Award No. 6814
Docket No. TE-6672

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Francis J. Robertson, Referee

PARTIES TO DISPUTE:

THE ORDER OF RAILROAD TELEGRAPHERS

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY—(Coast Lines)

STATEMENT OF CLAIM: Claim of the General Committee of The Order of Railroad Telegraphers on the Atchison, Topeka & Santa Fe Railway System, that:

1. The Carrier violated the Agreement between the parties when, beginning June 1, 1951, it refused and continues to refuse to allow incumbents of telegrapher-towermen positions at Redondo Junction Tower, California, twenty minutes in which to eat during each shift of eight consecutive hours, and

2. The Carrier shall be required to pay each of the incumbents of said positions the equivalent of twenty minutes pay at the rate of the position occupied for each day they have been denied twenty minutes in which to eat during their 8 hour shifts.

EMPLOYES' STATEMENT OF FACTS: An agreement bearing effective date of June 1, 1951, beween the parties to this dispute is in evidence.

At Redondo Junction, California, approximately three miles from the Union station at Los Angeles, California, the Carrier maintains an interlocking tower at a point where the Union Pacific and Santa Fe tracks cross. Three shifts of towermen are assigned in around-the-clock service. In addition to the three regularly assigned towermen there is a regularly assigned relief towerman to provide rest day relief service.

Page 82 of the Agreement shows the following:

Redondo Junction ..... Towerman (3) ..... (L) 1.755

Each of the towermen is assigned to a shift of eight consecutive hours and there is only one employe on duty at any given time during the twenty four hour period of each calendar day. Switch engines operate in the yards during the entire 24 hours of each day. The moves made by the switch engines as well as both Santa Fe and Union Pacific through trains require the towermen to line up switches and signals to permit the necessary operations.

"The Board views the second claim as an effort on the part of the Organization to penalize the Carrier for a breach of the Agreement, i.e., to levy a fine on the Carrier. There is nothing in the Railway Labor Act to give this Board any such authority. Nor is there any provision in the Agreement calling for any fines or penalties in case of violations."

It must therefore be equally true that the Board is without authority to write a penalty into a rule, such as Article VI, Section 2, where none now exists.

The Third Division, NRAB, has consistently held that it has no authority to revise or otherwise change or modify agreement rules in effect between the parties to a dispute. The Carrier quotes hereunder in that connection in part from Opinion of Board in Award 2622:

"Unless language expressly or impliedly authorizing payment of eight (8) hours' pay at rate and one-half for service on petitioner's rest day can be found in the agreements themselves it is not within the province of the powers of this Board to read into them any such meaning or import. To adopt the practice of broadening or extending the terms of 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."

See also Third Division Awards 383, 389, 794, 1248, 1257, 1568, 1589, 1609, 2029, 3421, 4050, 5636, 5767, 5790 and many others.

The Third Division has also consistently held that it does not sit as a court of equity. Witness particularly the following from Opinion of Board in Third Division Award 5994:

"We are dealing with Rules as written. Equity cannot be considered. The Rules here considered are not ambiguous. If the Rules are to be changed it must be done under the Railway Labor Act."

See also Awards 4250, 4763, 5517, 5703, 5977 and others.

In conclusion, the Carrier repeats that the Employes' claim in the instant dispute is not only wholly without schedule support or merit, but is furthermore a clear attempt to obtain by Board award a payment which the Employes were unable to obtain in negotiation of the current Agreement with the Carrier, and should be denied in its entirety for reasons which have been stated hereinabove.

The Carrier is uninformed as to the arguments the Organization will advance in its ex parte submission and accordingly reserves the right to submit such additional facts, evidence and argument as it may conclude are necessary in reply to the Organization's ex parte submission or any subsequent oral argument or briefs presented by the Organization in this dispute.

All that is herein contained has been both known and available to the Employes or their representatives.

(Exhibits not reproduced.)

OPINION OF BOARD: This claim is based upon an asserted failure of the Carrier to comply with Article VI, Section 2, of the current Agreement. The Claimants hold shift positions in the Redondo Junction Tower, California, and assert that they were not allowed twenty minutes in which to eat as provided in the aforementioned section of Article VI which reads as follows:

"Section 2. An employe working a shift of eight (8) consecutive hours shall be allowed twenty (20) minutes in which to eat without deduction in pay."

The Employes contend that this rule entitles the Claimants to twenty uninterrupted minutes in which to eat, regardless of whether they do so inside or outside of the Tower.

The Carrier contentions are mainly (1) that the Employes have failed to maintain the burden of proof in that they have not shown that the Claimants were not allowed the twenty minutes; (2) that under a practice originating on the property in 1922 of which the present rule is an outgrowth, no claims were ever made that these employes were not afforded the twenty minutes in which to eat; (3) that the rule does not contemplate that the employes shall be wholly released from duty during the period and (4) that the rule carries no penalty provision.

From the language of the rule it is clearly mandatory that shift employes are to be allowed twenty minutes to eat without deduction in pay. It is also clear from the rule that it does not necessarily require that the shift employe be permitted to leave the Tower during that twenty minutes.

The Carrier's contention with respect to the failure of the Employes to sustain the burden of proof seems to be based upon its concept of the rule which is apparently that so long as twenty minutes in the aggregate spread over the eight hour shift is allowed to the employe in which to eat there is compliance with the rule. From the Carrier's submission in this dispute it is clear that the requirements of the service at Redondo are such that the greatest period of uninterrupted time a towerman would have during a shift would be about 5 minutes (the length of time it takes for a train or a cut of cars to move through the plant). This is a clear admission that the employes involved were not free to eat for a period of twenty minutes. Inasmuch as the caption of the rule refers to a "Meal Period" the conclusion is inescapable that the twenty minutes refers to a period of time in which to eat and set aside for that purpose. If it were intended that meals were to be taken on the fly, so to speak, five minutes or less at a time, it is reasonable to expect that the rule would merely have provided that employes would be permitted to eat while on duty without any provision for a specific number of minutes for the purpose. We conclude, therefore, that the Claimant employes were not allowed twenty minutes in which to eat within the meaning of the rule.

The Carrier's argument with respect to the so-called practice does not refer to a practice under this rule since the rule was only written into the Agreement in 1951. The practice referred to stems from the so-called "Gregg" letter written July 17, 1922. That letter indicated that the Carrier decided as a gratuity not as a matter of agreement to allow Telegraph Department employes not to exceed twenty minutes for lunch without deduction in pay, at such time during their period of assignment as would least inconvenience the service. Since 1951, however, what was formerly a gratuity became a contract obligation which would place a different complexion on a money claim for failure to allow the time to eat. The mere fact that the rule carries no penalty provision is no bar to sustaining the claim as made. (See Awards 2855, 2756.)

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 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 violated the Agreement.

AWARD

Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: (Sgd.) A. Ivan Tummon
Secretary

Dated at Chicago, Illinois, this 29th day of November, 1954.