Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD Award No. 8224
SECOND DIVISION Docket No. 8042
2-N&W-CM-'80

The Second Division consisted of the regular members and in addition Referee George E. Larney when award was rendered.

Parties to Dispute: (System Federation No. 16, Railway Employes' Department, A. F. of L. - C. I. O. (Carmen)
(Norfolk and Western Railway Company

Dispute: Claim of Employes:

1. That under the controlling Agreement Local Chairman William R. Cramer was unjustly denied pay and reimbursement for transportation costs when representing an employee in formal investigation on August 2, 1977.

2. That, accordingly, carrier be ordered to compensate Local Chairman William R. Cramer eight (8) hours at the straight time rate of pay, and, in accordance with carrier's mileage allowance schedule, $51.29 for transportation costs on account of mileage incurred on August 2, 1977.

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, William R. Cramer, a Car Inspector at the Carrier's Bellevue, Ohio facility was denied time off with pay and reimbursement for transportation costs incurred when, on August 2, 1977, in his capacity as Local Chairman for the Organization, he represented another Carman before an investigatory hearing at Carrier's facility located at Muncie, Indiana.

On August 1, 1977, Claimant requested of his General Foreman that Carrier make arrangements to furnish him free transportation from Bellevue, Ohio to Muncie, Indiana and return on August 2, 1977 for the purpose of attending the formal investigation. The Organization contends the General Foreman apprised Claimant Carrier would not furnish him free transportation but that, as in past instances of similar nature, he would be paid for the time spent at the investigation scheduled to take place coincidentally with Claimant's regularly assigned hours. On August 2, 1977, Claimant drove his privately owned automobile to and from the investigation travelling a total of four-hundred twelve (412) highway miles. Carrier neither reimbursed Claimant for travel expenses on a per mile basis nor for the time spent representing a constituent at the formal investigation.

The Organization alleges that in not reimbursing Claimant for time spent at the investigation and for travel costs incurred, Carrier is in violation of Rules 32 and 34 respectively of the Controlling Agreement effective October 1, 1952. These Rules are cited in full as follows:

> Rule 32 - GRIEVANCES. "Should any employe subject to this agreement believe he has been unjustly dealt with or any of the provisions of this agreement have been violated, he shall have the right to take the matter up with his foreman in person or through the duly authorized local committee within ten days. If unable to arrive at a satisfactory settlement with the foreman, the case may be taken to the highest local officials in the regular order, preferably in writing. If stenographic report of investigation is taken, the committee shall be furnished a copy. If the result still be unsatisfactory, the employe or the duly authorized general committee shall have the right of appeal, preferably in writing, with the higher officials designated to handle such matters, in their respective order, and conference will be granted within ten days of application.
>
> Should the highest designated railroad official, or his duly authorized representative, and the duly authorized representative of the employes fail to agree, the case may then be handled in accordance with the Railway Labor Act.
>
> All conferences between the local officials and local committees to be held during regular working hours without loss of time to committeemen. Prior to assertion of grievances as herein provided and while questions are pending, there will neither be a shutdown by the employer nor a suspension of work by the employe."
>
> Rule 34. "The company will not discriminate against any committeemen who, from time to time, represent other employes, and will grant them leave of absence and free transportation when delegated to represent other employes."

Two key issues present themselves before this Board in the instant case:

1(a) Is there a distinction to be made with regard to definition between the term "conference" as it is used in Rule 32 and other forums in which committeemen represent other employees as referred to in Rule 34?

1(b) If such a distinction exists, what effect, if any, does this have on compensation for committeemen attending investigatory hearings?

2 What is the meaning and intent of the term "free transportation" as it is used in Rule 34?

The positions of the parties on both these issues are diametrically opposed. With regard to issue number 1(a) and 1(b), the Organization contends the definition of "conference" is of such an all inclusive nature that it encompasses such other forums of representation as investigatory hearings - that forum which is under

consideration in the instant case. That being so, the Organization asserts that Rule 32 is clear and unambiguous with respect to compensation of committeemen for time spent in conferences; Rule 32 in relevant part reads:

> "All conferences between the local officials and local committees to be held during regular working hours without loss of time to committeemen."

