Award No. 18424
Docket No. MW-18845

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Robert M. O'Brien, Referee

PARTIES TO DISPUTE:

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES

NORFOLK AND WESTERN RAILWAY COMPANY

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

(1) The Carrier violated the Agreement when it paid Clamshell Operator C. Michaels and Machine Laborer B. G. Barton for fourteen (14) hours at the straight time rate on March 4, 1969 and for one (1) hour at the straight time rate on March 7, 1969 instead of paying the claimants for fifteen (15) hours at the time and one-half rate for overtime service on March 4, 1969 and for one (1) hour at the time and one-half rate for overtime service on March 7, 1969. (System File MW-ROS-69-3.)

(2) Claimants C. Michaels and B. G. Barton will be allowed the monetary loss suffered because of the violation referred to in Part (1) of this claim.

EMPLOYES' STATEMENT OF FACTS: C. Michaels and B. G. Barton are the occupants of the regular positions of clamshell operator and machine laborer respectively, with assigned headquarters at Roanoke, Virginia. Their regularly assigned work period extends from 7:30 A. M. to 4:00 P. M., Monday through Friday, exclusive of a thirty (30) minute meal period.

The claimants' work day, as well as their time, starts and ends at Section No. 2 Tool House at Roanoke, Virginia under the provisions of Rule 38 which read:

"Employes' time will start and end at designated assembling points for each class of employes, such as tool houses, camp cars, carpenter shops, etc."

On or about March 4, 1969, a derailment occurred at Rippon, West Virginia whereat the Carrier had need for a unit of equipment commonly referred to as a "clamshell." At 4:30 P. M. on March 4, 1969, the claimants and the clamshell were "transported to said derailment by a work train which arrived at Rippon at 7:30 A. M. on March 5, 1969. The claimants were entitled to fifteen (15) hours' pay at their respective time and one-half rates for such overtime service under the provisions of Rule 43(a) which read:

That part of revised Rule 47 is explicit and is not limited to employes in relief or extra service. By its wording, it applies to any employes other than those having movable headquarters covered by Part I. Even if Interpretation No. 40 did amend Part II of the rule, which we deny, it would only pass upon the deductibility of the one-hour lag time on the going and returning trips. It would in no event support your position that the time in question must be paid for at time and one-half rate. Again the Carrier relies upon the plain wording of the rule that the excess over one hour in each case 'shall be paid for as working time at the straight time rate.' The Carrier's denial of August 1, 1969, is affirmed.

Regarding your request for additional time, the Carrier is agreeable that the time limit for your further handling of this case be extended 60 days.

Yours truly,

Vice President–Personnel"

OPINION OF BOARD: Claimants C. Michaels and B. G. Barton are the occupants of the regular positions of Clamshell Operator and Machine Laborer respectively, with assigned headquarters at Roanoke, Virginia. Pursuant to Rule 38 of the current Agreement, their time starts and ends at the Section No. 2 Tool House at Roanoke, Virginia. Rule 38 reads as follows:

"Employes' time will start and end at designated assembling points for each class of employes, such as tool houses, camp cars, carpenter shops etc."

This much is undisputed.

On or about March 4, 1969, a derailment occurred at Rippon, West Virginia, some 200 miles north of Roanoke. The Carrier had need for a unit of equipment commonly referred to as a "clamshell" at the derailment site. Consequently, on March 4, 1969, Claimants were ordered to prepare their crane for movement by work train from Roanoke to Rippon in order to assist in picking up derailed cars.

Claimants claim that their regularly assigned work period extends from 7:30 A. M. to 4:00 P. M., exclusive of a thirty (30) minute meal period, while Carrier claims their regular hours of duty are 7:00 A. M. to 3:30 P. M. with thirty (30) minutes for lunch.

Claimants further claim that at 4:30 P. M. on March 4, 1969, they and the clamshell were transported to said derailment by a work train which arrived at Rippon, 7:30 A. M. on March 5, 1969, while Carrier states that the work train left Roanoke at 4:00 P. M., March 4, 1969, and arrived at Rippon, the worksite, at 3:30 A. M., March 5, 1969. After picking up derailed cars at Rippon, they were returned to headquarters by a work train. Claimants alleging they arrived at Roanoke, at 5:00 P. M. on March 7, 1969, while Carrier avers they arrived at 5:30 P. M. on March 7, 1969.

