Award No. 9419

Docket No. CL-8903

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Merton C. Bernstein, Referee

PARTIES TO DISPUTE:

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

SOUTHERN PACIFIC COMPANY (Pacific Lines)

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

(a) The Carrier has violated and continues to violate the rules of the current Agreement between the parties when it uses employes holding seniority on Roster 5-A, Coast Division seniority district, Redwood City, to perform work on Roster 3, Western Division seniority district, at Belle Haven, California; and,

(b) The Carrier shall now be required to compensate employes Arleigh Henninger and John J. Shafer, and their successors, if any, on a call basis under the provisions of Rule 21 of the Agreement for all days upon which Coast Division employes are used to perform work at Belle Haven on the Western Division, such compensation to be retroactive to March 14, 1955, the date the issue was formally presented to the Division Superintendent.

EMPLOYES' STATEMENT OF FACTS: 1. There is in full force and effect an agreement between the Southern Pacific Company (Pacific Lines) hereinafter referred to as the Carrier, and the Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employes, hereinafter referred to as the employes, governing rates of pay, wages, hours of service and other conditions of employment, for employes of the Carrier covered thereunder. This Agreement, effective October 1, 1940, copy of which is on file with the Board, includes revisions to May 2, 1955, and by reference thereto, is hereby made a part of this submission.

Belle Haven is a non-agency station located on the Redwood Junction to Niles Tower Branch, Western Division, about 2½ miles east of Redwood Junction, the latter being the terminus thereof, and under jurisdiction of the Coast Division.

Sometime during the latter part of the year 1954 two industries, Johnson & Johnson, and Winthrop & Stearns Company were established at Belle

It should be borne in mind that Ravenswood referred to in the foregoing quotation is no longer involved in this claim. Considering that quotation otherwise, in the case of Belle Haven carrier is requested to use employe Henninger from Neward or employe Shafer from Milpitas to perform the small measure of work involved in gathering information for Redwood City agency, which information is incidentally taken back to Redwood City.

The carrier considers it an entirely proper arrangement to have work emanating from Redwood City agency performed by Redwood City employes, and further that there is no agreement of any kind allocating this work in dispute, which by its nature involves working out of and into Redwood City, to other employes at Relatively distant locations of Newark and Milpitas.

While petitioner refers to Rules 29 and 30 of the current agreement (full text attached as carrier's Exhibit "D"), the carrier considers that its obligations under those rules were discharged when employes of appropriate Coast Division roster were used to perform work emanating from Coast Division station of Redwood City.

In this connection, the situation at Belle Haven is no different than has existed at a number of similarly situated non-agency stations for years, and in those cases where it has been considered desirable that physical work be performed at such non-agency stations, employes from appropriately designated agency have been used without complaint from petitioner.

CONCLUSION

Carrier asserts that it has conclusively established that the claim in this docket is entirely lacking in either merit or agreement support; therefore, requests that said claim be denied.

All data herein submitted have been presented to the duly authorized representative of the employes and are made a part of the particular question in dispute. The carrier reserves the right, if and when it is furnished with the submission which has been or will be filed ex parte by the petitioner in this case, to make such further answer as may be necessary in relation to all allegations and claims as may be advanced by the petitioner in such submission, which cannot be forecast by the carrier at this time and have not been answered in this, the carrier's initial submission.

OPINION OF BOARD: The facts are undisputed. In late 1954 two new industries opened at Belle Haven, California. Most of the clerical work in connection with servicing them was done at Redwood City, California. In addition, yard checks and consultations with industry representatives were performed at Belle Haven (a non-agency) by clerks coming from Redwood City twice a day for a total of about one hour a day. It is this work at Belle Haven which is in dispute.

Redwood City is on the Coast Division of the Carrier at Milepost 25.4. Belle Haven is at Milepost 28.8. The Division Point between the Coast and Western Divisions lies between Redwood City and Belle Haven at Milepost 27.6.

Claimants contend that: the work at Belle Haven was improperly assigned to clerks from Redwood City who hold seniority on the Coast Division; the work to be performed lies within the Western Division area and hence must be performed by clerks holding seniority in that seniority area.

The Carrier contends, in effect, that Belle Haven is functionally within the Coast Division and the work done by Coast Division clerks at Belle Haven is a part and logical extension of their work on the Coast Division.

In addition, the Carrier points out that Belle Haven is within the corporate limits of Redwood City and that Belle Haven is listed on its Terminal Tariff 230-K as within the switching limits of Redwood City.

