Award No. 7944
Docket No. MW-7663

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Whitley P. McCoy, Referee

PARTIES TO DISPUTE:

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES

UNION PACIFIC RAILROAD COMPANY

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

(1) The Carrier violated the Agreement when it failed and refused to compensate Roadway Equipment Operator Gildo Pantuso for all the time he was in charge of and responsible for Locomotive Crane 02043 while accompanying such equipment in transit between Salt Lake City and Iron Springs, January 4 to 6, 1954;

(2) Roadway Equipment Operator Gildo Pantuso now be allowed sixteen hours of time and one-half pay and sixteen hours of double-time pay account of the violation referred to in part (1) of this claim.

EMPLOYES' STATEMENT OF FACTS: The claimant, Mr. Gildo Pantuso, who was regularly assigned to the position of Roadway Equipment Operator, was instructed to accompany Locomotive Crane 02043 while in transit from Salt Lake City, Utah to Iron Springs, Utah, leaving Salt Lake City on January 4, 1954 at 1:10 P. M. in train No. 107, arriving at Provo, Utah at 4:00 P. M. Immediately upon arrival at the Provo, Utah terminal, the claimant made an inspection of the crane in accordance with the Carrier's instructions.

Shortly thereafter, the Claimant went to the Yard Office to ascertain the time the crane was scheduled to leave Provo, and was advised that the crane was being placed in another train which would then be ready to depart as soon as power was available, however the Yard Master was unable to give the time of the train's departure. At approximately 10:00 P. M. the claimant again inquired at the Yard Office, relative to the time the train would depart and was given the same answer as before. Accordingly the claimant remained on duty, expecting the crane to be moved at any time.

On January 5, 1954, Extra No. 103 picked up the crane and left Provo, Utah at 12:30 P. M. and arrived at Milford, Utah at 7:30 P. M. Upon arrival at Milford the crane was left in the train at the east end of the Milford Yard. Immediately thereafter, the claimant made an inspection of the crane, then telephoned the Yard Office and was advised that the train was scheduled to move in the first Iron Mountain drag to Iron Springs, however, the claimant

was his responsibility to check with the Chief Dispatchers at those points, who would have been able to give him that information. Having received that information it was his responsibility to relieve himself from duty in accordance therewith. Accordingly, there is no basis for allowing him compensation for the 20-hour lay-over at Provo and the 11-hour lay-over at Milford.

Even if the information concerning future movements had not been obtainable through reasonable diligence, which the Carrier emphatically denies, Pantuso would still not be entitled to the compensation claimed under the circumstances of this particular case. The agreed-upon interpretation of Rule 27, contained in Item 8 (b), specifically covers this particular situation and clearly indicates that there is no basis for continuous compensation where the employe is **"provided with sleeping accommodations on train"** and has the **"opportunity to go to bed for five or more hours"**.

In this case Pantuso had been assigned his own outfit car in which to accompany the movement of this locomotive crane. He, therefore, had been "provided with sleeping accommodations on train". There was a layover of 20 hours at Provo, including the night of January 4th and 5th, and a layover of 11 hours at Milford during the night of January 5th and 6th. Accordingly, he also had the "opportunity to go to bed for five or more hours". It must be assumed that he did utilize those periods for sleeping purposes, but whether he did or not, it is clear that he had been provided with sleeping accommodations on the train, and had the "opportunity" to make use of them for two periods of five hours or more.

There is no basis whatsoever for a continuous time payment for this entire movement, and the claim for eight hours at time and a half and eight hours at double time for January 5th and 6th, 1954, during which time Pantuso was laying-over at a terminal and had at his disposal sleeping accommodations in his own outfit car accompanying the locomotive crane, is totally without merit, and should be denied.

All information and data contained in this Response to Notice of Ex Parte Submission are a matter of record or are known by the Organization.

(Exhibits not Reproduced)

OPINION OF BOARD: The Claimant is employed by the Carrier as a Roadway Equipment Operator. On January 4, 1954, he was instructed to accompany Locomotive Crane No. 02043 from Salt Lake City, Utah to Iron Springs, Utah, via Provo and Milford. The crane is self-propelled but was to be taken in a train. Claimant was furnished with an outfit car, and train No. 107 carrying this crane and outfit car left Salt Lake City at 1:10 P. M. January 4. It arrived at Provo at 4:00 P.M. that day. He inquired at the Yard Office when the crane would leave Provo. He was advised that it would be placed on another train and would depart as soon as power was available, but the Yardmaster was unable to say just when. At 10:00 P.M. he again inquired at the Yard Office, received the same information, and remained on duty expecting the crane to leave at anytime. An engine did not become available until late the next morning, January 5. If left Provo with extra train No. 103 at 12:30 P. M. that day, arriving in Milford at 7:30 P. M.

Upon arrival at Milford the Claimant inquired at the Yard Office and was advised that the crane would leave in the first Iron Mountain drag, but that the time of departure was not known.

