Award No. 6264
Docket No. 6100
2-UP-CM-'72

NATIONAL RAILROAD ADJUSTMENT BOARD

SECOND DIVISION

The Second Division consisted of the regular members and in addition Referee Irving R. Shapiro when award was rendered.

PARTIES TO DISPUTE:

SYSTEM FEDERATION NO. 105, RAILWAY EMPLOYES' DEPARTMENT, AFL-CIO (Carmen)

UNION PACIFIC RAILROAD COMPANY

DISPUTE: CLAIM OF EMPLOYES:

(1) That the Carrier unjustly dealt with Carman E. J. Dowd and L. V. Williams, Denver, Colorado, when on April 23, 1970 they failed to properly compensate them for service performed.

(2) That accordingly the Carrier be ordered to pay E. J. Dowd eight (8) hours and fifteen (15) minutes and L. V. Williams thirteen (13) hours additional pay due them for services performed on April 23, 1970 in accordance with agreement rules.

EMPLOYES' STATEMENT OF FACTS: E. J. Dowd and L. V. Williams, hereinafter referred to as the Claimants, are employed as Carmen on the Union Pacific Railroad, hereinafter referred to as the Carrier, at Denver, Colorado, where the Carrier maintains a car repair track.

The Claimants were regularly assigned as Carmen Freight Inspectors on the 23rd Street repair track from 7:00 A. M. to 11:00 A. M. and 11:30 A. M. to 3:30 P. M. five days per week. Claimant Dowd had rest days of Saturday and Sunday and Claimant Williams had rest days of Wednesday and Thursday.

Op April 6, 1970 claimants were ordered to arrange to go to Cheyenne, Wyoming on Train #9 at 7:00 A. M. Thursday April 23, 1970, claimant Williams' rest day, to attend classes on AAR Interchange Rules and return to Denver on Train #10 the same date by Foreman P. A. Litwin.

Upon returning home claimant claimed time in accordance with agreement rules covering services performed outside their regular hours at home point. Upon receipt of their pay checks May 15, 1970 for the period in which April 23rds' pay was received they discovered they were allowed only eight (8 hours straight time pay for the day in question.

On June 11, 1970 claim was made in behalf of claimants claiming 8¼ hours additional pay for claimant Dowd, who arrived back in Denver and

It is likewise noteworthy that, in addition to the Carrier, the other Organization representing Boilermakers, Blacksmiths, Machinists, Electricians and Sheet Metal Workers recognize that Rules 7 and 10 are inapplicable to the situation at hand, since they have never disputed the long-established practice on the property of compensating employes who are away from work at the Company's direction in a manner similar to that prescribed in Rule 24 of the Agreement.

The carrier has conclusively shown that the organization's position in this dispute is not supported by any agreement rule, and this claim should 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 respectfully 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.

The Claimants are regularly assigned Carmen Freight Inspectors employed by the Carrier at Denver, Colorado. On Thursday, April 23, 1970, per instructions issued to them by the Carrier, they travelled to Cheyenne, Wyoming to attend classes on American Association of Railroads Interchange Rules being conducted there that day. They left Denver at 7:00 A. M. and returned that same day at 9:00 P. M. Thursday, April 23, 1970 was a regularly assigned work day for claimant Dowd and one of Claimant Williams' scheduled rest days. Both claimants were paid eight (8) hours straight time pay, plus their personal expenses for April 23, 1970.

Petitioner invokes Rules 7 and 10 of the Controlling Agreement between the parties hereto and alleges that pursuant thereto Claimants should have been paid as follows: Dowd, 8 hours at straight time rates and five and one-half hours at the overtime rate; Claimant Williams, fourteen hours at time and one-half his regular rate of pay. Said Rules read:

> "Rule 7 (a) For continuous service after regular working hours, employes will be paid time and one half on the actual minute basis with a minimum of one hour for such service performed.
>
> (b) Employes worked more than five days in a week shall be paid one and one-half times the basic straight time rate for work on the sixth and seventh day of their work week, * * *.
>
> Rule 10 — An employe regularly assigned to work at a shop, enginehouse, repair trade or inspection point, when called for emergency road work away from such shop, enginehouse, repair trade or inspection point will be paid from the time ordered to leave home station, until his return in accordance with the practice at home station, and will be paid straight time rates for straight time hours and overtime rates for overtime hours for all time waiting or travelling. * * *"

Rule 10 is inapplicable to the claim herein. It is clearly and definitely limited to a specific performance, namely, emergency road work and completely unrelated to the situation herein.

Were Claimants' activities on April 23, 1970, "service" within the meaning of Rule 7 of the Controlling Agreement? In Awards 1632, 2251, 3484, 3485, 3486, 3487, 3488, 3489, 3490, 3491, 3492, 3638 of this Division and several Awards of other Divisions of the National Railroad Adjustment Board, it was determined that the functions of each classification spelled out in the agreement between the parties in effect describes what constitutes "service" for the purposes of application of Rule 7. Participation in classes necessary for improvement of performance by employes are not found to be among the duties of the Carmen category. It would therefore appear that absent provision in the Controlling Agreement for payment to attend training classes, no compensation would be required for employes who are ordered by their employer to participate in such programs.

