Award No. 6859
Docket No. CL-6767

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

GULF COAST LINES; INTERNATIONAL-GREAT NORTHERN RR. CO.; THE ST. LOUIS, BROWNSVILLE & MEXICO RY. CO.; THE BEAUMONT, SOUR LAKE & WESTERN RY. CO.; SAN ANTONIO, UVALDE & GULF R.R. CO.; THE ORANGE & NORTHWESTERN R.R. CO.; IBERIA, ST. MARY & EASTERN R.R. CO.; SAN BENITO & RIO GRANDE VALLEY RY. CO.; NEW ORLEANS, TEXAS & MEXICO RY. CO.; NEW IBERIA & NORTHERN R.R. CO.; SAN ANTONIO SOUTHERN RY. CO.; HOUSTON & BRAZOS VALLEY RY. CO.; HOUSTON NORTH SHORE RY. CO.; ASHERTON & GULF RY. CO.; RIO GRANDE CITY RY. CO.; ASPHALT BELT RY. CO.; SUGAR LAND RY. CO. (Guy A. Thompson, Trustee)

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

(a) The Carrier violated the Clerks' Agreement during the period Sunday, December 21 through December 26, 1952, and during subsequent periods, when it failed and refused to pay Lumber Inspector H. C. Sparks for time working, waiting or traveling outside of his regularly assigned working hours and days. Also

(b) Claim that Mr. Sparks be paid at the rate of time and one-half for all time spent working, waiting or traveling outside of his regularly assigned working hours and days during the period December 21 through 26, 1952, and during all subsequent periods a like violation occurs.

EMPLOYES' STATEMENT OF FACTS: Mr. Sparks is regularly and properly assigned to the position of Lumber Inspector, with a work week Monday through Friday.

His assigned hours are 8:00 A. M. to 5:00 P. M. with meal period of one hour.

described as 'Temporary or Emergency Travel Service' as covered by Rule 36 of our Agreement of April 1, 1946."

Your Board, with the assistance of Referee Wenke, concurred with the Employes that the position there involved was not "regularly assigned to road service," and accordingly sustained the claim. In the Opinion of Board, it is stated with respect to Rule 36 relied upon by the Employes: "We think the rule means that unless employes are assigned to road service with some degree of regularity the Rule is applicable to them when they are temporarily required to perform service away from their headquarters which necessitates traveling."

Certainly there can be no question concerning the position of lumber inspector in the instant case being "regularly assigned to road service." Therefore, consistent with the position taken by the Clerks' Organization and the Findings of your Board in Award 5704 the contention and claim of the Employes in the case under consideration should be denied since the foregoing record conclusively shows the claim to be entirely lacking in support under the applicable rules of the governing agreement.

The substance of matters contained in this submission has been the subject of correspondence and/or conference between the parties.

(Exhibits not reproduced.)

OPINION OF BOARD: The System Committee of the Brotherhood makes this claim on behalf of H. C. Sparks, the occupant of a lumber inspector position, regularly assigned to road service in connection with performance of the duties of his position. The claim is for pay in addition to regular compensation for time spent working, waiting or traveling outside of Claimant's regularly assigned working hours and days on the dates therein set forth and on all subsequent occasions.

A review of the facts and circumstances on which the rights of the parties depend is essential to a proper understanding of the issues involved, as well as the disposition of the cause. For that reason they will be related as briefly as the state of the record permits.

Carrier has maintained a position of Lumber Inspector on its property for over thirty years and Claimant, H. C. Sparks, has been the occupant of that position for more than thirteen years. Prior to September 1, 1949, the effective date of the 40-Hour Week, also the execution of a new agreement to be presently mentioned, the incumbent of such position was assigned to work six days a week with Sunday his rest day. Thereafter the days assigned were reduced from six to five, with Saturday and Sunday rest days and with no other change in working conditions.

At all times the duties of the position in question have been to visit mills in the south from which Carrier purchases lumber and make inspection of such materials before acceptance for shipment and, of necessity, the occupants thereof have been regularly assigned to road service. In fact Carrier asserts, without refutation, that the major portion of their time is spent in traveling from one point to another, where mills from which lumber has been purchased are located.

Although it appears it was a monthly rated position up to November, 1940, and thereafter a daily rated position, because of an agreement respecting the rating of positions generally, the record makes it clear that, from the time of the establishment of the involved Lumber Inspector position, the Carrier has always regarded it as carrying the rate fixed therefor on the monthly or daily basis with expenses, such as pullman, hotel, meals and like items, paid while traveling. The same source makes it equally clear that up to January 21, 1953, when notice of the instant claim was first given, both the Claimant and the Organization had either acceded to or at least acquiesced in the Carrier's understanding and construction of the existing

agreements. This it can be stated is true, although having been theretofore wholly excepted, the position was placed under the agreement of April 1, 1939, for all purposes except seniority, in filling subsequent vacancies. And, it should be added, is also true notwithstanding Claimant's contentions the disposition in 1950 of the W. L. Andrew's claim, discussed at length in the submissions, evidences a different understanding and construction. Even though reference thereto at this point is somewhat out of sequence, it should be now stated that upon careful examination of such claim we find it is clearly distinguishable from a factual standpoint; and that the fact it was allowed and paid by Carrier under the conditions there existing is in no sense to be construed as warranting a contrary conclusion, or for that matter, as entitling it to weight and consideration in disposing of the issues here involved.

