

The Second Division consisted of the regular members and in addition Referee Herbert L. Marx, Jr. when award was rendered.

Parties to Dispute: { Brotherhood Railway Carmen of the United States  
and Canada  
{ Norfolk and Western Railway Company

Dispute: Claim of Employees:

1. That under the controlling Agreement Local Committeeman J. R. Kostek was unjustly denied pay when, during his regularly assigned working hours, he represented an employee in formal investigation on January 19, 1978, at Buffalo, New York.
2. That, accordingly, carrier be ordered to compensate Local Committeeman J. R. Kostek six (6) hours at the straight time rate of pay for January 19, 1978.

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.

Local Committeeman J. R. Kostek, in his capacity as a duly authorized representative of the Carrier's Car Department employes at Buffalo, New York, represented an employe in a formal investigative hearing on January 19, 1978, beginning at approximately 9 a.m. The hearing lasted until at least 3 p.m. The Local Committeeman's regular assigned hours that day were from 7 a.m. to 3 p.m.

The Carrier deducted six hours' time from the Local Committeeman's pay on this date. The Organization claims this is contrary to the provisions of Rules 32 and 34.

These rules read 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."

Recently issued Award No. 8141 (Scearce) involved the same Organization and the same Carrier and dealt with the same issue (as well as the matter of transportation reimbursement expense, not at issue here). The Board has reviewed Award No. 8141 and finds no basis to fault the conclusions reached therein.

A substantial quantity of evidence was produced by the Organization to show that in numerous instances no deduction in pay from regularly scheduled time had been made by the same Carrier under identical circumstances. The Carrier answers this by stating emphatically the well established principle, here endorsed by the Board, that no amount of past practice may vary the meaning of clear and unambiguous agreement language. But the key word here is "conference", which the Carrier claims to be something quite separate from meetings involved under the processing of grievances as provided in Rule 32, including investigative hearings. In other words, there is some lack of total clarity in its meaning. In the face of such ambiguity, past practice, of course, takes on an important significance. As stated in Award No. 8141:

"It may be that the framers of Rule 32 intended a different meaning as between 'investigation' and 'conference', but if so, such distinction was not made manifest. If, as the Carrier contends, conferences are not related to the work of investigating and/or resolving grievances, it does not follow that a provision relative to conferences (as defined by the Carrier) would be integral to the Rule which clearly sets forth as its purpose the procedure for grievance handling. Thus, it seems obvious that the presence of the expression 'All conferences between the local officials and local committees to be held during regular working hours without loss of time to committeemen ...' in Rule 32 is more reasonably interpreted to mean all meetings under this provision rather than conferences between the local officials and local committees to discuss non-grievance handling matters of mutual interest as is asserted by the Carrier."  
(Emphasis added)

The Carrier raises another argument which requires discussion. The Carrier points out that the Organization had sought additional language in the applicable agreement concerning this subject and had failed to achieve it. Again, the Carrier relies upon a well established principle that where a new provision is sought and not obtained, it follows logically that such provision may not be "read into" the existing agreement.

But again, the application of this principle is not persuasive here. According to the Carrier, the rules change sought by the Organization was as follows:

"(a) All Employee representatives and witnesses attending the investigation shall be compensated at the applicable rate of pay. In addition, employees attending investigation outside their regular bulletined hours will be allowed a minimum of two hours travel time at the applicable rate of pay and 25¢ per mile from their residence to the location of the investigation and 25¢ per mile from the location of the investigation to their residence.

(b) All local employee-representatives shall be allowed eight hours at the applicable rate of pay to investigate the charges against the accused employee. The local representative will be advised of all carrier's witnesses at a reasonable time prior to the investigation and shall be allowed to discuss the charges against the accused employee with the employee witnesses on the witnesses' tour of duty."

Note that this change goes far beyond the point at issue here. It calls, among other things, for wage payments to witnesses; mileage allowance; pay for representatives regardless of their hours of work; and time for investigation of charges -- none of which is involved in the claim now before the Board. The unsuccessful request for addition of such benefits cannot be read to negate the resolution of the single issue here; the definition of "conference" under Rule 32.

In sum, the evidence shows that the Carrier and the Organization have in the past generally recognized "conference" in Rule 32 to include the attendance without loss of pay of a duly authorized committeeman to represent a claimant at an investigative hearing. The Carrier now seeks to redefine the word "conference" in the face of its previously accepted meaning. As pointedly detailed in Award No. 8141, the Board reaffirms that the Carrier is not persuasive in its limited interpretation of Rule 32.

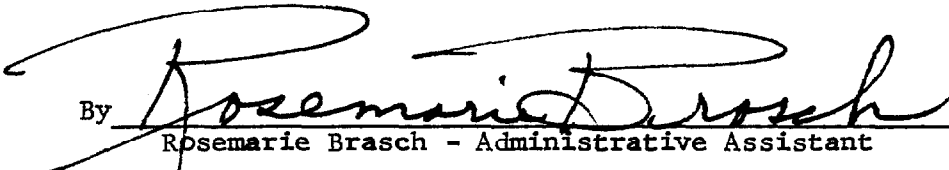
A W A R D

Claim sustained. Claimant will be paid six hours at the straight time rate of pay for January 19, 1978.

NATIONAL RAILROAD ADJUSTMENT BOARD  
By Order of Second Division

Attest: Executive Secretary  
National Railroad Adjustment Board

By

  
Rosemarie Brasch - Administrative Assistant

Dated at Chicago, Illinois, this 4th day of March, 1981.