The crane left Milford the following morning on train No. 111 at 6:00 A.M. and arrived at Iron Springs at 8:30 A.M.

The Claimant submitted overtime on the applicable payroll form and was refused all but eight hours straight time pay for each of the three days. The claim before us demands, in addition to eight hours straight time pay for

each of the three days, sixteen hours of time and one-half pay and sixteen hours of double time pay. In other words, the claim is based upon the contention that the Claimant was on duty for 48 consecutive hours.

The duty devolving upon a Roadway Equipment Operator accompanying equipment in transit is stated by the Carrier in its Second Submission as follows:

> "It is clear from the record that the only duties he had been assigned to perform and his only responsibility during this period was to watch his equipment while traveling and to make an inspection after each stop. During the entire remainder of the time there were no duties or work for him to perform."

The matter of pay in general is covered by Rule 27 of the Agreement between the parties, effective September 1, 1949, which reads as follows:

> "**Temporary or Emergency Travel Service.** (a) Employes except as provided by Rule 26, who are required at the 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. Travel or waiting time during the recognized overtime hours at home station will be paid for at the pro rata rate.
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> "(b) If during the time on the road a man is relieved from duty and is permitted to go to bed for five or more hours, such relief time will not be paid for, provided that in no case shall he be paid for a total of less than eight hours each calendar day, when such irregular service prevents the employe for making his regular daily hours at home station. Where meals and lodging are not provided by the railroad, actual necessary expenses will be allowed.
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> "(c) Employes will not be allowed time while traveling in the exercise of seniority rights, or between their homes and designated assembling points, or for other personal reasons."

But more particularly the matter is governed by an agreement entitled "Application and Interpretation of Agreement", which became effective on the same date, namely, September 1, 1949. Item 8 of this latter Agreement reads as follows:

> "**Temporary or Emergency Travel Service.** (a) Instructions covering inspection and operation of maintenance of way roadway equipment and machines, contain the follows:
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> > 'Employes in charge of roadway equipment while in transit must inspect same at each stop, and in case of movement of load on car or defect in tieing down appliances, same must be remedied or conductor notified and equipment taken from train.'
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> "Operators in charge of and responsible for roadway machines, such as pile drivers, locomotive cranes, erection derricks and spreaders, which are not transported on flat cars, and who are required in accordance with the instructions above quoted, to inspect such equipment at each stop will be considered as working, and will be paid straight time during the regular working hours, and overtime rates during overtime hours, in accordance with practice at their home stations.
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> "Where relieved from duty or responsibility for roadway equipment in accordance with the above quoted instructions, Section (b) will apply.

"(b) Employes notified or called to leave home station and provided with sleeping accommodations on train, will be allowed three hours compensation and no time while traveling. They will be allowed straight time from time of arrival at point of work until commencing work unless they have opportunity to go to bed for five or more hours.

"Employes notified or called to leave home station who are not provided with sleeping accommodations while enroute, will be allowed straight time from time leaving home station until arrival at point of work, and straight time from time of arrival at point of work until they begin work, unless they are afforded opportunity for five or more hours' sleep. After completion of work at point to which sent, employes will be allowed straight time while waiting unless opportunity is afforded for five or more hours' sleep, and straight time traveling to home station unless sleeping accommodations provided."

The first question to be disposed of is whether the Claimant was "relieved from duty or responsibility for roadway equipment," for unless he was so relieved Section (b) has no application to this case but the case is governed solely by Section (a).

It is clear from the wording of Item 8 that "operators in charge of and responsible for . . . locomotive cranes, . . . who are required . . . to inspect such equipment at each stop will be considered as working." In other words, the Claimant was entitled to be paid, not only for the time spent in making inspection at stops but for all time spent during the trip while "in charge of and responsible for" the crane, from time of departure from Salt Lake City to arrival at Iron Springs, except for such time as he may have been relieved from duty or responsibility. It is true, as argued by the Carrier, that Claimant had very few duties and that his actual duties of inspection consumed little time. It is not true, however, as seems to be argued by the Carrier, that he was working only while making inspections. Item 8 makes it very clear that since he was required to make the inspections, he was considered as working during the entire trip. During the seven hour trip from Provo to Milford, he may have slept for four or five hours for aught that appears in the record. This is immaterial and the Carrier makes no contention that his going to sleep, if he did so during that period, would have any effect upon his pay. The train may have stopped on a siding for twenty minutes during that period waiting for another train to pass. If that occurred, his inspection of the crane at that time might take only four or five minutes, but no contention is made that it is only that for or five minutes that is to be paid for.

The same thing is true of stops at stations. On any of the legs of the journey the train might have made stops of half an hour or three quarters of an hour at intermediate stations. No contention is made by the Carrier that the Claimant would be off duty as soon as he had made his inspection, and then would resume duty only when the train started from the station again. It is quite clear from the record, and from Item 8, that the entire time of the trip is considered working time, except where the Claimant is relieved from duty or responsibility.

