Award No. 6756
Docket No. CL-6856

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Jay S. Parker, Referee

PARTIES TO DISPUTE:

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

THE PENNSYLVANIA RAILROAD COMPANY

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

(a) The Carrier violated the Rules Agreement, effective May 1, 1942, as amended, on October 20, 1950, Baggage Department, Pennsylvania Station, New York, N. Y., New York Division, when various regular Station Baggagemen were used to perform extra work but C. P. Dwyer, senior Station Baggageman, was not called to perform this work.

(b) C. P. Dwyer be paid a day's pay at the punitive rate on account of this violation.

EMPLOYES' STATEMENT OF FACTS: This dispute is between the Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employes as the representative of the class or craft of employes in which the Claimant in this case held a position and the Pennsylvania Railroad Company—hereinafter referred to as the Brotherhood and the Carrier, respectively.

There is in effect a Rules Agreement, effective May 1, 1942, amended September 1, 1949, covering Clerical, Other Office, Station and Storehouse Employes between the Carrier and this Brotherhood which the Carrier has filed with the National Mediation Board in accordance with Section 5, Third (e), of the Railway Labor Act, and also with the National Railroad Adjustment Board. This Rules Agreement will be considered a part of this Statement of Facts. Various Rules thereof may be referred to herein from time to time without quoting in full.

The Claimant in this case on the date in question—October 20, 1950—was the incumbent of a regular position of Station Baggageman, Symbol No. 7-8-B-41, tour of duty 7:59 A. M. to 3:59 P. M., rest days Thursday and Friday, located in the Baggage Department, Pennsylvania Station, New York, N. Y. Positions of Station Baggageman are fully covered by all of the rules of the Rules Agreement.

On Thursday afternoon, October 19, 1950, it was determined by the Management that it would be necessary to augment the regular and extra force of Station Baggagemen on Friday, October 20, 1950. A notice was

ployes in the Baggage Department have done in similar circumstances, in rendering himself available for such work.

The Carrier submits that the Agreement does not support the claim, and that even if the Claimant had any right, based on seniority, to the work in question, it would not be reasonable to construe the Agreement as being violated under the factual situation in the instant case and, therefore, the present claim should be denied.

With respect to the time and one-half rate claimed by Mr. Dwyer, the Carrier submits that in no event would such a rate be payable in the instant case. It has been repeatedly held by your Honorable Board that time not actually worked does not require payment at the time and one-half rate of pay. This question has been settled undisputably by Award No. 5978 of your Honorable Board involving the same parties. The sole issue in Award No. 5978 was whether Claimants who were improperly denied the right to work were entitled to the time and one-half rate of pay. The Board decided they were only entitled to the pro-rata rate on the basis that the Claimants did not actually perform work. Consequently, even assuming the claim of the Employes were payable in the instant case, which the Carrier denies, payment would be at the pro-rata rate and not the overtime rate as set forth in the claim quoted at the beginning of this submission.

III. Under the Railway Labor Act, the National Railroad Adjustment Board, Third Division, is Required to Give Effect to the Said Agreement and to Decide the Present Dispute in Accordance Therewith.

It is respectfully submitted that the National Railroad Adjustment Board, Third Division, is required by the Railway Labor Act to give effect to the said Agreement and to decide the present dispute in accordance therewith.

The Railway Labor Act, in Section 3, First, subsection (i), confers upon the National Railroad Adjustment Board the power to hear and determine disputes growing out of "grievances or out of the interpretation or application of agreements concerning rates of pay, rules or working conditions." The National Railroad Adjustment Board is empowered only to decide the said dispute in accordance with the Agreement between the parties to it. To grant the claim of the Employes in this case would require the Board to disregard the Agreement between the parties thereto and impose upon the Carrier conditions of employment, and obligations with reference thereto not agreed upon by the parties to this dispute. The Board has no jurisdiction or authority to take such action.

CONCLUSION

The Carrier has shown that the Claimant was not available to be used under the Agreement for the work in question; that he is not entitled to the additional compensation which he claims; and that the claim should be denied.

All data contained herein have been presented to the employe involved or to his duly authorized representative.

(Exhibits not reproduced.)