The Organization argues that since investigatory hearings are in reality just another type of conference, the Claimant is therefore, under the pertinent language of Rule 32 cited above, entitled to receive payment for the time he spent at the investigation held in Muncie, Indiana on August 2, 1977. The Organization supports their position based on the following evidence of record:

(a) That in many instances over many past years the Carrier has compensated the Claimant when he had to forego his regularly assigned position to represent an employee in a formal investigation scheduled by the Carrier.

(b) Affidavits, totalling twenty (20) in number, solicited from former and present local committeemen throughout the Carrier's system, and covering a time period beginning with calendar year 1946 and extending through 1978, all attest to the practice of Carrier's compensating them for time spent at investigations held at a time coincidental with their regular working hours.

(c) Previous cases cited by the Organization, specifically Second Division Awards 3845, 4615 and 5044 in which the Board has sustained claim of employees in past cases involving the same situation and application of the same rules.

The Carrier on the other hand, takes the position that a "conference" and an "investigation" are not, as the Organization contends, one and the same. In delineating the two forums, the Carrier asserts that "conference" as used in Rule 32 refers to an informal meeting of all interested parties to discuss a pending grievance; while an "investigation" refers to a formal proceeding conducted to ascertain the facts relating to a specific charge, wherein witnesses for the Carrier and for the charged employee testify and are cross-examined, and wherein objections and rulings are made. Rule 32, the Carrier notes, is conspicuously devoid of any reference, either express or implied, regarding payment for attending investigations for either charged employees or their authorized representatives. The Carrier cites Second Division Awards 3260, 4363, 5342, 5371, 6151, and 6719, in support of its position, wherein the thrust of these cases distinguish the difference between conferences and investigations, and in each, the Board found the Carrier was not contractually obligated to compensate committeemen or local chairmen for time spent attending investigations. In addition, Carrier asserts that according to Section 2 Fourth of the Railway Labor Act, it is unlawful for a carrier to reimburse a "union representative" for attending an investigatory hearing. This Section of the Act reads in relevant part as follows:

> "*** it shall be unlawful for any carrier *** to use the funds of the carrier in maintaining or assisting or contributing to any labor organization, labor representative, or other agency of collective bargaining ***."

Carrier denies the allegation by the Organization that Carrier has allowed a past practice of many years in the making to develop with regard to compensating representatives when attending investigatory hearings. However, even if such a past practice was reality, the Carrier argues it is not bound by it based on the following two contentions:

(a) If any such payments were ever made by local officials, it was through error, contrary to the provisions of the current agreement, and without the knowledge or sanction of the Carrier's officer authorized to interpret the agreement. Thus, such payments are erroneous and therefore not binding.

(b) Since Rules 32 and 34 are clear, precise and unambiguous, no amount of misapplied past practice can amend the explicit and precise language of these provisions.

With regard to issue number 2, the Parties invoke all the foregoing arguments applicable to the first issue. In addition, however, the Carrier takes the position that the term "free transportation" has a historical meaning and intent. Carrier notes that the term "free transportation" also appears in Section 2 Fourth of the Railway Labor Act and argues that these words were written at a time in history when rail passenger service was at its peak. In relevant part, Section 2 Fourth of the Act reads as follows:

> "That nothing in this Act shall be construed to prohibit a carrier from *** furnishing free transportation to its employees while engaged in the business of a labor organization."

The Carrier believes the authors of the Act did not have in mind any mode of travel other than rail and certainly did not anticipate a carrier reimbursing a labor representative for money spent for gas and related expenses incurred by reason of using his automobile for labor organization business. Carrier therefore asserts, that "free transportation" as used in Rule 34 means on transportation under the control of the Carrier. The Carrier argues that in the instant case, it had no such transportation under its control to provide the Claimant. According to the Carrier, the only time an employee is allowed reimbursable expenses for automobile mileage is during performance of Company business and only when authorized by a proper officer of the Carrier.