The Claimants were compensated as follows:

MARCH 4: 8 hours at straight time rate, 7:00 A. M. to 3:30 P. M. 14½ hours at straight time rate as travel time 3:30 P. M., March 4, to 7:00 A. M., March 5, deducting one hour lag time.

MARCH 5: 8 hours at straight time rate plus ½ hour at overtime rate account no meal period taken.

MARCH 6: 8 hours at straight time rate plus 3½ hours at overtime rate which included 30 minutes at overtime rate account no meal period taken.

MARCH 7: For the travel back to their headquarters which extended over their regular work period March 7, they were allowed 22 hours straight time rate, 6:30 P. M., March 6, to 5:30 P. M., March 7, less one hour lag time.

The Organization alleges that Carrier violated Rule 43(a) of the Agreement when it compensated Claimants for fourteen (14) hours at the straight time rate on March 4, 1969, while traveling from Roanoke to Rippon, instead of paying said Claimants for fifteen (15) hours at the time and one-half rate for overtime service. It is further claimed that Carrier violated Rule 42(a) of said Agreement when it compensated Claimants for one (1) hour at the straight time rate on March 7, 1969, instead of for one (1) hour at the time and one-half rate for overtime service on March 7, 1969.

There can be no question that Rule 42(a) of the applicable Agreement requires time and one-half compensation for "time worked" preceding or following and continuous with a regularly assigned eight hour work period and that Rule 43(a) provides for the same punitive compensation when the "time worked" is not continuous with the regular work period. Rule 42(a) of the Agreement, effective December 16, 1963, reads, as follows:

"RULE 42. OVERTIME

(a) Except as otherwise provided in the sub-paragraph of this Paragraph (a), of Rule 42, 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 (a) 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 shall not affect the present provisions of this agreement covering meal periods.

Except as otherwise provided in Paragraph (b) and (c) of this Rule 42, and Rule 40, employes who perform relief service on two or more positions within a twenty-four (24) hour period will be paid straight time for the first eight (8) hours worked on each position."

Rule 43(a) of said Agreement reads:

"RULE 43. CALLS

(a) Employes notified or called to perform work not continuous with the regular work period will be allowed a minimum of 2 hours and 40 minutes at the overtime rate for 2 hours and 40 minutes or less and if held on duty in excess of 2 hours and 40 minutes, will be paid at the overtime rate for all work performed until the beginning of the regular work period. Employes will be paid at the overtime rate on minute basis for service performed continuous with and in advance of regular work period."

However, Carrier denies that Rule 42(a) and Rule 43(a) are applicable to the case at bar, and premises its denial of time and one-half compensation on revised Rule 47 II(d), effective November 18, 1968, which reads as follows:

"PART II.

EMPLOYES NOT IN CAMP CARS, CAMPS OR HIGHWAY TRAILERS

Such employes who are required in the course of their employment to be away from their headquarters point as designated by the Company, including employes filling relief assignments or performing extra or temporary service, shall be compensated as follows:

(a) The Company shall designate a headquarters point for each regular position and each regular relief position. For employes other than those serving in regular positions or in regular assigned relief positions, the Company shall designate a headquarters point for each employe. No designated headquarters point may be changed more frequently than once each 60 days and only after at least 15 days' written notice to the employe affected.

* * * * *

(d) If the time consumed in actual travel, including waiting time enroute, from the headquarters point to the work location, together with necessary time spent waiting for the employe's shift to start, exceeds one hour, or if on completion of his shift necessary time spent waiting for transportation plus the time of travel, including waiting time enroute, necessary to his headquarters point or to the next work location exceeds one hour, then the excess over one hour in each case shall be paid for as working time at the straight time rate of the job to which traveled. When employes are traveling by private automobile time shall be computed at the rate of two minutes per mile traveled."

Rule 47 II(d) treats specifically with travel, and as such, Carrier alleges that it is a specific Rule, unambiguously applicable to the exact circumstances out of which this dispute arose, and as such, Rule 47 II(d) takes precedence over Rule 42(a) and Rule 43(a) which are general rules.

Thus the issue to be resolved is whether the Claimants' time involved, as enumerated in paragraph (1) of the Claim, is "time worked" and, as such, compensable at time and one-half pay within the purview of Rule 42(a) and

Rule 43(a); or whether said time is "travel time," and thus compensable at straight time pay, as is required by Revised Rule 47 II(d).

