Award No. 2824

Docket No. CL-2850

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Curtis G. Shake, Referee

PARTIES TO DISPUTE:

BROTHERHOOD OF RAILWAY AND STEAMSHIP CLERKS, FREIGHT HANDLERS, EXPRESS AND STATION EMPLOYES

MISSOURI PACIFIC RAILROAD COMPANY

STATEMENT OF CLAIM: Claim of the General Committee of the Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employes on the Missouri Pacific Railroad, that the Carrier violated the Clerks' Agreement:

1. When on June 2, 1944, it required Chief Caller Mrs. Evelyn H. Gates, Monroe, to report at 9:00 A. M. and until 10:30 A. M. as witness for the Company in connection with investigation case of Brakeman W. J. Morrison, in which investigation Mrs. Gates was neither involved nor interested in, and, failed and refused to compensate Mrs. Gates for a call, two (2) hours at punitive rate of $6.16 per day, or $1.255 per hour, $2.51 as claimed;

2. That Chief Caller Mrs. Evelyn H. Gates shall be compensated for a "call" amount, $2.51 for the service rendered as witness on June 2, 1944, which service was rendered during the hours Mrs. Gates was off duty from her assignment as Chief Caller, which assigned tour of duty ended at 7:59 A. M. on that date.

EMPLOYES' STATEMENT OF FACTS: Mrs. Evelyn H. Gates was the regularly assigned Chief Caller at Monroe, Louisiana and went on duty at 11:59 P. M., June 1st, and worked until her eight hour tour of duty ended at 7:59 A. M., June 2, 1944, when she was instructed by Trainmaster Jones to report as witness for the Company at 9:00 A. M. in connection with the investigation involving Brakeman W. J. Morrison, which terminated at 10:30 A. M., for which service Mrs. Gates, on June 2, filed claim for a call under the provisions of Rule 25, section (d) of the current Clerks' Agreement.

On June 7, 1944, Exhibit "A," the Division Superintendent wrote Mrs. Gates and denied her claim, in which communication he said in part:

> "Employes are expected to be present for the taking of statements, investigations, etc., without claim for time. In this case it was necessary to have you present at the investigation, which did not consume more than one hour and thirty minutes. It did not work any undue hardship on you by having you in attendance and the claim is declined."

On June 16, 1944, the Division Chairman of the Clerks' Organization wrote to the Division Superintendent, Exhibit "B," and supported Mrs. Gates' claim and pointed out that Mrs. Gates had finished her assignment at 7:59 A. M. on June 2nd and that she was due to report back on duty at 11:59

It is the Carrier's position that the Craven cases cannot be construed as a precedent under the working rules of the July 1, 1943 agreement for the specific reason given by General Superintendent Fink in his letter of January 7, 1944 for allowing the two claims—on the basis of equity and not on the basis of any obligation under any rule of the July 1, 1943 agreement. Such a decision from General Superintendent Fink could not have the effect of establishing a precedent in the application of the rules of the general agreement as he does not have that authority, his jurisdiction being limited to the Carrier's Southern District. Rule 37 of the July 1, 1943 agreement is applicable. The rule reads:

> "RULING: Rule 37. Whenever a ruling is made by an officer of the Company, having jurisdiction over the System affecting the interpretation of any rule in this agreement, the General Chairman representing the employes will be furnished with copy of such ruling."

The Employes further cited, to support their claim filed by Mrs. Gates, Award No. 2223, and in commenting upon its applicability to the instant case, the Employes stated:

> "In Award 2223 of the Third Division, National Railroad Adjustment Board, it held very strongly to the conclusion that 'the time has come when we should say that where the employe is not himself involved in a matter being investigated and is called by the carrier in its own interest to attend an investigation, he should be paid, whether what he does is called "work" or "service" or whether he is called on his rest day or otherwise is not controlling.' "

It is significant to note that Award No. 2223 is dated Chicago, June 29, 1943, whereas the agreement between the Carrier and the Complainant Organization that contains a specific rule governing the allowances to employes appear as witnesses for the Railroad, as heretofore quoted, is in an agreement dated July 1, 1943, subsequent to the Board's award cited by the Employes to support their claim.

In this connection attention of your Honorable Board is respectfully called to an award subsequent to No. 2223, and that is award No. 2512 dated Chicago, March 24, 1944, involving a dispute between the Order of Railroad Telegraphers and the Chicago, Milwaukee, St. Paul and Pacific Railroad Company. It is significant to note that the Board in this case denied the Employes' claim. The Carrier feels that this award—2512—is more applicable to the instant case than Award No. 2223 which was cited by the Complainant Organization.

The Management feels that the Employes are, in the presentation of this case to your Honorable Board, attempting to obtain a condition of employment that is applied under rules of agreements other organizations have with other railroads that is not contained in the rules of the working agreement the Complainant Organization has with the Missouri Pacific Railroad.

The Carrier has herein shown there is no basis under the applicable rules of the July 1, 1943 agreement between the Carrier and the Clerks' Organization that would support the claim presented by the Clerks' Organization in the instant case, but, to the contrary, the rules specifically provide what compensation will be allowed and under what circumstances it is allowed to employes required to appear as witnesses for the Railroad, and that all conditions set forth in this rule have been fully complied with in the time allowance made to Mrs. Gates for the service she performed on June 2, 1944.