OPINION OF BOARD: This case was progressed on the property upon a joint factual statement, so succinct and complete it reflects the major portion of the controlling facts and should be quoted at length. It reads:

"Claimant is regularly assigned as a Station Baggageman, position symbol 7-8-B-41, Baggage Department, Pennsylvania Station, New York, tour of duty 7:59 A.M. to 3:59 P.M., rest days Thursday and Friday.

"On Thursday afternoon, October 19, 1950, it was determined that it would be necessary to augment the regular force on Friday, October 20, 1950. As a result, a notice was posted at about 3:00 P. M. on Thursday notifying the employes in the Baggage Department of the availability of extra work. Moreover, employes absent from duty observing a rest day of their regular assignments were so notified by telephone, if a telephone number was listed in the Baggage Department Office. Furthermore, all employes who presented themselves for work on this date were advised of the availability of the extra work.

"The Claimant was absent from duty on Thursday and Friday, October 19 and 20, 1950, observing the regularly assigned rest days of his position. Claimant has no telephone.

"In the past, employes of the Baggage Department have been notified of the availability of extra work by telegram until this method of contacting employes was discontinued by instructions of the Superintendent."

Supplementing the foregoing statement it can be stated a fair analysis of the record as presented discloses the following facts pertinent to the issues, about which there can be no dispute, viz:

That there is a Collective Bargaining Agreement in force and effect between the parties, effective May 1, 1942, governing the working conditions of the employes here involved which contains seniority rules ordinarily found in such agreements and contemplates that the work encompassed by its terms belong to the employes therein specified on the basis of seniority.

That such agreement was amended September 1, 1949, to conform to the 40-Hour Week Agreement and subsequently reprinted on August 1, 1953, without changing or disturbing, so far as present issues are involved, the seniority rights of the employes covered by the terms of the 1942 Agreement.

That except for posting a notice in the Baggage Department at the Pennsylvania Station at 3 P. M., on Thursday, October 19, 1950, Carrier, which had no information whether he would be available if called, made no attempt to call Claimant or notify him of the availability of the involved extra work on Friday, October 20, 1950. Thursday, it is to be noted, was a day on which Claimant was off duty and not at the Station.

That on the date involved Station Baggagemen, also off duty on their rest days, whose seniority rights were junior to those of Claimant were called and used to perform the involved work.

There is some dispute between the parties respecting the manner in which Carrier notified employes in the Baggage Department prior to October 20, 1950, of extra work available on their off duty days, Claimant contending that as a matter of practice they were notified by telegram as early as 1935. Since the 1942 Agreement abrogated all past practices, and for another reason to be presently discussed, we need not labor this contention although there is some evidence of record to support it. The fact remains all parties concede that commencing with the year 1943 Carrier initiated the practice of notifying all employes of the Baggage Department, off duty on their rest days, by telegram of the availability of extra work such as is here involved; and that this practice continued until February 1950, when representatives of Claimant's Organization were orally notified by Carrier that it was being discontinued. Subsequently, pursuant to unilateral instructions issued by the latter, the practice was discontinued in March 1950. Thereafter, personal notice while at work, notices posted in the Station, or calls by telephone to employes who had a telephone and had listed the number thereof with the Carrier, were the only notices given by it of the availability of such work.

In what appears to be an effort to avoid the consequences flowing from well-established principles Carrier contends at the outset that seniority is not involved in determining whether the instant claim has merit. We have no difficulty in concluding this contention is wholly fallacious. Actually seniority is the keystone of the arch on which the claim depends. Otherwise in the performance of extra work Carrier could make assignments at will without regard to the seniority rules of the Agreement. Long ago in Award No. 2347, to which we adhere, we said:

> "One of the paramount purposes of collective agreements in railroad service is the establishment and protection of seniority rights. There is no question that all the employes involved in this claim had seniority rights in their regular assignments as mail and baggage handlers. The Carrier admits this to be true, but contends that when their regular assignments have been protected, the Agreement has been fulfilled. We are not in accord with the Carrier on this point. It is well known that regular assigned employes often desire and are often required to do extra work outside of their regular assignment, generally at an increased rate of pay. This work may be said to be incidental to their regular assignment in the sense that it would not be available to them except for the regular assignment. We think that the Agreement properly interpreted in the spirit in which it was written requires the Carrier, when it is obliged to call extra men from an established class of employes, to take notice of their seniority rights. And this is true even if the Carrier was not required to call any one of that class of employes at all. We conclude, therefore, that the Carrier was required, when it elected to call regular assigned employes for extra work on their day of rest, to give effect to the seniority rights of the men in the mail and baggage handling service. It is simply another case where 'the letter killeth and the spirit giveth life'."