It cannot be questioned that the language in the pertinent Rules of the Agreement is in conflict. Since the record is wanting with regard to past conduct of the parties which could shed light on the interpretation of these apparently conflicting Rules, and since it is not unquestionably clear whether the time in question was "travel time" or "time worked," this Board must ascertain what Rule the parties intended to apply to the circumstances of this Claim.

The record indicates that Claimants were required by the Carrier to travel at night, in their crane, to a site over 200 miles from their headquarters, without apparently being able to sleep enroute. We feel these circumstances clearly demonstrate that Claimants time while enroute to Rippon was "time worked" and thus compensable at time and one-half as required by Rule 43(a).

This holding is in accord with well established principles enunciated by this Board.

In Award 9983, involving similar overtime and travel provisions, this Board held:

> "Rule 41(b) treats specifically with travel and would be controlling in the present situation if it were clear that the one hour period under consideration constituted 'travel' within the meaning of the Rule. The record, however, contains considerable evidence . . . that the parties have regarded short-haul motor transportation to work sites as 'service performed' rather than as 'travel'."

While 9983 is distinguishable from the case at bar in that the travel there was short-haul, we are constrained to hold that the travel there was no less "time worked" than that of the Claimants.

And in Award 4850 (Carter), this Board held:

> "Time spent in traveling between the assigned headquarters and the location of the work is time for which an employe is entitled to payment, and if done before or after assigned hours, it is overtime work."

See Awards 13359 (Engelstein) and 6668 (Robertson).

It is undisputed that Claimants arrived back at Roanoke, their headquarters, at either 5:00 P. M. or 5:30 P. M. on March 7, 1969. It is also undisputed that Claimnants' regular tour of duty terminates at either 3:30 P. M. or 4:00 P. M. For this time worked following their regularly assigned eight-hour period, Claimants claim payment at the time and one-half rate. For the reasons previously stated Claimants' allegation is meritorious and they are entitled to said punitive compensation. It is unnecessary to harmonize the apparent conflict between the arrival times since looking at the facts in a light most favorable to Carrier, Claimants admittedly have worked at least one hour beyond their regular work period and therefore Carrier is not prejudiced by the Claim.

Nor does the one hour lag provision of Rule 47 II(d) preclude said result as Arbitration Board No. 298, in Interpretation No. 40, construed Paragraph D of Section II of the award, which is identical to the first paragraph of Rule 47 II(d) when it stated:

> "To the extent that this dispute may involve the interpretation of the schedule agreement, Arbitration Board No. 298 does not have jurisdiction; however, that portion of II-D providing for a one-hour lag before travel or waiting time starts applies only to employes in relief or extra service while traveling to or from a work location."

There can be no doubt that Claimants were not relief or extra service employes and thus by evident implication were not bound by the one-hour lag provision. (See also 18033 (Dolnick).)

No one can deny Carrier's contention "that it is a well known rule of *construction that where there is a dispute as to the possible application of* rules, alleged to be conflicting, the rule or rules having specific application must be taken." Award 14332 (Hall). However, having construed revised Rule 47 II(d) as not a special rule, the Awards proffered to this effect are inapplicable.

Carrier asserts that the Claim should have been dismissed since Petitioner relied on Rule 42(a) on the property as justification for punitive compensation for the going trip while for the first time in his Claim, he relied on Rule 43(a). This Board has consistently held that where there is a **"substantial variance** (emphasis ours) between the claim handled on the property, and that presented to the Board, we cannot resolve the dispute." Award 15384 (Ives); 14878 (Ritter).

Yet, in Award 11214 (Dolnick), we held:

> "It is not the purpose of the Railway Labor Act . . . to dismiss *disputes on mere technicalities. It is rather the intent to resolve them* on the merits unless it is clear that the essential procedural provisions have been completely ignored or that the Carrier is unable to ascertain the identity of the Claimants."

In the case at bar, essential procedural provisions have not been ignored, nor can the alteration from Rule 42(a) to Rule 43(a) as the basis for the Claim, be interpreted as a "substantial variance" as alleged by Carrier. Consequently, we decided the dispute on the merits.

For all the reasons herein set forth, the Board concludes that the claim is valid.

FINDINGS: The Third Division of the Adjustment Board, upon the whole record and all the evidence, finds and holds:

That the parties waived oral hearing;

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 Agreement was violated.

AWARD

Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 26th day of February, 1971.

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