With the advent of the 40-Hour Week, obviously for the purpose of placing the provisions of that agreement in force and effect, the parties entered into a new agreement, effective September 1, 1949. Among others this agreement contains certain rules, relied on by Claimant as requiring Carrier to pay waiting or traveling time outside his regularly assigned working hours and days, which will now be quoted.

Rule 37(a-1) reads:

> "Day's Work. Except as otherwise provided in this rule, eight (8) consecutive hours or less, exclusive of the meal period, shall constitute a day's work for which eight (8) hours' pay will be allowed."

Rule 37(c-1) reads:

> "Overtime. Time in excess of eight (8) hours, exclusive of the meal period, on any day will be considered overtime and paid on the minute basis at the rate of time and one-half."

Rule 37(c-5) reads:

> "Service on Rest Days. Service rendered by employes on assigned rest days shall be paid for under Rule 43 unless relieving an employe assigned to such day in which case they will be paid eight (8) hours at the rate of the position occupied or their regular rate, whichever is higher."

In addition, such agreement contains a rule dealing with travel time of such importance to the issues as to require quotation of its pertinent portions. This is Rule 54. Its first two subsections read:

> "(a) Employes not regularly assigned to road service who are temporarily required to perform service away from their headquarters, which necessitates their traveling, shall be allowed necessary expenses while away from their headquarters, and will be paid pro rata for any additional time required in traveling to and from the temporary assignment, except that where lodging is furnished or paid for by the railroad, no additional compensation will be allowed unless actually required to perform service in excess of eight (8) consecutive hours exclusive of the meal period.
>
> "(b) The foregoing paragraph shall not apply to an employe temporarily filling a position during the absence of the employe regularly assigned to road service or pending a permanent assignment, but in such cases the basis of compensation shall be as for the regular employe except as provided in Rule 50."

Another rule of the agreement, almost if not equally important, is Rule 58, dealing with Relief and Travel Time wherein, like in the one last above quoted, the parties saw fit to spell out in detail the conditions and

circumstances under which travel time, if any, is payable to employes coming within the purview of its terms.

Finally it is to be noted that with respect to positions regularly assigned to road service, the controlling agreement contains no rule of any kind or character where, like in the two rules last above mentioned, specific provision is made for pay for traveling time.

It is to be noted the claim as presented is dual in character. The first portion is for time spent in actually working, while the second is for time spent in waiting and in traveling. For practical purposes these two portions must be given separate consideration. As to the first, there can be no question that with the coming of the 40-Hour Week, and for that matter under the current agreement, effective as of September 1, 1949, Carrier, without payment of additional compensation, could not require Claimant to perform actual work on his position for more than eight consecutive hours on any one day, and then for only five days per week, without violating the agreement. In fact Carrier so concedes. The difficulty with this portion of the claim, so far as its allowance is concerned, is that the record fails to establish Carrier required Claimant to perform actual work on his position in excess of eight hours on his regularly assigned working days and compels a like conclusion with respect to his additional contentions he was required to perform work of that character on his rest days or on Christmas 1952. The result is there is no basis for allowance of the portion of the claim premised on time spent while actually working.

Boiled down the gist of all contentions advanced by Claimant with respect to the second portion of his claim is that in and of themselves Rules 37(a-1), 37(c-1) and 37(c-5) are so clear and unambiguous as to compel a conclusion they require to pay for waiting and traveling time. The essence of all Carrier arguments is that past practice governs under conditions and circumstances such as have been heretofore related.

In support of his position on the point now under consideration Claimant directs our attention to Award 5013 where it is said:

> "* * * Under our decisions, except where an agreement is ambiguous or indefinite, past practices do not affect enforcement of and compliance with its applicable provisions. * * * In other words with such a contract in existence and governing the rights of the parties neither long continued acquiescence in a practice nor mutual continuance thereof after it has become effective bar its enforcement for the simple reason its provisions supercede any and all practices incompatible therewith."

There can be no quarrel with the rule announced in the foregoing Award. The trouble from Claimant's standpoint stems from the fact that where, as here, the parties themselves have seen fit by Rules of an Agreement, such as Rules 54 and 58 above quoted and mentioned, to spell out the conditions and circumstances under which traveling time, if any, is to be paid for temporary assignments to road service and relief, it simply cannot be said or held that Rules 37(a-1), 37(c-1) and 37(c-5), on which he relies, are so clear and unambiguous as to warrant or compel the construction he seeks to have this Board give them.

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 payment of compensation for those matters until such time as it may be eliminated by negotiation. That practice has been heretofore indicated and need not be repeated. It suffices to say adherence thereto means that Claimant is not entitled to pay for the waiting or traveling time herein involved. Having heretofore determined the portion

of the claim based on time actually worked outside of regularly assigned working hours and days cannot be upheld, it necessarily follows such claim must be denied in its entirety.

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 based on what is said and held in the opinion the claim cannot be sustained.

AWARD

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: (Sgd.) A. Ivan Tummon
Secretary

Dated at Chicago, Illinois, this 31st day of January, 1955.