The resistance of the Carrier to this claim seems to be due entirely to the fact that the stops at Provo and Milford were of such long duration that the Claimant should be considered as having been relieved of duty or responsibility. There is no contention that he was in fact relieved of duty or responsibility.

The Carrier contends that in consulting with the Yardmaster as to the time of expected departures, the Claimant did not perform his whole duty, but that he should have also contacted the Chief Dispatcher. But in its original submission the Carrier states the duty in the alternative, saying that "it is his own personal responsibility to determine **either** from the yard forces or the

Chief Dispatcher, when the next movement would be commenced." (Emphasis ours.) Claimant did make inquiry of the yard forces at both stops. In having done so he apparently complied with his duty as it was stated in the above quoted except from the Carrier's Submission.

The Carrier contends that if Claimant, upon being given no satisfactory information by the yard forces, had inquired of the Chief Dispatcher, he would have obtained the information upon which he could have relieved himself from duty. The Carrier asserts that the Chief Dispatcher had the information.

Claimant stated, and has contended throughout this record, that it is the usual practice in such cases to contact the Yardmaster because he has the same information as the Chief Dispatcher. If in fact the Chief Dispatcher did have definite information, we think it was incumbent upon the Carrier to introduce into this record an affidavit from the Chief Dispatcher to that effect. In the absence of definite proof that the Chief Dispatcher had knowledge of which the Yardmaster was ignorant, we cannot hold that the Claimant was negligent or failed in his duty. Not knowing when the train would depart, he was not free to leave the train to go into town. If he had, and the train had departed in his absence, he would unquestionably have made himself liable to severe discipline if not discharge. It is clear that Claimant was not in fact relieved of duty or responsibility, and we cannot hold, on the facts provided, that he should have relieved himself from duty.

It is true that he could have gone into the outfit car at Provo or Milford and slept. But as pointed out earlier in this opinion, as long as he was present with the equipment, and responsible for it, he was entitled to be paid under Item 8 regardless of what he was doing.

In the last analysis, the Carrier's argument comes down to this: during the delays at Provo and at Milford, each lasting all night, Claimant must have got five hours sleep each night, and therefore he is not due pay for those night hours under Item 8, Section (b). The fallacy in this argument is that it is based upon the provisions of Section (b), and that section comes into play, by the express terms of Item 8, only when the operator is relieved from duty or responsibility. Claimant never was relieved, either actually or constructively. He was standing by, waiting for momentary departure; was in charge of and responsible for his crane, and was clearly "working" within the terms of Item 8, Section (a), which does not mention rest or sleep, but which provides for pay until the operator is "relieved". It is not our function, nor is it within our power, to rewrite Section (a).

We are unable to reconcile the denial of this claim, and the reasons argued for denial, with the Carrier's admission of liability for the hours claimed at time and one-half. The Chief Engineer wrote the General Chairman on February 12, 1955 in part as follows:

> "Of this amount I advised you that all of the straight time, amounting to $48.51 either has been or will be paid without question. The time and one-half claimed on January 4 and 5 amounting to $48.48 will be allowed as will the time and one-half from 6:30 A.M. to 8:00 A.M. on January 6, in the amount of $4.55, or a total of $101.54. Deducting this amount from the time claimed, of $161.67 for the three days, will leave a difference of $60.13, and this amount I do not agree is due this employee."

If the Carrier's contentions in this case were sound, the sums which the Chief Engineer has said would be paid would not be due. The sums thus admitted to be due could be payable only for the reasons advanced by the Claimant and stated above. Since these sums are admittedly due, the balance of the claim is equally due and payable.

The Carrier argues that offers of compromise are not admissible, and cites awards so holding. Of course, this is true. But we do not read the letter

of the Chief Engineer as an offer of compromise. We read it as an admission that the time and one-half claimed is due. This reading of the letter is confirmed by a later letter from the Chief Engineer to the General Chairman, dated February 28, 1955, in which he refers to his letter of February 12, but erroneously speaks of it as his letter of February 21. He states:

> "The claim, except as noted in my letter of February 21, is respectfully declined."

He thus approved the claim of straight time and time and one-half, and declined only the double time.

In reading this record we have been able to come to no other conclusion than that the Carrier was reluctant to pay merely because it deemed the sum claimed unconscionable for the amount of work actually done. Of course, we are bound by the Agreement and the Interpretation agreed upon by the parties. We are not permitted to go beyond the contract and relieve against what might be called inequities. According to the strict and literal reading of Item 8, the Claimant was working during the entire period of time. He had not in fact been relieved of duty during that time, and he is not shown to have been negligent in such way as to amount to a constructive relieving of duty and responsibility. For these reasons the claim must be sustained.

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

Items (1) and (2) of the claim are sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: A. Ivan Tummon
Executive Secretary

Dated at Chicago Illinois, this 3rd day of June, 1957.