Employes rebut by asserting that the Carrier's timetable lists Belle Haven on the Western Division, but that, in any event, all of these factors are without significance because of the seniority provisions of the Agreement.

The Seniority Provisions and Their Effect

Rule 29 provides:

"Seniority districts are established as follows:

"Each Operating Division shall constitute a separate seniority district . . ."

Within each district there are separate rosters comprised of individual locations and/or kinds of work within the districts.

Other rules within the article relating to seniority govern the advertising and assigning of positions. Generally, first rights are in order of seniority "within scope of the roster"; next in line are "other employes within the seniority district"; thereafter, employes in other seniority districts have preference over non-employes. (Rules 37 and 38)

The initial question is whether Belle Haven is within the Western Division seniority district. There is no doubt that Belle Haven lies within the geographical limits of the Western Division and outside the geographical limits of the Coast Division. The tariff and administrative arrangements made by the Carrier cannot change that fact.

Carrier contends that the divisions were agreed upon before the industries located at Belle Haven and clerical work became necessary there. When it became necessary to service the area, Belle Haven became an adjunct and extension of Redwood City and thereby came within the Coast Division.

The answer is that the Agreement provides otherwise. It does not permit variations based upon physical proximity or functional convenience. The Agreement does make special provision for special circumstances, e.g., at Los Angeles and San Jose. In the absence of such special provisions the provisions of the Agreement cannot be varied for reasons which are not provided for in the Agreement. To hold otherwise would exceed the powers of the Board.

We hold that Belle Haven is within the Western Division. It would follow that employes on the appropriate roster could assert preemptive seniority rights to a clerical **position** at Belle Haven.

Does it follow that a small amount of daily work, here involving two visits averaging one hour a day together, belong preemptively to employes within the Western Division seniority district?

The question is not new and the answer is well settled. In Award 1611 (Blake) it was said:

> "To condone a seemingly slight violation would tend to undermine the basic structure of seniority rights. This the Board has consistently refused to do."

See also Awards 9193 (Weston), 2585 (Blake), 1403 (Mitchell) and 753 (Swacker).

In one case, the Carrier had sent cars to one location for unloading and in order to speed the work and avoid overtime payments some of the cars were sent to another location in another seniority district. This was held to be an infringement of seniority rights. Award 4667 (Connell). In reaching that conclusion it was observed:

> "This Board has consistently held that positions or work within a specific seniority district must be reserved for employes holding seniority rights therein (citations) . . . even though such work must be performed on overtime."

The situations seem analogous. If the rule were otherwise seniority rights could be eroded away. If parts of jobs could be withheld from employes in seniority district otherwise entitled to full time jobs, scheduling and fragmentation of work could defeat rights to full time jobs. By the same token, what originates as only a few hours of work can mature into a full time position. Should the original portion be denied those in whose seniority district it arises they might also lose the full time position. Similar problems attend the abolition of positions.

The Carrier contends that requiring it to assign Western Division employes at Belle Haven would interfere with orderly, efficient and economical operation. We cannot and should not decide such an issue. Our task ends when the Board interprets the provisions of the Agreement taking into account the purposes of the contract provisions.

The carrier also contends that practice on the property militates against the claim of violation. As it has been frequently held, where the languge is clear practice is not a proper basis for departing from an agreement. See Awards 5100 (Coffey) and 2585 (Blake).

The Carrier also invokes paragraph (b) of Rule 45 ("Transferring"). It provides:

> "When the limits of a seniority district are extended or reduced, the employes affected shall have the choice of carrying their seniority upon either the extended or reduced district. Such choice shall be exercised within thirty (30) days from the effective date."

This, it is said, permits unilateral Carrier determination of seniority districts and the work within them; and Rule 45 (b) is said to be analogous to the following Rule as interpreted in Award 6066 (Wenke):

> " 'When work of a seniority district and/or a number of seniority districts is withdrawn and established within another seniority district, under a centralized bureau or department, the rights of the

employes directly and indirectly affected will be established by negotiation and agreement.'

"Ordinarily Carrier may not unilaterally remove work from the confines of one seniority district and put it in another."

It was held in that case that the only limit upon removal of work within the seniority district was that "the rights of the employes directly and indirectly affected will be established by negotiations and agreement". The provision was read as placing no **prior** condition upon **withdrawal** of **work** and establishment "within another seniority district". The expressed limitation came after the withdrawal of work from the seniority district.