In answer to issue number 1(a) and 1(b) posed above, although Rules 32 and 34 are both a part of the Grievance Procedure under the Controlling Agreement, effective October 1, 1952 as subsequently amended, we nevertheless find a difference in definition as well as in concept between a "conference" and an "investigatory hearing". And it is clear to this Board that there is a corresponding difference in the language between "without loss of time to committeemen" appearing in Rule 32 with reference to attending conferences, and "will grant them leave of absence" appearing in Rule 34 with reference to committeemen attending investigations. As the language of both Rules is clear and unambiguous, we must turn to the plain and ordinary meaning of the words in our determination of the issue before us. Clearly, the phrase, "without loss of time to committeemen" in Rule 32 means, that committeemen will be compensated for their time spent in "conferences" attempting to resolve grievances. On the other hand, the plain and ordinary meaning of the phrase, "will grant them a leave of absence" as used in Rule 34 normally denotes that time

spent on such a leave will not be compensated unless otherwise specified to the contrary. However, even though the framers of the Controlling Agreement may have intended a clear distinction between activities of a committeeman which were and were not to be compensable, the Parties, through their consistent and long-standing application of both Rules, have obliterated these distinctions between the compensable and non-compensable activities of committeemen and in so doing have amended the clear and unambiguous language of their collective bargaining agreement. The Parties' application of Rules 32 and 34 go well beyond the concept of mere past practice and therefore this Board cannot, in all good conscience, invoke the general principle developed by us in other cases that no amount of misapplied past practice can amend the explicit and precise language of contract provisions. The evidence before us is overwhelming, showing that the practice of paying committeemen for attending investigations is system-wide on this Carrier's railroad and we cannot, in the face of the evidence, abide by Carrier's assertion that these payments made at the various local properties were, have been, and still are, unknown to the appropriate Carrier officials. We reach this conclusion based on the record, which reflects that subsequent to the filing of this instant claim, Claimant attended another investigation in his capacity of committeeman and was paid for his time spent at the hearing. The Carrier cannot sustain a basis of serious contention on this issue nor should it press for an alternate interpretation of Rules 32 and 34 before this Board when, by its ongoing and continuous practice, it has changed in part, the apparent original meaning of both these Rules.

With regard to issue number 2 above, the Board recognizes and lends credence to the historical interpretation of the term "free transportation", noting that there obviously is a difference between "free transportation" and "paid transportation". As there was nothing in the record of a substantial nature to indicate Carrier has paid for travel expenses within the same context as they have compensated committeemen for time spent at investigatory hearings, we must conclude that such expenses are non-reimbursable.

A W A R D

Claim sustained in part: Claimant is to be compensated for time spent at the investigatory hearing held on August 2, 1977 in the same manner as has become the custom. Claim denied in part: Claimant shall not be reimbursed for his travel expenses incurred as a result of his attending the investigation.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Second Division

Attest: Executive Secretary
National Railroad Adjustment Board

By Rosemarie Brasch
Rosemarie Brasch - Administrative Assistant

Dated at Chicago, Illinois, this 16th day of January 1980.

CARRIER MEMBERS' DISSENT TO AWARD NO. 8224 - DOCKET NO. 8042
(REFEREE LARNEY)

The majority in this Award bifurcated the Statement of Claim as presented to the Board thusly:

> "Two key issues present themselves before this Board in the instant case:
>
> "1(a) Is there a distinction to be made with regard to definition between the term 'conference' as it is used in Rule 32 and other forums in which committeemen represent other employes as referred to in Rule 34?
>
> "1(b) If such a distinction exists, what effect, if any, does this have or compensation for committeemen attending investigatory hearings?
>
> "2. What is the meaning and intent of the term 'free transportation' as it is used in Rule 34?"

Their conclusion relative to issue numbered 2 was correctly and properly reached and no exception is taken therewith.

However, the conclusion expressed and the decision reached concerning issues numbered 1(a) and 1(b) are palpably erroneous in at least three (3) major areas and it is toward these mistaken conclusions that this Dissent is directed.

Award No. 8224 correctly concluded that:

> "* * * we nevertheless find a difference in definition as well as in concept between a 'conference' and an 'investigatory hearing'. * * *."

