

Award No. 10073
Docket No. MW-8626

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Charles W. Webster, Referee

PARTIES TO DISPUTE:

**BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES
FORT WORTH AND DENVER RAILROAD COMPANY**

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

(1) The Carrier violated the Agreement when it failed and refused to compensate Foreman J. A. Berg for the time consumed in complying with the Carrier's instructions to report to Wichita Falls, Texas, and be examined on the Carrier's rules on Saturday, March 5, 1955.

(2) Claimant J. A. Berg be allowed four hours' pay at time and one-half rate because of the violation referred to in part (1) of this claim.

EMPLOYEES' STATEMENT OF FACTS: The Claimant, Mr. J. A. Berg, was regularly assigned to the position of section foreman at Iowa Park, Texas, with seniority as a section foreman dating from March 16, 1924. He was regularly assigned to a 40 hour work week, consisting of 5 days, eight hours each, Monday through Friday, with Saturdays and Sundays as designated rest days.

On Saturday, March 5, 1955 the claimant was instructed by the Carrier to report at Wichita Falls, Texas for an examination on the Carrier's Book of Rules. In complying with the Carrier's instructions, the claimant consumed a total of four hours in the performance of this service.

The Carrier has refused to compensate the Claimant for four hours at the time and one-half rate for services as rendered at its direction on the aforementioned date.

The Agreement in effect between the two parties to this dispute dated January 1, 1955, together with supplements, amendments, and interpretations thereto are by reference made a part of this Statement of Facts.

POSITION OF EMPLOYEES: During the handling of this dispute on the property, the Carrier has contended that it was entirely proper to require the claimant's attendance at Wichita Falls, Texas for an examination of its Book of Rules on the date in question without compensation for the time so consumed.

The courts have also held that a carrier is free to issue instructions from time to time as it considers necessary to govern the working conditions of its employes so long as the instructions are not in conflict with existing collective bargaining agreements. *In re Chicago North Shore & M.R. Co.* 147 F. (2d) 723 (CCA 7), *Williams v. Jacksonville Terminal Co.*, 315 U. S. 386, and *Terminal Association v. Trainmen*, 318 U. S. 1.

The instructions issued in this particular instance to attend a re-examination on rules classes did not conflict with the existing collective bargaining agreement for, as above stated, there exists no schedule rule to support this claim.

The Carrier can only construe that the claim filed in this instance is an attempt to obtain a rule by sustaining award, rather than follow the usual orderly process of negotiating rule changes. Consequently, the Board is respectfully requested to deny the claim in its entirety.

Carrier affirmatively states that all data contained herein and submitted herewith have previously been submitted to the Employes.

OPINION OF BOARD: The facts in this case are not in dispute. The Claimant was ordered to report for a re-examination on the Book of Rules of the Carrier. The day he was ordered to report was one of his rest days. After reporting for the re-examination he filed a claim requesting payment for the time consumed in being examined.

The sole issue before this Board is whether, under the Collective Bargaining Agreement between the parties, the Carrier can require employes to take periodic re-examinations on the Book of Rules on their rest day without compensating them for the time spent.

The Organization claims that this case is governed by Rule 27 of the Agreement which provides:

"Rule 27 — EXAMINATION FOR PROMOTION

(a) Employes in the Track and Bridge and Building Sub-departments will be required to pass an appropriate examination for promotion to positions of assistant foreman or foreman. When examination is to be given notice will be posted to the employes concerned for a period of ten (10) days and those desiring to apply will do so in writing within that period of time. The senior applicants in the number to be examined will be supplied the necessary data for preparation for examination and will be allowed reasonable time, (at least thirty (30) days) to prepare therefore. Those taking the examination shall be advised in writing within thirty (30) days whether or not they satisfactorily passed the examination. Those passing will be eligible thereafter for service in accordance with paragraph (b) of this rule. Employes failing to pass satisfactorily may apply for re-examination when a subsequent examination is given, but upon failure to pass a second time will be ineligible for further consideration.

(b) Employes who have satisfactorily passed the required examination will be placed on an 'eligible list' in the order of their seniority

and the 'eligible list' will be posted for the information of all concerned. Such employes will be used in the order of their rank on the 'eligible list' for filling vacancies of assistant foreman or foreman unless such vacancies are filled by employes holding seniority in such grades. The available employe on the 'eligible list' who declines to accept assignment to a vacancy of five work days or more in his turn on the 'eligible list' will be placed at the foot of the list."

The Carrier on the other hand contends that General Rules 2 and 3 of the Operating Department's "Rules and Instructions Governing Maintenance of Way and Structures" and Rule 11.

Rule 2 and 3 provide:

"2. All persons except laborers applying for employment, must sign application, form number 6150, properly filled out, and pass medical and other examination of prescribed form when required." (Emphasis ours).

"3. All employes whose duties are governed by these rules must provide themselves with a copy. If in doubt as to their meaning they must apply to proper authority for an explanation. The head of each department must be conversant with the rules, supply copies of them to such subordinates as are expected to have copies, and see that they are receipted for and observed."

Rule 11 provides:

"Rule 11 — SUPERVISORY EMPLOYES

"Employes whose responsibilities and/or supervisory duties require service in excess of the working hours or days assigned for the general force will be compensated on a monthly rate to cover all services rendered, except that when such employes are required to perform work which is not a part of their responsibilities or supervisory duties on their assigned rest days and holidays or in excess of the established working hours, such work will be paid for on the basis provided in these rules in addition to the monthly rate. Section foremen required to walk or patrol track on their assigned rest days and holidays shall be paid therefore on the basis provided in these rules and in addition to the monthly rate."

This Division cannot accept the Organization's position that Rule 27 operates to provide the only time in which examinations may be given without compensation under this agreement. While there is no question that operating rules of the Carrier which have been established unilaterally must give way to the Agreement and that if they are inconsistent, the contract governs, it is also true that absent such inconsistency management has certain prerogatives.

While the position of the Carrier in this case may be inequitable, it is not the function of this Division to render equity but its sole function is to interpret the agreement.

This referee has carefully studied the awards presented by the Organization but feels that they are distinguishable. After a thorough consideration of all previous awards it is the judgment of this Division that the reasoning and the logic of Award 7577 with Referee Shugrue is controlling. In this award he stated:

Award 7577 (Shugrue):

"There is no conflict in the awards of this Division on the question of whether attending rule re-examination classes constitutes 'work' or 'service' as those words are used in the rules here involved. Careful examination of other awards cited are not found to be applicable to the situation existing in this docket. We have held that attending rules re-examination classes is not the 'work' or 'service' referred to in the applicable rules which could give rise to a valid claim for overtime payments. Awards 773 and 487.

"Whether or not we feel that appropriating an employee's time in this manner, absent of course a specific rule, is fair or just is not for us to say for this Board does not sit as a court of equity. We are limited to interpreting the applicable Agreement provisions as they stand. It would be exceeding our statutory function to allow compensation where the Agreement itself does not authorize it. We do not believe it to be the prerogative of this Board to attempt to do so by reading into the rules something that is not there. We feel that the employee's recourse is to negotiate with the Carrier under Section 6 of the Railroad Labor Act."

In light of this the claim is denied.

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 Employee involved in this dispute are respectively Carrier and Employee 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 not violated.

AWARD

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 18th day of September 1961.