

> "That the alleged violation not having been 'found to be such' on its merits, our allowance is limited to the period prior to the late declination and is not addressed to the substantive merits of the basic claim."

See also Third Division Award 10401 (Referee Richard F. Mitchell).

If your board should overrule both parties' procedural objections and allow this dispute strictly on its merits, the carrier desires to point out that the claimants would not be entitled to payment of the overtime rate for time not worked, nor would they be entitled to payment of travel time when they actually did not travel. Your board has often held that an individual is not entitled to the overtime rate when he performs no service. Likewise it has held that travel time is not payable if the individual does not travel. Such a decision in this instance would be consistent with past awards.

III. Under The Railway Labor Act, The National Railroad Adjustment Board, Second Division, Is Required To Give Effect To The Said Agreement And To Decide The Present Dispute In Accordance Therewith.

It is respectfully submitted that the National Railroad Adjustment Board, Second Division, is required by the Railway Labor Act to give effect to the said Agreement, which constitutes the applicable Agreement between the parties, and to decide the present dispute in accordance therewith.

The Railway Labor Act, in Section 3, First, Subsection (i), confers upon the National Railroad Adjustment Board the power to hear and determine disputes growing out of "grievances or out of the interpretation or application of agreements concerning rates of pay, rules or working conditions". The National Railroad Adjustment Board is empowered only to decide the said dispute in accordance with the agreement between the parties. To grant the claim of the employes in this case would require the board to disregard the agreement between the parties hereto and impose upon the carrier conditions of employment and obligations with reference thereto not agreed upon by the parties to this dispute. The board has no jurisdiction or authority to take any such action.

CONCLUSION: The carrier has conclusively shown that this claim, as presented, is not a valid claim in accordance with the recognized provisions of Rule 4-O-1; therefore, it should be dismissed by your Honorable Board.

The carrier demands strict proof by competent evidence of all facts relied upon by the claimant, with the right to test same by cross-examination, the right to produce competent evidence in its own behalf at a proper trial of this matter and the establishment of a record of all the same.

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.

By letter dated June 5, 1962 and filed with the Superintendent of Motive Power on the same date the employes made the following claim.

> "We desire to have 8 hours at overtime rate for lead mechanics plus 7 hrs. travel time, paid for every Monday, Wednesday and Friday, beginning with April 5th, 1962, and until need therefor is ended, on account of proper inspections and repairs not being made by employees from our Seniority District on certain work train and other locomotives working on the Chautauqua Branch.
>
> "This work, if being done at all, is being performed by men from Ebenezer Engine-house, who have no claim on it. The names of men involved were—machinists G. L. Lee for Monday; Frank Barrett for Wednesday; and Dom. Swires for Friday, or whoever would have been available if these men had been called out to work on days in question.
>
> "Will you please advise?"

Under date of June 13, 1962 the claim was denied in writing by the Motive Power Foreman. In a letter dated July 3, 1962 addressed to the Superintendent-Personnel the Local Chairman protested the Foreman's decision of June 13, 1962 and the matter was discussed at a regularly scheduled meeting on August 12, 1962. On September 8, 1962 the Local Chairman wrote the Superintendent-Personnel and requested payment of the claim because it was not denied within the 60 day period. Under date of September 19, 1962 the Superintendent-Personnel denied the claim in a letter in which he indicated that he did not consider the letter of July 3, 1962 required a formal reply and that the claim was not a valid continuing claim.

The carrier concedes that its use of Machinists from Ebenezer Engine House to perform Machinists work on the Chautauqua Branch, another seniority district, violated the rights of the Machinists in the Oil City-Chautauqua Branch seniority district. In substance its defense to the payment of this claim is three-fold.

1. The claim as presented was invalid since it asserts a violation on April 5, 1962 and was not filed until June 5, 1962 or 61 days after the occurrence complained of.

2. That the employes did not appeal the decision of the Motive Power Foreman to the Superintendent of Personnel.

3. That the claim is not a proper continuing date claim.

The claim asserted in the June 5, 1962 letter above quoted refers to every "Monday, Wednesday and Friday commencing April 5, 1962". Why the Local Chairman chose to use the date of April 5, 1962 (a Thursday) instead of April 6, 1962 is not clear. However, it is clear that he could not have been referring to any occurrence other than one on Friday April 6, 1962. Consequently, we can find no merit in the assertion that the claim was not filed within sixty days of the first occurrence involved therein.

The carrier's second defense is based upon the fact that in phrasing his letter of June 13, 1962 the Local Chairman stated "we are writing to protest the decision of the Motive Power Foreman". Apparently, it is the Carrier's view that because the word "protest" was used instead of the word "appeal" the letter was not in accordance with Rule 4-O-1 (1) (B) which provides that if a disallowed claim is to be appealed, said appeal must be taken within sixty days. This, we consider to be a highly specious semantical argument. Clearly, the letter was a plea to higher authority seeking a reversal of the decision on the first step, and constituted an "appeal" within the meaning of Rule 4-O-1 (1) (B).

We cannot agree that this claim does not qualify as a continuing claim under Rule 4-O-1 (1) (C). In pertinent part that provision states that a claim may be filed at any time for an alleged continuing violation of any agreement and all rights of the claimant or claimants involved thereby shall be fully protected by the filing of one claim or grievance based thereon as long as such alleged violation, if proved to be such, continued. It is clear that the violation did exist and the claim clearly identified an ascertainable recurring situation.

We do not condone the use of the superfluous derogatory insinuation, in the claim letter with respect to the proper performance of the work, as evidenced by the phrase beginning "This work if being done at all***". However, we cannot subscribe to the carrier's contention that the use of the phrase is an admission that the violation was not of a continuing nature.

It follows from the above that a sustaining Award is in order. In the light of the fact that the carrier failed to deny the claim as made until September 19, 1962 the claim will be sustained as made for each Monday, Wednesday and Friday that the work complained of was performed by men from the Ebenezer Enginehouse from April 6, 1962 to September 19, 1962. Following that date payment to the claimants shall be limited to payment of eight hours at the pro rata rate each Monday, Wednesday and Friday that men from the Ebenezer Enginehouse performed the complained of service until the violation was corrected. This, for the reason that the denial letter of September 19, 1962 was sufficient to put in issue before this Board the question of whether or not the premium rate and travel time was proper for the violation complained of with respect to dates following September 19, 1962. The proper payment for deprivation of work (work not performed) under these circumstances is pro rata and the claimants are not entitled to payment for travel not required. If following September 19, 1962 any of the Mondays, Wednesdays or Fridays when the complained of work was performed fell on a holiday the time and one-half payment to the claimants is proper.

AWARD

Claim disposed of as indicated in Findings.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of SECOND DIVISION

ATTEST: Charles C. McCarthy
Executive Secretary

Dated at Chicago, Illinois, this 12th day of January, 1966.

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