The majority also correctly concluded that:

> "* * * the language of both Rules is clear and unambiguous, * * *."

and went on to detail the ordinary meaning of the language in those clear and unambiguous Rules as it correctly applies to the separate circumstances; i.e. Rule 32 means: "* * * that committeemen will be compensated for their time spent in 'conferences' attempting to resolve grievances. * * *" and that "* * * the phrase, 'will grant them a leave of absence' as used in Rule 34 normally denotes that time spent on such a leave will not be compensated unless otherwise specified to the contrary. * * *" (Underscore ours) These proper conclusions, derived from the record before the Board and from the language of the properly negotiated Rules, should have resulted in a total denial of issues 1(a) and 1(b).

"any instrument by a tribunal such as ours will only lead to confusion and uncertainty and ultimately to injustice and hardship to both employe and carrier. Far better for all concerned is a course or procedure which adheres to the elemental rule, leaving it up to the parties by negotiation or other proper procedure to make certain that which has been uncertain."
(Underscore ours)

Second Division Award No. 1164 (Thaxter) (1946):

"The rules in this instance speak for themselves. They are perfectly clear. District maintainers have no regularly assigned hours and are paid on a monthly basis for all services rendered regardless of the number of hours worked or the time of day when the work is done. This is the agreement the parties made.

"It may be true that the monthly rate of pay was fixed in the belief that over a month or a year the average work day would not exceed eight hours. But the employes subject to the provisions of Rule 8 took their chances on that. The argument which they have made before this Division is a very persuasive one for a change in the rule. But we cannot change rules. Our jurisdiction is only to interpret them."
(Underscore ours)

Second Division Award No. 3686 (Johnson):

"The trouble is that this Board has no power to add a word to the agreement as set down by the parties and thus materially change its meaning; that it has not the power of a court of equity to reform an agreement so as to make it state what either party contends was actually intended but not stated; that the contention was denied and was not proven by evidence; and that practice cannot be used to interpret an unambiguous provision as meaning something else."
(Underscore ours)

Second Division Award No. 3807 (Johnson):

"* * * in the absence of errors or omissions a written contract is conclusively presumed to constitute the entire agreement, and therefore leaves no room for implied understandings. * * *."
(Underscore ours)

Second Division Award No. 6354 (Bergman):

"* * * the Board in this case is not free to apply the rationale expressed in Second Division Award No. 4361. That Award is based on the reasoning that as an instrument of industrial and social peace a labor agreement is flexible. It may be applied broadly and liberally to accomplish its evident aim and purpose. Rather than to limit litigation and to promote industrial harmony, flexibility resulting in different applications of the same Rules and provisions of a labor agreement may create confusion and uncertainty leading to chaos which would negate the result of conditions earned by both sides through negotiations. The dissenting opinion of the Labor Members expresses a more exacting but sounder approach, to wit: 'The relations are to be governed not by the arbitrary will or whim of the management or the men, but by written rules and regulations mutually agreed upon and equally binding on both.'

"Unfortunately for the claimant, this fundamental approach to the problem does not provide the equitable relief which he might otherwise obtain."
(Underscore ours)

Second Division Award No. 6948 (Lieberman):

"* * * He desires the Board in its Award to correct this inequity. Unfortunately, much as Claimant's appeal may have the cloak of righting injustice, this Board cannot deal in equity. The validity of Agreements cannot be challenged in this forum. Our function is to make sure that the Agreements are applied as written and in this instance it appears that the Agreements were meticulously adhered to by Carrier. There is no contract violation established by Petitioner. As Carrier points out, this Board's function is limited, under the Railway Labor Act, to adjudicating disputes growing out of the interpretation or application of agreements. We cannot change or amend agreements, which is the thrust of the remedy sought in this dispute."
(Underscore ours)

Second Division Award No. 7032 (Twomey):

"* * * It is not within our authority to allocate work based on our own sense of consistency or equity. We are empowered only to interpret the Agreement of the parties. We have no authority to add to or alter the Agreement in any way. * * *."
(Underscore ours)

"It is hornbook that this Board may not enlarge upon or diminish the terms of a collective bargaining agreement. If either party finds the terms of such an agreement not to its liking it must seek a remedy through collective bargaining. RLA, Section 6."