The happenstance, as Carrier suggests, that there was extra work available for all regularly assigned Baggagemen on the date in question does not alter or change the principle. Unless the record discloses some other reason for not using him Claimant, by virtue of his superior seniority status, was entitled to the work before junior employes were called to perform it.

We have no quarrel with the established rule that our authority is limited to interpretation of the applicable rules of a Collective Bargaining Agreement as written. Nor with the one that when the language of such an agreement is clear and unequivocal the terms thereof must be given their plain and ordinary meaning. However, when, as here, the agreement gives work to employes on the basis of seniority it does not follow, as Carrier seems to suggest, that our hands are tied because that instrument fails to expressly spell out the manner and method whereby they are to be called to perform it. In that event it is our duty to construe all applicable provisions of the contract and supply what its terms by inference imply should be supplied in order to make the entire agreement workable. That has been done by this Division in situations comparable to the one now under consideration. See, e.g., Award No. 4841, where it is said:

> "Claimant had a prior right to work by virtue of his seniority. Carrier contends that he was not available. The record does not show any attempt by the Carrier to call the claimant for this work.
>
> "We think Carrier was obliged to call the claimant. If claimant could not be found after a reasonable attempt to contact him had been made, the Carrier would be justified in calling someone else. An employe is not unavailable merely because he lives 3.64 miles from his headquarters. This is not an unreasonable distance under modern methods of transportation. The case is very similar to and controlled by Award 4200."

See, also, Award No. 4467 where, although factually dissimilar, the same principle is recognized and applied by the following statement:

> "The difficulty with the position of the Carrier as above stated is that nowhere does it show that it made any attempt whatsoever to contact any of these employes whether they had listed a means of communication with it or not. If effort had been made to contact any of the claimants and they were found unavailable or unwilling to work, there would appear to be good reason for denying a claim for such employes. But here the Carrier blanked the positions without any attempt at filling them and thus violated the Agreement. At that time then it made itself liable for a penalty for such violation. It cannot now escape that liability by demanding statements of availability and willingness to work if called from Claimants who left means of communication with it or by pleading that others were unavailable because they left no means of communication with it . . . . . ."

Limited strictly to the facts of this case we think the foregoing Awards are sufficient to warrant a conclusion that Carrier's failure to make any effort whatsoever to call Claimant to perform the work in question entitled him to a sustaining Award, particularly in view of the fact that it was bound to know he was off on his rest days and would not be present at the station on either Thursday or Friday, to receive the information imparted by the notice it had posted in the station. Be that as it may, we are not required to base our decision on this case entirely upon what has been heretofore stated and therefor turn to the next reason affording sound ground for a sustaining Award.

Heretofore we have pointed out that from 1943 to 1950, over a period of some seven years, Carrier itself had followed the method of advising employes by telegrams, under conditions such as are here involved, of the availability of extra work. In other words it had initiated the practice of giving employes entitled to the work a call in that manner. We are not here concerned with the reasons for Carrier's unilateral discontinuance of that procedure. Assuming, there was sound reason for doing so, we believe that so far as employes of the class and seniority status in question are concerned it had established a practice at the involved station, during the period of time heretofore mentioned, which it could not discontinue unless abrogated by negotiation and agreement between the parties. This conclusion finds ample support in many Awards of this Division. For just a few of them see, e.g., Awards Nos. 2436, 5150, 6011 and other decisions of like import there cited.

Based on what has been previously stated; what is said and held in the foregoing Awards; and since the record discloses no understanding between the parties warranting abrogation of the practice of giving notice by telegram to Claimant regarding the availability of extra work under the confronting facts and circumstances; we are convinced the Agreement was violated and hence are impelled to so hold. However, since Claimant performed no work his recovery, under well-established Awards (see Award No. 6730 and other decisions there cited), must be limited to a day's pay at the pro rata rate.

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 at the pro rata rate in accord with the Opinion and Findings.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: (Sgd.) A. Ivan Tummon
Secretary

Dated at Chicago, Illinois, this 10th day of September, 1954.