Award No. 5260

Docket No. MW-5224

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Francis J. Robertson, Referee

PARTIES TO DISPUTE:

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES

THE BALTIMORE AND OHIO RAILROAD COMPANY

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood:

(1) That Kenneth B. Freightner, Archie M. Traster, Warren E. Royer, John Handshoe, Russell D. Traster, Charles A. Traster, Delmar C. Newman and William E. Royer, Section Men at Garrett, Indiana, who on March 9, 10, 15, 16, 17, 18, 22 and 23, 1948, were required to travel prior to and following their assigned work period, were improperly compensated for such service;

(2) That the above listed Employes be paid the difference between what they received at their straight time rate of pay and what they should have received at the time and one-half rate of pay for all time spent traveling at the Carrier's direction during the time referred to in part (1) of this claim.

EMPLOYES' STATEMENT OF FACTS: The eight claimants involved in this instant claim were required to report prior to their assigned starting time on March 9, 10, 15, 16, 17, 18, 22 and 23, 1948, as they were assigned to assist in laying new rail at Nappanee, Indiana.

At the close of their work each day, they were returned to Garrett, Indiana, their assigned headquarters, and released. They did not return to Garrett until after their assigned quitting time each evening.

In transporting these employes between Garrett and Nappanee, Indiana, the Carrier assigned them to ride in an old box car which had been converted into a camp car. There were no seats in the car except one bench, about 8 ft. long. The employes who were required to ride in this converted box car had no place to sit except on the 8 ft. bench or on spike kegs or on the floor of the car. The employes were compensated for the time consumed traveling in the camp car at their straight time rate of pay.

It has, in the past, been the practice to compensate section men who are required to travel on work trains during overtime hours at the time and one-half rate of pay except in instances where these employes were permitted to ride in the caboose, or where adequate and comfortable camp car facilities were afforded.

The agreement dated April 17, 1930, and all subsequent amendments and interpretations, are by reference made a part of this Statement of Facts.

In Award No. 1435 the Division with Referee Royal A. Stone sitting, stated in part that:

> "Conduct may be, frequently is, just as expressive of intention and settled conviction as are words, either spoken or written. Here there is so much uncontradicted evidence of unambiguous conduct by both parties to the issue, evidencing the conclusion which is considered determinative, that no course is open for a judicial pronouncement other than the claim be denied. * * *."

In Award No. 3499 the Division together with Referee James M. Douglas found in part:

> "Accordingly, under the terms of the Agreement as revised travel time may not be considered as part of sixteen continuous hours of work as a basis for double time. The rule could not have intended that travel time could be a basis for double time although expressly not for the overtime rate.
>
> It follows that the claim must be denied."

In view of the above the Carrier submits that the Awards of this Division do not support this claim.

OPINION OF BOARD: Claimants are sectionmen working out of Garrett, Indiana. On the days involved in this claim they were required to report in advance of their regular starting time at Garrett in order to travel to Nappanee, Indiana, to assist in a rail laying project. For the time spent in such travel they were paid at the straight time rate. Claim is made for an additional half time. Employes rely on Rules 39 and 45 of the Agreement, both of which are quoted below:

Rule 39

> "**OVERTIME.** Time worked preceding or following and continuous with a regularly assigned eight-hour work period shall be computed on actual minute basis and paid for at time and one-half rates, with double time computed on actual minute basis after sixteen continuous hours of work in any twenty-four hour period computed from starting time of the employe's regular shift. In the application of this paragraph to new employes temporarily brought into the service in emergencies, the starting time of such employes will be considered as of the time that they commence work or are required to report. This not to affect basis of pay for meal period, travel time, or attending court, as provided in Rules 49, 50, 53, 56, 58, 61, 62, 63, 64, 65 and 66.
>
> Nothing herein shall apply to positions which are not assigned to regular daily hours and the rates of which comprehend all service performed, including incidental overtime.
>
> The straight time hourly equivalent of daily, weekly or monthly positions affected, i.e., positions requiring time and one-half payment under this rule, and for the purpose of adjusting rates of pay under Rule 38, shall be determined on the basis of the hours and compensation (both straight time and overtime) comprehended by existing rates."

Rule 45

> "**BEGINNING AND ENDING OF DAY.** Employes' time will start and end at designated assembling points for each class of employes."

Carrier asserts that Rule 62 of the Agreement is controlling and that the employes were duly compensated in accordance therewith. Rule 62 reads as follows:

Rule 62

"Employes required by the Management to travel intermittently on or off their assigned territory and return to their home station at the end of the day, will be allowed straight time, exclusive of meal period, for actual time traveling, working or waiting."

Obviously, Rule 39 and Rule 62 must be considered together. In fact, the parties in the drafting of the Agreement indicated that they should be so considered when they provided that the premium time requirements of Rule 39 were not to affect rules relating to travel time. Clearly, in situations where Rule 62 is applicable, not all time elapsing between time of reporting and time of release is counted under Rule 39 in determining the number of hours worked for the purpose of computing overtime premium. The Employes inferentially recognize that this is true for they state in their submission:

"It has, in the past, been the practice to compensate section men who are required to travel on work trains during overtime hours at the time and one-half rate of pay except in instances where these employes were permitted to ride in the caboose, or where adequate and comfortable camp car facilities were afforded." (Underscoring added.)

A great deal of the Employes' submission is devoted to discussion of the type and condition of the car in which they were transported from Garrett to Nappanee. In affidavits of claimants the car is variously described as a converted box car or camp car. The Carrier asserts that the car was a camp car in good and sanitary condition and mechanically sound. Further Carrier points out that at no time prior to the presentation of this claim did any of the claimants or representatives of the Employes protest about the type of accommodation with which they were outfitted.

In substance, the Employes recognize the applicability of Rule 62 to the situation herein present, but claim that because of the type of accommodation furnished the time spent in traveling from Garrett to Nappanee should be treated as time worked and paid for at the premium rate. Rule 62 makes no mention of type of accommodation which should be afforded employes required to travel. The burden of establishing a qualification or exception to the Rule would clearly be upon the Employes. On the basis of the facts of record herein we cannot conclude that they have met this burden. Accordingly, the claim must be denied.

FINDINGS: .The Third Division of the Arjustment 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 Employes involved in this dispute are respectively Carrier and Employes 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 Carrier did not violate the Agreement.

AWARD

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: A. I. Tummon
Acting Secretary

Dated at Chicago, Illinois, this 19th day of March, 1951.