Award No. 8825

Docket No. MW-8297

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Norris C. Bakke, Referee

PARTIES TO DISPUTE:

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES

CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY

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

(1) The Carrier violated the effective Agreement when, on September 9, 10 and 14, 1954, it compensated track laborers assigned to the sections at Aurora, Illinois and Montgomery, Illinois at straight time rate for work performed in going to and from their headquarters and point of work;

(2) Claimant employes now be allowed the difference between what they should have received at their respective overtime rate of pay and what they did receive at their pro rata rate of pay account of violation referred to in part one (1) of this claim.

EMPLOYES' STATEMENT OF FACTS: Claimant employes are members of the Carrier's Section Gangs located at Aurora, Illinois, and at Montgomery, Illinois, respectively. Their section headquarters is their home station and designated assembling point where their time begins and ends. The regular established daily assignment for these employes was from 7:30 A. M. to 4:30 P. M. with one (1) hour meal period.

The following named section laborers, on the dates indicated, were required to leave this headquarters in advance of their regular reporting time in order to perform service at Serena, Illinois, during the hours comprising their regular assignment (7:30 A. M. to 4:30 P. M., less one (1) hour for noon meal period), thereby making it necessary that they return to their assigned section headquarters during hours not comprehended in their regular assignment.

"We are of the opinion the employes ceased performing work for the Carrier when the emergency work to which they were assigned was completed or they were relieved by Carrier. That the requirement by Carrier for the employes to return to their headquarters was not **work** within the meaning of the Scope Rule, and Rules 11 and 12, but was **service** performed, as required by Carrier and such a situation of facts as we have here is clearly covered by the provisions of Rule 22 of the Agreement, and the employes were paid for the actual time consumed in traveling, by Carrier, at the regular rate of pay. The fact the employes were required to travel, does not constitute work, as provided by the Scope Rule, and we hold the traveling as required was a service, and not work generally recognized as signal work within the meaning of the Scope Rule."

Also see Third Division Awards 6567, 6568, 6651, 6857 and 6859, all of which denied claims for punitive rate in cases where the rules, facts and circumstances were similar or identical to those present in the instant dispute.

It is conceivable, although employes did not so contend on the property, that in their submission the Employes might contend that had claimants traveled on a track motor car instead of in a truck they would have been considered working and would have been paid punitive rate. If such contention is made by Petitioner, it cannot be supported by any rule, ruling, practice or understanding in effect. Actually, if claimants had traveled on a motor car, only the operator thereof would have been compensated at the punitive rate, because he would have been considered working. All others on the motor car would have been paid pro rata rate because they would have been riding, not working, in exactly the same manner as described in the Opinion of the Board in Award 2304.

The claimants in this case performed no work before or after assigned hours, as contemplated by Rule 39. They did perform a "service", that is, they traveled by direction of Management from their home station to another station. This "service" is clearly provided for in Rule 46(b), which specifically and unambiguously states that such "service" will be paid for at the **pro rata rate before and after assigned working hours.**

In the light of the clear provisions of Rule 46(b), and the fact that claimants rode in a chauffeur-driven truck and performed no work whatever, the Carrier respectfully submits that claim for punitive rate is completely unsupported by any contractual requirement and must be denied, just as the claims were denied in Awards 2304, 2305, 2306, 2307, 2308, 2309, 3499, 5260, 6400, 6567, 6568, 6651, 6857 and 6859.

* * * * *

The Carrier affirmatively asserts that all of the data herein and herewith submitted has previously been submitted to the Employes.

* * * * *

(Exhibits not reproduced.)

OPINION OF BOARD: The only question to be decided in the instant dispute is whether Claimant employes are entitled to be paid at the overtime (time and one-half) rate for time consumed in going from their headquarters

to point of work and returning therefrom on the dates listed. They were paid at the straight time or pro-rata rate.

The factual situation and rules involved are as follows:

Claimants, eleven in all, are Section Laborers assigned on Sections at Aurora, Illinois, or Montgomery, Illinois. On the days involved in this claim they were required to report in advance of their regular starting time (7:30 A. M.) in order to travel by truck to Serena, Illinois (a distance of thirty-one miles from Aurora and twenty-nine miles from Montgomery), to assist in the unloading of rail—work was done during the regular hours of their assignments (7:30 A. M. to 4:30 P. M.). At 4:30 P. M., on each of the days involved, they made the return trip to their starting points (the tool houses at Montgomery and Aurora) by the same trucks used to take them to Serena. These trucks were driven by the Foremen.

For the time spent in travelling to and from Serena the Claimants were paid the straight time rate. Claim is made for an additional half time, the Organization relying on provisions set out in Rules 33 and 39 of the Agreement, both of which are quoted in part, below:

"STARTING POINT

"Rule 33. Time of employes will start and end at designated assembling point. Designated assembling or starting point will be interpreted as follows:

(a) Section Forces:—At tool houses."