The Carrier did not advance such an argument on the property; it has not until the argument of the case within the Division raised the issue nor asserted the facts upon which it must be based — the change of seniority districts. Even if it had, the seniority districts are fixed by the Agreement. The Agreement would be a nullity if the agreed upon bounds could be expanded and contracted unilaterally. Further, such an interpretation of the contract provisions in Award 6066 (which are admittedly different from those here) and Rule 45 (b) run so counter to the ordinary purposes of seniority provisions that the interpretation of Award 6066 will not be extended to cover the kind of situation involved here. To read "When" to mean "The Carrier shall have power to change the" is an expensive reading indeed. To equate the lack of an express condition with an affirmative, important and far-reaching unilateral power for either party is to run the risk of seriously altering the agreement which the parties made. Such a reading would introduce a novel unilateral power and does not recommend itself to the Board.

We hold, therefore, that the clerks' work performed **at** Belle Haven belongs to the Western Division seniority district and that its assignment to employes within the Coast Division seniority district was a violation of the agreement as claimed.

The Remedy

Claim was made for compensation on a call basis for each of two Western Division employes. Apparently the claims were based upon the fact that the Belle Haven work was to be done at two different times during the day.

Nothing in the record, however, shows that the work would involve an interruption or separation in time from regular duties, so as to warrant "call" pay under the applicable provision of the Agreement.

In sustaining the claim we award overtime pay only for the time which would have been worked. It is undisputed that the work of both visits averaged a total of an hour a day. For simplicity of administration we award half an hour of overtime plus necessary travel time (a matter known to the parties) for the period during which the work was performed by employes from the Coast Division. The parties are free to agree upon another division of the hour of overtime per day if they feel another method is more realistic and fair.

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 in accordance with Opinion.

AWARD

Claim sustained in accordance with Opinion and Findings.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois this 16th day of May, 1960.

DISSENT TO AWARD NO. 9419, DOCKET NO. CL-8903

Here, the sole question was whether work at a newly located industry should have been initially assigned to employes of Carrier's Western Division to to employes of Carrier's Coast Division, according to geographical location, since no provision of the Agreement established division limits.

While the majority states "the Carrier contends that the divisions were agreed upon before the industries located at Belle Haven" this is in error; there is no evidence whatever in the record indicating that the composition of a division was ever "agreed upon".

Manifestly, the composition of a division is a function of management.

Awards 9193, 2585, 1611, 1403 and 753, cited by the majority, are not relavant; all involved work transferred from one seniority district to another in situations which were held to be improper under limitations contained in the agreements on the properties involved, whereas the instant case involved solely the initial assignment of work at a newly located industry under an agreement which did not specify division limits for distinguishing between seniority districts.

The statement of the majority that

> "* * * seniority districts are **fixed** by the Agreement. The Agreement would be a nullity if the agreed upon bounds could be expanded and contracted unilaterally."

is not only irrelevant to a determination of the issue but is palpably wrong since the parties have already agreed through the provisions of Rule 45, Sections (a), (b) and (c), on the manner in which such situations are handled. This is not a unilateral situation but one covered by agreed-upon-rules which this Board has no authority to change.

For the above reasons, among others, Award 9419 is in error and we dissent.

/s/ J. E. Kemp

/s/ R. A. Carroll

/s/ W. H. Castle

/s/ C. P. Dugan

/s/ J. F. Mullen

ANSWER TO CARRIER MEMBERS' DISSENT TO AWARD NO. 9419, DOCKET NO. CL-8903

The error of the Dissenters' contentions lies in the fact that Respondent Carrier admitted in the record that Belle Haven, California, was on the Operating Division of the Western Division.

Rule 29 of the Parties Agreement established separate seniority districts for each Operating Division. Consequently, it was agreed that the Western Divsion and Coast Division "shall constitute a separate seniority district" on the execution of the agreement. The districts thus created have covered the same geographical limits since that time.

This is fully evidenced by a map of the involved Divisions, presented by the Carrier, showing Belle Haven as being one mile east of Mile Post 27.6, which divides the two Divisions at that point. The Coast Division running west from Mile Post 27.6 and the Western Division running east. Carrier also stated:

> "For certain operating purposes, Belle Haven appears on Carrier's Western Division timetable, * * *."

In view of this record, it is crystal clear that the Dissent is based entirely on a false premise, which has lead the Dissenters to untenable and illogical conclusions.

A long line of Awards of this Division has ruled consistently that work arising in one seniority district cannot be assigned to employes in another seniority district unilaterally by a Carrier. See Awards 99, 753, 973, 975, 1403, 1440, 1611, 1612, 1711, 1808, 2050, 2585, 3964, 4534, 4653, 4667, 4674, 4987, 5091, 5100, 5195, 5240, 5311, 5396, 5397, 5413, 5437, 5441, 5541, 5731, 5895, 5995, 6016, 6021, 6024, 6036, 6309, 6357, 6420, 6453, 7816, 9193.

