Award No. 5167
Docket No. CL-5144

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Adolph E. Wenke, Referee

PARTIES TO DISPUTE:

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

ST. LOUIS SOUTHWESTERN RAILWAY COMPANY

ST. LOUIS SOUTHWESTERN RAILWAY COMPANY OF TEXAS

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employes:

1. That the Carrier violated the Clerks' Agreement, beginning in January, 1949, when it arbitrarily changed a long established practice of allowing employes pay at their regular rates when called to perform jury duty or to serve as Judges or Clerks at elections, thereby changing the working conditions attached to the position of Miscellaneous Agent's Accounts Clerk, Auditor Freight Accounts Office, St. Louis, Missouri, occupied by Mr. Harold Baer, when on January 17, 18 and 19, 1949, Mr. Baer was called to perform jury service in St. Louis, Missouri, and Mr. Baer was required to suffer a loss in earnings in the amount of thirteen hours at pro rata rate of his assigned position.

2. (a) That the Carrier be required to reinstate the practice in effect as of the effective date of our working conditions Agreement, namely, April 1, 1946 and thereafter until January, 1949.

(b) That Harold Baer be repaid the amount of compensation, i.e., thirteen (13) hours at $10.52 per day—amount $17.10—that was initially allowed to him but subsequently deducted from his pay, representing time he was absent in the performance of jury duty on January 17, 18 and 19, 1949.

EMPLOYES' STATEMENT OF FACTS: For many years prior to January, 1949, it had been an established practice to allow Clerical employes compensation at their regular rates of pay on days they performed jury service and served as Judges or Clerks at elections when it was not necessary to fill their assigned positions, and when the Carrier was put to no additional expense by reason of the employe being absent from his assigned position. This established practice was arbitrarily discontinued by the Carrier during January, 1949, without conference with the Organization, and since that action was taken, all Clerical employes are required to lose pay at the rate of their assigned positions for each hour they are absent from work on their positions.

upon the daily rate of position last worked, for actual hours attending court, inquest, or making deposition.

"38-3. Any fee or mileage accruing will be assigned to the Carrier."

It will be noted that in return for payment of a basic day on days directed to attend court the agreement is that the employe will assign fees and mileage to the Carrier. This, of course, results in the Carrier paying the difference in what an employe earns in court and what he would have earned had he not been required by the Carrier to attend court. The present claim is not that an employe should receive the difference in what he earns while in jury service and what he would have earned had he not been summoned. It is that he should retain his earnings as a juror and in addition should be paid by the Carrier the same as if he had been working. Such a requirement would be inequitable and inconsistent with present rules. Also the requirement claimed would not be justified for any reason. Mr. Baer laid off for a reason personal to him. He was, as a citizen of the City of St. Louis, required to perform service as a juror. But the duty devolved upon him by reason of being a citizen of the community and not because of being an employe of the Carrier. As previously indicated, the Carrier was without authority to direct him as to the time he would perform the jury service or to direct him in any other manner in connection therewith. It was required to release him promptly when he asked to lay off for jury service, regardless of the effect of such release upon its business. It could not reasonably be expected to contract to pay him under such conditions while laying off and under the direction and pay of other authority the same as though he had not layed off and had remained at work.

Furthermore, sustaining the claim for an employe absent because of jury service would only leave room for further claim when employes are absent for other personal reasons. That is, if an employe must be paid when absent on jury service, claims may be made that his fellow employes must also be paid when absent for other compulsory court attendance, such as, when required by service of summons to appear in court to testify in a case not involving the Carrier. In such instances, the absence would be compulsory as is jury service and might be due to no fault of the employe, but like the jury service it would be for a reason personal to him and not due to anything connected with business of the Carrier, for which he would be justified in requiring payment from the Carrier.

As previously pointed out the conditions under which payment is due are now definitely set forth in the agreement. Even when payment is intended to cover a period while absent rather than for time worked, a definite limit is specified, as shown by the 12-day limit in the sick leave and vacation rules. The existing conditions were fixed by agreement. The present claim would enlarge those conditions without agreement and leave the matter of payment while absent in an uncertain state. The Railway Labor Act, of course, makes the changing of rules a matter of negotiation and agreement, and not a function of the Board.

The Carrier respectfully submits that the claim is not supported by the rules nor justified for any reason, and respectfully requests that the claim be denied.

(Exhibits not reproduced).

OPINION OF BOARD: The System Committee of the Brotherhood contends that begining in January 1949 the Carrier changed a long established practice of allowing employes pay at their regular rates when called to perform jury duty or to serve as judges or clerks at elections when, on Jan. 17, 18 and 19, 1949, Harold Baer, Miscellaneous Agent's Accounts Clerk, lost thirteen hours of his regular assignment when called for jury service and Carrier refused to pay him for the hours lost by reason thereof.

The record shows that it has long been an established practice for the Carrier to allow clerical employes in the office of the Auditor Freight Accounts, St. Louis, Missouri, compensation at their regular rates of pay on days when they are absent from their work because performing jury service or serving as judges or clerks of elections, provided; it was not necessary for the Carrier to fill their assigned positions on those days and that Carrier was not put to any additional expense by reason of the employes being absent therefrom. This practice had become a part of their working conditions.

As stated in Award 2436 of the Division: "It is fundamental that a practice once established remains such unless specifically abrogated by the contract of the parties."

As stated in Award 4493 of this Division: "* * * where a contract is negotiated and existing practices are not abrogated or changed by its terms, such practices are enforceable to the same extent as the provisions of the contract itself."

No rule directly dealing with this practice and abrogating it has been cited nor do we find any. Rule 27-2 of the parties' agreement is cited by the Carrier. It deals with employes who lay off of their own account after they have commenced a tour of duty but before they have completed it. It does not deal with the subject now before us nor is it applicable thereto.

We think the claim is meritorious and therefore must be allowed.

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 Agreement was violated.

AWARD

Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: A. I. Tummon
Acting Secretary

Dated at Chicago, Illinois, this 20th day of December, 1950.