Third Division Award No. 21703 (Eischen):

"From the foregoing it is apparent that the parties argued over the meaning of a Rule which has not been in effect for some twenty-five (25) years. * * * Are we to be bound by the mistakes of parties and interpret a non-existent Rule while ignoring the clear language of the existing contract? We think not. We deem it self-evident that we must refuse to perpetuate this comedy of errors. The Agreement we interpret and apply must be the existing Agreement including the amendment of Rule 4-E-2. * * *."
(Underscore ours)

Third Division Award No. 21966 (Sickles):

"This Board may not attempt to adjudicate disputes on some basis of 'equity, fairness or hardship.' Rather, it is clear that we are restricted and confined to the interpretation and application of collectively bargained agreements. * * *."
(Underscore ours)

Third Division Award No. 22310 (Lieberman):

"While the Board recognizes the equitable request implicit in this Claim, equity is not within our purview in dealing with Rules disputes such as this; we may only interpret the agreement of the parties as literally as possible. * * * Since the Board has no authority to remake agreements when conditions have changed, or otherwise, the Claim has no basis in the rules and must be denied."
(Underscore ours)

This litany could go on and on, but these should suffice to show that the majority in this case has seriously erred. They simply do not possess the authority or the right to attempt to re-write clear and unambiguous negotiated rules under the guise of "good conscience".

Second Division Award No. 6581 (Lieberman):

"When the terms of an Agreement are clear and unambiguous, there is no need to look beyond it. * * *."

Second Division Award No. 7083 (Twomey):

"* * * Awards of this division have repeatedly held that a practice cannot overcome the definite and unambiguous provisions of a rule. We concur in this line of Awards, and conclude that the Carrier's contentions about a contrary practice cannot be controlling in this case in view of the clear and unambiguous language of the rule that existed prior to merger and indeed the rule that exists after the merger."

Second Division Award No. 7182 (Marx):

"Past practice, however ingrained and tolerated by the parties, cannot be used as a defense to defeat clear and precise language of a collective bargaining agreement. * * *."
(Underscore ours)

Second Division Award No. 7498 (Wallace):

"It follows that past practice cannot be invoked to modify or amend what is seemingly unambiguous. See Award 1898 (Stone). * * *.

Second Division Award No. 7610 (Lieberman):

"It has long been held in this industry that no hiatus or past practice can bar the enforcement of clear and unambiguous rights under an agreement. In Award 6025, this Board said:

> "'....It should be noted that a conflicting past practice, no matter how long endured, does not serve to alter or nullify clear and unambiguous contract language.'"
> (Underscore ours)

Third Division Award No. 18064 (Quinn):

"As to the past practice arguments, the Board has consistently held that where provisions of an Agreement are clearly unambiguous, they shall prevail over conflicting practices, and either party to the Agreement may insist upon its rights thereunder at any time."
(Underscore ours)

"the enforcement of that right or result in its loss. Arbitrators may consider laches when searching for a remedy or determining a dispute. An Arbitrator might rule that if a party has 'slept on its claimed rights' for too long a time, it might therefore have lost all its claims to those rights.

"However, while recognizing the legitimacy of the above doctrine in the arbitral forum, this Board is also conscious of numerous prior awards to the effect that either party to a valid contract may insist upon its rights thereunder at anytime, notwithstanding a practice or custom of long duration (See Second Division Award 273; Fourth Division 2985, 2952, and 1224; Third Division Awards 20899, 20711, 19552, 18064 and 14599). We so hold here, recognizing that all the parties have something to gain from continuity in the Board's decisions."
(Underscore ours)

Award No. 5 - Public Law Board No. 131 (Daugherty):

"As to (2) above, it is clear that the practice had been abrogated before claim dates. More important, however, such practice, even if not abrogated, could not have taken precedence over the clear Rules. In the absence of written agreement to the contrary approved at properly high levels, the written agreement must always prevail in such situations. This is a settled rule of contract construction."
(Underscore ours)

Award No. 9 - Public Law Board No. 1790 (Dolnick):

"* * * Whatever may have been the practice for 12 years, if any did exist, it may not supersede and vitiate the clear and express language of Rule 20(a). * * *."