"OVERTIME

"Rule 39 (a). 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, * * *."

as well as a purported practice supposedly in effect from the earliest days on this property:

"The Employes submit that service of this nature, i. e. time consumed in advance of and following the regular eight (8) hour assignment in going from the headquarters to the actual point of work and return, has always been paid for under the aforequoted Rule 39(a), at the applicable time and one-half rate of pay. * * *"

Carrier asserts that Rule 46 of the Agreement is controlling and that, based on its provisions—particularly Section (b), the Claimants were duly compensated in accordance therewith . Section (b) of this rule reads, in part, as follows:

"(b) **Employes not in outfit cars,** other than Water Service Repairmen and Helpers **who are required by direction of the Management to leave their home station,** will be allowed actual time for traveling or waiting during the regular working hours. All hours worked will be paid for in accordance with practice at home station. **Actual time traveling before and after assigned working hours, and on holidays and their assigned rest days,** including time waiting for trains at away from home stations, **will be paid for at pro rata**

rates, except that when sleeping accommodations are afforded for five (5) hours or more, no travel time will be allowed outside of regularly established working hours." (Emphasis added.)

That the Claimants did actually leave their home stations, Carrier shows that those Claimants based at Aurora had to travel over four Sections before they reached Serena, and that those Claimants based at Montgomery had to travel over no less than three Sections (and five stations) before they reached Serena.

As usual, numerous awards are cited on both sides to sustain their respective positions, but when we get down to the "blue chip" awards, a brief comment on them focuses the issue on three or four awards, and one award, as we shall show later is determinative.

Three of the principal awards relied upon by the Carrier are 2304 by Rudolph, 5040 by Carter, and 5942 by Parker, all denial awards. Award 2304 has gone through so many refinements that it has lost its potency as a precedent. See Awards 3303, 3304, 3966, 4581, 4850, 6668.

Awards 5040 and 5942 were both decided under a rule captioned "Temporary or Emergency Travel Service" and both awards were grounded on the emergency feature of the facts therein delineated, so they are not too much help to us here, because our Rule 46(b) is not an emergency rule.

However, the key to our situation is found in another award relied upon by Carrier viz. 6859 wherein occurs this language:

"Having determined, as we do, that under the confronting facts and circumstances the rules of the agreement last above mentioned are not of such character as to warrant or compel a construction they require payment for time spent in waiting or traveling while assigned to the involved lumber inspection position, we have little difficulty in concluding that **past practice on this property must govern** * * *." (Emphasis ours.)

Employes in the instant case state unequivocally that the past practice on this property has been to pay claims of this kind and the record contains several pages of claims so paid. In commenting on these claims the Carrier says:

"* * * All that need be said about these statements and their purported payment is that the Carrier was obviously misled by the Section Foreman if it paid for overtime at the time and one-half rate, if travel time was included therein. * * *"

We had a strikingly similar situation involving the same class of employes, similar rules and claims in our recent Award 6668, wherein the Carrier claimed the payments of similar claims were "due to error or improper passing by the Accounting Department" we said:

"* * * The ease with which error in so reporting this time could be detected, if in fact it was to be treated as 'travel time' * * * renders Carrier's explanation of such payments * * * somewhat implausible. * * *"

In Award 6668:

"The Employes assert that it has always been a practice on this Carrier to pay track gangs for time spent in getting from and to the assembly point (Tool House) and the work location as work time

and when that time was spent before or after working hours, it was paid for on an overtime basis. * * *" (Parenthesis ours.)

That is the position of Claimants in the instant case and we feel Award 6668 is controlling.

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 the Carrier violated the Agreement.

AWARD

Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: A. Ivan Tummon
Executive Secretary

Dated at Chicago, Illinois, this 15th day of May, 1959.

DISSENT TO AWARD NO. 8825, DOCKET NO. MW-8297

Departure from sound rules of contract interpretation resulted in serious error in this Award.

Rule 46 (b) specifically applied to the facts and circumstances involved. Since that rule expresses its own exceptions, no other exceptions could be assurmed. It stipulates the requisite compensation in no uncertain terms so that resort to practice, clearly established or otherwise, was wholly unwarranted, and the practice in evidence in this case was dubious and unsupported to say the least. Applying general rules when a specific rule controls, and weighing practice when the rule itself is definite and certain, obviously produced an unsound result.

Our authority and conduct are governed by law and our Opinions and Awards must be within the framework of the Railway Labor Act and the pertinent Agreement maintained thereunder. Award 8825 exceeds our lawful authority and extends beyond the terms of the applicable Agreement rule.

For these reasons, we dissent.

/s/ J. F. Mullen

/s/ R. M. Butler

/s/ W. H. Castle

/s/ C. P. Dugan

/s/ J. E. Kemp