However, in Award 1438 (Swacker) a well reasoned sound and cogent view was expressed as follows:

> "* * * It is an elementary principle of the law of contract, that where parties situated as are these i.e., employer and employe, that if the employer calls upon the employe to perform any service the employer thereby creates an implied contract to the effect that if the employe responds he will be paid for such service. If nothing is said about the amount of compensation they will be paid, the law then implies the rest of the contract to be that he employer will pay the reasonable value of such service. Some decisions by Divisions of the Board have held in cases of this type that in the absence of an express provision in the schedule specifying the compensation, the Board is without jurisdiction of the claim, and has dismissed it; in other cases, they have held it amounted to an application to write a new rule that it was beyond its jurisdiction, and the claim was dismissed. Of course, such dismissal did not mean a claimant was remediless; it was considered he could go to a common law court and recover an quantum meruit, but the Adjustment Board apparently considered that course not open to it. However, in the light of recent decisions of the Supreme Court of the United States in Slocum vs. D.L. & W.R.R. Co. 339 U.S. 239, 70 S. Ct. 577; O.R.C. vs. Sou. Ry., Co. 339 U.S. 255 70 S. Ct. 585, holding in substance that the Adjustment Board has exclusive jurisdiction over grievances and disputes concerning contracts governing wages and working conditions, expressly excluding any jurisdiction in the common law courts as to such disputes, it becomes necessary to reconsider the course heretofore followed, and to adjudicate cases of implied contract where the schedules do not particularly specify the work or the compensation. That there may not be express contract provisions does not operate to curtail the elementary law of contract. It cannot be said properly that to supply a missing but implied term of contract amounts to writing a new rule. It does not follow that a quantum meruit ascertained as a judicial function necessarily becomes a fixed price applicable to some other or future case. It may be said in passing, concerning the relationship of employer and employe here involved, that it is well understood that the employe is under his contract under a duty to perform any work ordered to whether the contract mentions such work or not, and on refusal to obey such instruction that he is subject to discipline,

extending even to discharge. If the employe thinks the orders given him are outside his duties imposed by his contract, it is his duty to perform them and then follow specified procedure of grievance concerning the matter. * * *"

Applying this sensible concept we sought for a standard, negotiated by the parties, as to what would be an appropriate "quantum meruit" for work performed by the Claimants herein.

It should be noted that the Carrier did not desire that the Claimants attend the classes on their own time and expense. They were paid a day's pay plus personal expenses, a recognition of the principlees of the above quoted Award 1438.

The Agreement between the parties provides:

"Rule 24. When attending court as a witness for the Company, employes will be reimbursed for actual expenses and paid eight hours for each day away from work and for Sunday and holidays when away from home point. * * *"

This is the only provision of the Controlling Agreement which affords a basis upon which values can be related. If an employe, held over at a distant point from his regular work station on Sundays and holidays is to receive eight hours straight time pay when called upon to participate in a trial as a witness for his employer, by agreement of the parties, is this not reasonable for us to apply this mutually acceptable standard to the instant matter?

There is no requirement that travel time was to be considered working time for purposes of compensation under this rule. Nor was performance of this type of assignment on a scheduled rest day to be subject to punitive rates of pay. Claimant Dowd's claim undoubtably rests on alleged overtime incurred traveling from the class in Cheyenne, Wyoming back to his employment base. Claimant Williams' claim is based on his attendance at the class on his rest day and the time spent in travelling to and from the class. Rule 24 is the best we can find as a guide to what the parties negotiated to determine "quantum meruit" for the activities undertaken by the Claimants herein and in applying the concepts of Award 1438, we must hold that the carrier fully met its obligation to them.

It is now more than ten years since Awards enunciating the views quoted hereinabove have been issued. The National Railroad Adjustment Board has time and again asserted its limited authority and jurisdiction. This was well stated in Award 389 (Third Division) as follows:

"* * *, the request of the employes cannot be granted without alteration by this Board of the scope of the agreement between the parties, which is beyond the bounds of its authority. The positions here involved were in existence prior to the negotiation of the prevailing agreement, and might well have been covered by that agreement, but in point of fact they were not included within its terms. * * * It is not within the authority of this Board to alter the terms of an agreement either by including positions not covered thereby or by excluding positions embraced therein. The end here sought by the employes can properly be achieved only through the process of negotiation."

Regardless of our subjective reactions relative to the circumstances of the claim before us, we are not empowered or authorized by statute or otherwise to substitute our personal affinities and sense of equity for the judgment of the parties as to how problems will be dealt with as indicated by the specific terms negotiated by them.

AWARD

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of SECOND DIVISION

ATTEST: E. A. Killeen
Executive Secretary

Dated at Chicago, Illinois, this 20th day of March 1972.

Keenan Printing Co., Chicago, Ill. Printed in U.S.A.