This is but a sampling of the plethora of case law on this vital point. The great multitude of clearly reasoned Awards on this issue which, incidentally, have ruled against the Carrier as well as for the Carrier, cannot be overcome by this one lonely mistaken conclusion. The sound logic as expressed in Fourth Division Award No. 3478, which said:

"* * * all the parties have something to gain from continuity in the Board's decisions."

applies here and effectively renders these erroneous conclusions a nullity.

If these two areas of gross error were not enough to render Award No. 8224 null and void, then the third error - standing alone - would surely accomplish that end.

See also:

First Division Award No. 19372 (Sembower):

"The Division often has stated that to ask for a rule change is one of the best ways to indicate in the party's own estimation that it is needed to supply the authority to do what the proposed language covers. See Awards 12848, 13528, 15536, 15684, 16302. * * *."

Second Division Award No. 3638 (Watrous):

"Claimants Schaefer and Eugue argue that they are due compensation for 4½ hours according to agreement rule 4(d) consequent to their service as carrier witnesses on off-duty hours attending an investigation in which they had no personal interest.

"* * * * *

"The carrier extends protection against loss in regular compensation to the employes in the instance of attending investigations. It is therefore persuasive, coupled with evidence that the organization has attempted to negotiate a specific rule covering compensation for attending investigations, that the Agreement does not require the payment of compensation in the circumstances of this dispute."
(Underscore ours)

Second Division Award No. 6324 (Harr):

"The Carrier points out, in its Submission to the Board, that on September 1, 1970, the Organization served a Section 6 Notice upon the Carrier requesting that the Carmen's Classification of Work Rule be amended to specifically provide that wrecking service was reserved exclusively to Carmen. They also asked to amend Rule 128 to provide for a penalty payment when other than members of wrecking crews performed wrecking service.

"We believe that the serving of the Section 6 Notice was recognition by the Organization that the existing rules did not give Carmen the exclusive right to wrecking service. * * *."

Third Division Award No. 17985 (Devine):

"* * * We also cannot ignore the attempt of the Organization to obtain a revision of the rule which would have granted the handling of train lineups and other communication work to employes covered by the Agreement. The Board has previously held that to ask for a change in the rule indicates that it does not cover that which it seeks to secure by the change. Awards 14594 (Dorsey), 15394 (Hamilton) and 15488 (Zumas)."
(Underscore ours)

Fourth Division Award No. 1114 (Johnson):

"The Organization seems to have recognized that there was no provision under the contract of August 21, 1954, for the type of compensation requested herein, by its action on November 12, 1954, where notice was served upon the Carrier for changes in wages and conditions in six particulars, including 'one extra day's pay if a holiday falls during a Vacation Period.' As a result of negotiations the parties hereto entered into an Agreement dated March 26, 1956, which included a provision of pay for holidays occurring on rest days during the vacation period."
(Underscore ours)

Fourth Division Award No. 1225 (Coburn):

"* * * It is noteworthy that the Notice of Intent to submit this claim to the Board is dated June 22, 1957, because at that time if the Union believed, as it now contends, that the failure to recall claimant was a violation of the seniority provisions of the agreement, then why did it find it necessary on July 7, 1957, to negotiate a new rule covering those employes who had been recalled but whose seniority rights were not recognized at the time of recall.

"* * * * *

"It is well established that the Board is limited to an interpretation of the terms and conditions of the applicable agreement and that so long as its provisions are clear and explicit we may not vary or modify them by implication. It is also well established that to the extent the contract does not expressly limit or restrict management's rights and prerogatives, it is free to exercise fully the usual and customary managerial functions."
(Underscore ours)

J. E. Mason

J. W. Gohmann

P. E. LaCosse

B. K. Tucker

P. V. Varga