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Form 1

NATIONAL RAILROAD ADJUSTMENT BOARD
SECOND DIVISION

Award No. 6378
Docket No. 6228
2-C&O-MA-'72

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

Parties to Dispute: (System Federation No. 41, Railway Employes' Department, A. F. of L. - C. I. O. (Machinists)
(The Chesapeake and Ohio Railway Company

Dispute: Claim of Employes:

1 - That under the current agreement Machinist Helper G. L. Tyree, Jr. was improperly compensated for the date of February 10, 1971, which was the seventh (7th) consecutive day worked by him.

2 - That accordingly the Carrier be ordered to compensate Claimant the difference between double time rate and the time and one-half rate allowed him for service performed February 10, 1971.

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.

Claimant worked the 11:00 P.M. to 7:00 A.M. shift on five consecutive days Thursday through Monday. His first and second rest days were Tuesday and Wednesday. There is no dispute in this case that the extra work was performed on the first and also on the second rest day. The Organization contends that the December 4, 1969 Wage Settlement made effective by Public Law 91-226, dated April 9, 1970 provides for double the basic straight time rate for the service performed on the second rest day.

Carrier rejected the claim on the ground that claimant worked at a different location than the place assigned on two of his regular work days; also that he performed work on his rest days at a place where no one is regularly assigned.

Therefore, the Carrier concludes, claimant does not come within the Agreement referred to by the Organization which requires that service be performed, "by a regularly assigned--employe--.", (see Employes' Exhibit B).

Carrier also rejected the claim on the theory that the Agreement relied upon excludes double time pay on the second rest day if the service performed was, "emergency work paid for under the call rules--." Carrier supports this theory by calling attention to Rule 7(c) (f) derived from Decision No. 222 Docket 475 of the United States Labor Board effective August 16, 1921.

In addition, Carrier contends that the work on the rest days was emergency work required by weather conditions which could not be anticipated. The Organization objected to the use of this contention because it was not raised on the property.

We will consider the last objection of the Carrier as properly raised in its letter Employes' Submission Exhibit B, by the words, "--but for extra work at Pier 14 due to freezing weather,--." In addition, as we stated in Second Division Award No. , (Docket No. 6229), "--, the Agreement relied upon by the Organization, opens the door to discussion of whether or not an emergency existed."

On its face, it does appear that the call in rule suggests that all extra work would be for an emergency. If this is so, then no purpose would be served by the Agreement which amends, "All agreements, rules, interpretations and practices, however established--." An agreement reached by the entire industry, enacted as Public Law is not an exercise in futility. It must have a purpose which cannot be swept aside by an application of logic. The later Agreement is an amendment of prior agreements and rules and must be interpreted as a fact, not as a fiction.

No time need be spent over the type or location of the assignment. The words used in the National Agreement are, "--provided he has worked all the hours of his assignment in that work week and has worked on the first rest day of his work week, --.", (underlining added). It serves no purpose to argue about "assignments" when the Agreement requires that, "hours.", be worked.

The claimant has qualified for double time pay unless he was needed for, "emergency work paid for under the call rules--." Is this an ambiguity or does this seeming inconsistency recognize a situation under the call rule as something which leaves no room to doubt that an emergency exists? To give credit to the existence of the National Agreement, more than mere "lip service", we must assume the answer to be that the emergency contemplated is the occurrence of the unexpected; something which should not happen, all things being equal. In this case, the condition occurred in the winter. Cold weather is expected and can be forecast with reasonable accuracy. If the open top loaded coal cars have been subjected to rainfall, it did not require split second timing to start up the thawing pit. Carrier's Submission p.5, 6, refers to a possible sixteen or more hours with temperature below 30 degrees plus wet coal to, "call for starting up the thawing pit sooner." Although this combination of events may provide a need for action on a rest day, an emergency is not indicated. This result is to be found also in Second Division Awards No. 6252 and No. 6336.

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A W A R D

Claim is sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Second Division

Attest: E. A. Killeen
Executive Secretary

Dated at Chicago, Illinois, this 28th day of September, 1972.