Award 9419 is proper and in accord with this long line of decisions.

/s/ J. B. Haines
Labor Member

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

INTERPRETATION NO. 1 TO AWARD NO. 9419

DOCKET NO. CL-8903

NAME OF ORGANIZATION: Brotherhood of Railway & Steamship Clerks, Freight Handlers, Express and Station Employes.

NAME OF CARRIER: Southern Pacific (Pacific Lines).

Upon joint application of the representatives of the employes and the carrier involved in the above Award, that this Division interpret the same in the light of the dispute between the parties as to its meaning and application, as provided for in Section 3, First (m) of the Railway Labor Act, as approved June 21, 1934, the following interpretation is made:

DISCUSSION:

The parties are in dispute over that portion of the Award describing the remedy. It reads:

> "Claim was made for compensation on a call basis for each of two Western Division employes. Apparently the claims were based upon the fact that the Belle Haven work was to be done at two different times during the day.
>
> Nothing in the record, however, shows that the work would involve an interruption or separation in time from regular duties, so as to warrant "call" pay under the applicable provision of the Agreement.
>
> "In sustaining the claim we award overtime pay only for the **time which would have been worked.** It is undisputed that **the work** of both visits averaged **a total of an hour a day.** For simplicity of administration we award half an hour of overtime plus necessary travel time (a matter known to the parties) for the period during which the work was performed by employes from the Coast Division. The parties are free to agree upon another division of **the hour of overtime per day** if they feel another method is more realistic and fair." (Emphasis supplied.)

The Employes contend that each Claimant is to receive "half an hour of overtime plus necessary travel time", i. e., an hour plus travel time. The Carrier contends that pay for time worked should total one hour of overtime for both Claimants, including travel time.

The Employes are correct.

The total of the work in dispute averaged one hour a day, divided between two visits at different times of the day, with each visit performed by a different employe. The record did not show how much of the hour each of the visits consumed.

The award of one-half hour of overtime is a division of the hour "for simplicity of administration" as recompense for each of the two daily visits. To the half hour is to be added "necessary travel time (a matter known to the parties)". This makes clear that the Award directed the measure of the amounts to be paid, i. e. half an hour, plus travel time. The latter "a matter known to the parties", but not shown in the record, was to be ascertained.

If, as the Carrier contends, the total of the Award for each day of violation was one hour, there would have been no purpose whatsoever in mentioning travel time and indicating that it was to be added to the half hour in accordance with the parties knowledge of its duration.

The Carrier asserts that its interpretation is in accordance with the record, that the average of one hour included travel time. Looking at the record, as the Carrier suggests, we find the following description by the Carrier of the work performed at Belle Haven.

> "A Redwood City clerk, in conjunction with identical service at other industries in the area, makes a morning check of Johnson & Johnson spur for demurrage and car record purposes and messengers any messages there may be between that firm and Redwood City agency. Likewise, in the afternoon a Redwood City clerk on his regular rounds checks the tracks at Johnson & Johnson spur, consults with firm representative concerning shipping requirements, receives car orders, signs bills of lading and messengers any messages necessary between Johnson & Johnson Company and the Redwood City agency. The combined time of the two foregoing clerks would not exceed an average of 1 hour per day."

The description shows that the "average of 1 hour per day" is performed at Belle Haven. No mention is made of travel to or from Belle Haven. The Carrier contention that the work at Belle Haven required one-half hour in all and that the two round trips between Redwood City and Belle Haven consumed another half hour in total has no basis in the record.

The preceding description indicates that the clerks did the work while making similar visits "in the area" and "on his regular rounds".

The Carrier representative contended that even if the travel time was to be added to the hour, the measure should be the time required for a round trip between Belle Haven and Redwood City, where the reports were taken by the clerks working out of that agency.

This overlooks the fact that such work was in violation of the Agreement. If the Claimants are to be made whole they should receive the pay they would have gotten had they done the work to which they were entitled. Had they done the work they would have been required to travel from some point within their division.

Both parties state that the travel time for a round trip, Belle Haven to Newark, the nearest Agency in the Division to which the work at Belle

Haven belongs, is forty-five minutes. The clerks who did the work at Belle Haven carried their information back to Redwood City. Perhaps a full remedy might require adding the time of a round trip to Redwood City for each Claimant to the round trip Belle Haven-Newark. However, it is not a certainty that this additional round trip would have been necessary.