OPINION OF BOARD: The Claimant is Chief Caller of train and engine crews at Monroe, Louisiana, with assigned hours from 11:59 P. M. to 7:59 A. M. and is rated at $6.16 per day. From 9:00 until 10:30 A. M., June 2, 1944, after having worked her regular tour of duty, she was required to

attend a company investigation into the conduct of another employe, and to testify as a witness for the Carrier. The investigation did not otherwise concern the Claimant. She demands compensation for two hours at the punitive rate, by virtue of Rules 25 (a) and 25 (d), reading:

> "OVERTIME AND CALLS: Rule 25. (a) Except as otherwise provided in these rules, time in excess of eight hours, exclusive of the meal period, on any day will be considered overtime and paid for on the actual minute basis at the rate of time and one-half.
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> (d) Employees notified or called to perform work not continuous with, before, or after the regular work period, or on Sundays and specified holidays, shall be allowed a minimum of three (3) hours for two (2) hours work or less, and if held on duty in excess of two (2) hours, time and one-half will be allowed on the minute basis.
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> * * * *."

This inquiry will be confined to the subject before us, namely, the right of employes to compensation for time required to be spent in attending investigations during non-assigned hours. Our attention has been directed to eleven Awards of this Board in which that subject has been considered. In seven of these the claims were denied, (See Awards 134, 409, 1032, 1816, 2132, 2512, and 2778); and in four the claims were sustained, (See Awards 588, 1545, 2032, and 2223). It is conceded that the above Awards, considered together, are in conflict. Under the circumstances we may do one of three things: (1) we may undertake to reconcile the conflicting Awards by taking into account the niceties of the various rules and the particular facts involved; (2) we may lean upon the doctrine of stare decisis and follow what appears to be the majority rule; or (3) we may adopt the reasoning that appeals to us to be most persuasive and follow the dictates of our conscience to whatever end it may lead us. We may say that we have tried in vain to distinguish the various conflicting Awards and have concluded that they cannot be brought into harmony. As between the remaining alternatives, we have chosen the latter. One of the objectives sought to be achieved by the establishment of administrative agencies, such as this, was to obviate some of the technicalities and traditional concepts by which it was thought judicial proceedings were unduly circumscribed. Whether this viewpoint is well founded is not for us to say; but, in any event, we do not think the legalistic doctrine of ruling precedents is as inflexible in a proceeding before this body as it is in courts.

The theory of most, if not all, of the denying Awards cited above, is that required attendance at an investigation during an employes' off-hours is not **work** or **service** within the meaning of collective agreements. It seems to us that this argument is answered by the point, which appears to be conceded, that an employe may be disciplined or discharged for refusing a command to attend such an investigation. In that connection we quote what was said by Referee Shaw in Award 2032:

> "There can be no doubt, in fact the parties to this dispute each admit, that the claimant in this case had no choice but to attend the investigation, and it is likewise admitted that had he refused to do so he would have been guilty of insubordination and subject to discipline —perhaps even to discharge. The effort to distinguish 'work' and 'service' are entirely vain. The fact is that the Carrier took two hours of Mr. Hughes' time for its own use and benefit and in the furtherance of its own business. Whether he worked or only stood and waited he is entitled to be paid for this time. Neither refinements of reasoning or quibbling by words can alter the plain facts of the case nor impair the justice of the Employes' position. The time consumed was his time, subject to directions from his employer to use it otherwise, and

upon receiving such directions it was his duty to attend to his employer's business. It then became the duty of the employer to pay for that time at the agreed rate."

Subsequently, Referee Fox expressed his views on the subject in Award 2223, in the following clear and convincing language:

"We think the time has come when we should say that where the employe is not himself involved in a matter being investigated, and he is called by the Carrier, in its own interest, to attend an investigation, he should be paid, whether we call what he does 'work' or 'services,' and whether he is called on his rest day or otherwise is not controlling. Whatever it is, the employe's time is taken, at the request or under the direction of the Carrier, and in its interest. In the instant case, the employe was on continuous duty from 5:00 A. M. of one day until 4:00 A. M. of the day following, twenty-three hours, and deprived of an opportunity to get the rest which the Agreement must contemplate he was entitled to. We do not think the Agreement should be interpreted to mean that such services should be rendered without pay. We choose to follow Award No. 2032, and say that what he did was 'work' within the true intent and meaning of the Agreement, rather than the Awards which hold to the contrary. If the Board was wrong in its earlier or even recent Awards, it should set itself right."

Attention is called to the fact that Rule 25 (a) provides, generally, that "time in excess of eight hours . . . on any day will be considered overtime and paid for. . . ." (Our emphasis.) While it may be argued with much logic that the words "work" and "service" are synonymous, it can hardly be said that "time," as used in the above rule has the same meaning.

Considering the express language of the rule here before us and the fact that the investigation which the Claimant was required to attend was in nowise associated with her assigned duties, either by reason of the nature thereof or in point of time, but was for the exclusive benefit of the Carrier, we have concluded to allow this claim. To hold otherwise would place us in the unenviable position of saying that a person's particular services may be demanded without just compensation. This we are unwilling to do.

FINDINGS: The Third Division of the Adjustment Board, after giving the parties to this dispute due notice of hearing thereon, and upon the whole record and all the evidence, finds and holds:

That the Carrier and the Employes involved in this dispute are respectively carrier and employe within the meaning of the Railway Labor Act, as approved June 21, 1934;

That this Division of the Adjustment Board has jurisdiction over the dispute involved herein; and

That the Carrier violated the Agreement.

AWARD

Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: H. A. Johnson
Secretary

Dated at Chicago, Illinois, this 28th day of February, 1945.