The "necessary travel time" is that of a round trip between Belle Haven and Newark, not Belle Haven and Redwood City. For the purposes of the Award in this case, overtime pay for the time for such a round trip is to be added to half an hour overtime pay for each Claimant for each day during which the violation continued.

Referee Merton C. Bernstein who sat with the Division, as a member, when Award No. 9419 was adopted, also participated with the Division in making this interpretation.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois this 2nd day of February, 1961.

DISSENT TO INTERPRETATION NO. 1 TO AWARD 9419, DOCKET CL-8903

The majority in its interpretation has committed two basic errors: First, in the guise of an interpretation, it has decided a matter which the parties did not call on it to interpret and which was in the award clearly left to the parties for determination; and Secondly, in so doing it has read into the agreement a rule not negotiated by the parties.

The award provides "* * * In sustaining the claim we award overtime pay only for the time which would have been worked * * *" and allows pay for "* * * necessary travel time (a matter known to the parties) * * *" which properly leaves this latter feature to determination by the parties in accordance with the terms of the existing agreement and no interpretation was called for or requested concerning it.

The interpretation of the majority gratuitously changed the award from one properly leaving the rate of travel time to determination by the parties under their agreement to one specifying overtime pay for time spent in traveling in spite of the fact the controlling agreement contains no rule providing other than the pro rata rate for travel time.

For these reasons we must vigorously dissent.

/s/ D. S. Dugan

/s/ R. A. Carroll

/s/ P. C. Carter

/s/ W. H. Castle

/s/ J. F. Mullen

ANSWER TO CARRIER MEMBERS' DISSENT TO INTERPRETATION NO. 1 TO AWARD 9419, DOCKET CL-8903

There is no merit to the Dissent as alleged first "basic error" is predicated upon the unilateral statement of the involved Carrier and the second "basic error" is without contractual support.

The Joint Request for an interpretation of Award 9419 clearly shows that there was a difference of opinion between the parties as to the rate applicable to "travel time". Further, it must be remembered that it is this Board which is authorized under the Railway Labor Act to make interpretations of its awards when properly requested to do so. If such authority was vested in either of the parties, as the Dissenters here infer, the Act would so provide.

There is nothing in the Award "leaving the rate of travel time" to be determined by the parties. A review of the Award clearly shows that that the "amount" of necessary travel time was "a matter known to the parties", the only question left in dobut.

The further statement that "the controlling agreement contains no rule providing other than the pro rata rate for travel time", is without substance. This assertion is predicated on the erroneous theory that Rule 18, which governs temporary assignment to road service of employes not regularly assigned to such service, should apply here. A review of Rule 18 will clearly show that it has no application under the circumstances involved in the instant dispute. Furthermore, the Dissenters have conveniently overlooked Rules 20(a) and 21. Rule 20 provides for the time and one-half rate for "time" in excess of eight (8) hours on any day and Rule 21 provides for the time and one-half rate for an employe notified or called to perform service before or after assigned hours. In Award 3966, Referee Fox, the Board ruled, here pertinent, as follows:

> "* * * In such a situation, we think the employe should be paid. We do not believe the agreement should be, or was ever intended to be, construed as requiring employes to render any character of service to the carrier without compensation. The contention made in the Carrier's submission that 'if the investigation is held outside of his assigned hours and he would not have made overtime during those hours had he not been required to attend the investigation as a witness, he is not paid anything,' entirely ignores the very important fact that the employe's time is being appropriated, possibly against his will, for he must respond to a call for his services on pains of being disciplined. It constitutes a species of involuntary servitude, which we do not believe was ever contemplated by the parties to the Agreement.
>
> We have not observed any disposition on the part of employes to donate to the Carrier any time or service, nor do we think they are called upon to do so. We are, therefore, of the opinion that the Claimant is entitled to be compensated for the full 22 hours and 5 minutes consumed in traveling to and from Miami, * * *."

The travel time involved in Award 3966 was sustained at the time and one-half rate under the "Call" Rule.

It is interesting to note that Employes' Claim (b) requested a "call" of two hours for each Claimant under Rule 21. This Rule provides that service rendered thereunder shall be compensated at the time and one-half rate. Award 9419 reduced the amount of time involved, however, the Board did not reduce the rate from that provided in Rule 21 to the pro rata, as contended by the Carrier and the Dissenters.

It is crystal clear that Award 9419 sustained the Employes' claim at the punitive rate. Interpretation No. 1 removes any doubt about the intent of the Board when the Award was adopted.

/s/ J. B. Haines

J. B. Haines

Labor Member