Award No. 11224
Docket No. CL-10840

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

(Supplemental)

Phillip G. Sheridan, Referee

PARTIES TO DISPUTE:

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

THE DENVER AND RIO GRANDE WESTERN RAILROAD COMPANY

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

(1) The terms of the current Agreement were violated when position of Baggageman, assigned 5:20 A.M. to 2:20 P.M., was abolished effective November 29, 1957, and re-created with new hours, 5:20 A.M. to 8:20 A.M. and 11:20 A.M. to 4:20 P.M., with lunch hour assigned 10:20 A.M. to 11:20 A.M.

(2) That Wilbur M. Mathews be compensated at the rate of time and one-half on the minute basis for all time in excess of eight hours, exclusive of meal period not to exceed one hour, from time first required to report for duty to the time of final release from November 30, 1957 to date position restored to former hours June 18, 1958.

EMPLOYES' STATEMENT OF FACTS: Prior to November 30, 1957, there was in existence at Grand Junction, Colorado two positions titled "Baggageman." These positions were assigned hours as follows:

5:20 A.M. to 2:20 P.M.

5:30 P.M. to 2:15 A.M.

Both of these positions are combination positions performing duties commonly attributed to Baggagemen as well as Janitors.

On November 27, 1957, Agent L. T. Clark published a bulletin abolishing position of Baggageman 5:20 A.M. to 2:20 P.M. and concurrent therewith reestablished this position with hours 5:20 A.M. to 8:20 A.M. and 11:20 A.M. to 4:20 P.M. with lunch hour assigned from 10:20 A.M. to 11:20 A.M. (see Employes' Exhibit No. 1.) It can be seen that this position was paid for eight hours within a spread of eleven hours, (Employes' Exhibit No. 1.)

Mr. Ray: The only thing that evidences to me, Mr. Examiner, is the fact that even in those eight hours there is no work for these men to perform except the handling of trains, and in order to get as nearly as possible a full eight hours performance out of them, one additional character of work has been assigned to them in that period.

Exam. Walsh: Is there anything further?

Mr. Ray: I have nothing more.

Exam. Walsh: Mr. Sylvester?

Mr. Sylvester: Mr. Examiner, I think Mr. Ryan pointed out in his statement that where there are forty employes in a local office, or at a local point, there is certainly work, additional work, that those employes could take over even though they were in a position to clean up the work that was really on their desks when their intermissions come into effect.

However, as Mr. Ryan has said, there is also work there that they leave when they take their split at night, and suspend work, and also work on their desks in the morning under the present arrangement. However, it is work that can be postponed until a little later in the day, and be done, but we think that is in violation of the intent of the rule.

Exam. Walsh: Yes. Is that all?

Mr. Sylvester: I think that is all we have to say in this case, Mr. Examiner, unless Mr. Ryan has something.

Mr. Ryan: That is all I have.

Mr. Ray: Mr. Examiner, in connection with that character of work, it is quite evident from the form of it — expense bills — that it is not only work that can be postponed, but it is work that has no particular time for completion within at least a period of several days. It is not work that is being delayed. It is work that can be done at a time within reason, when the clerks are otherwise unoccupied.

Exam. Walsh: Is there anything further?

Mr. Ray: Nothing further.

Mr. Sylvester: That is all.

Exam. Walsh: There being nothing further, the hearing is closed.

(Whereupon, at 10:30 o'clock A. M., January 28, 1925, the hearing of the above entitled matter was closed.)

OPINION OF BOARD: The question for determination by the Board in this case is whether Claimant's service was intermittent on the position in question from November 30, 1957 to June 18, 1958.

The Claimant was a baggageman and his original hours of employment were from 5:20 A. M. to 2:20 P. M., and this tour of duty was abolished on November 29, 1957, and a new tour of duty was inaugurated between hours of 5:20 A. M. and 11:20 A. M. to 4:20 P. M. with lunch hour assigned 10:20 A. M. to 11:20 A. M.

The employes contend that Rule 31 and not Rule 33 is applicable to this work assignment.

The Carrier denies the assertions of the Employes and relys and alleges that this work is proper under Rule 33.

The Organization asserts that there is sufficient work to be performed between the hours of 8:20 A. M. and 10:20 A. M.

The rules relied upon by the respective parties herein are as follows:

"Rule 31 reads as follows:

'Except as otherwise provided in Rules 33 and 34, eight consecutive hours' work, exclusive of the meal period, shall constitute a days' work.'

"Rule 33 reads as follows:

'Where service is intermittent, eight hours' actual time on duty within a spread of twelve hours shall constitute a day's work. Employes filling such positions shall be paid overtime for all time actually on duty or held in excess of eight hours from the time required to report for duty to the time of release within twelve consecutive hours, and also for all time in excess of twelve consecutive hours, computed continuously from the time first required to report until final release. Time shall be counted as continuous service in all cases where the interval of release from duty does not exceed one hour.

'Exceptions to the foregoing paragraph shall be made for individual positions when agreed to between the Management and duly accredited representatives of the employes. For such excepted positions, the foregoing paragraph shall not apply.

'This rule shall not be construed as authorizing the working of split tricks where continuous service is required.

'Intermittent service is understood to mean service of a character where during the hours of assignment there is no work to be performed for periods of more than one hour's duration and service of the employes cannot otherwise be utilized.

'Employes covered by this rule will be paid not less than eight hours within a spread of twelve consecutive hours.'

"Rule 35 (a) reads as follows:

'Unless otherwise mutually agreed to, the meal period shall not be less than thirty minutes nor more than one hour.'

"Rule 37 (a) reads as follows:

'Except as otherwise provided in these rule, time in excess of eight hours, exclusive of the meal period, on any day will be considered overtime and paid on the actual minute basis at the rate of time and one-half.'

The Carrier objects to the introduction of certain letters and statements executed by employes relative to the amount of work involved. This objection is well taken for these matters were not introduced to the Carrier on the property. The objection is also timely.

The burden of proof rests upon the Claimants. The record reveals nothing but mere assertions in the letters from the Claimants representatives to the proper authorities of the Carrier. This is not evidence sufficient to sustain a claim. Evidence is the means by which questions of fact are proved or disproved. Mere assertion is not evidence.

There is proof by way of assertion and admission that persons other than the Claimant handled baggage between the hours of 8:20 A.M. and 11:20 A.M. On two of these occasions, Claimant was called and he performed the work, on the other three occasions, he couldn't be located but he was compensated under Rule 33.

This letter evidence isn't of sufficient preponderance to sustain Claimant's claim when the duration of this intermitted service is considered.

Further, the Carrier's failure to comply with a request for a joint check is not evidence. See Award 10067, the relevant portion is as follows:

> "* * * , Petitioner's case must fail since it is not supported by the record. This result is not affected by Carrier's refusal to make a joint check of the facts. While such refusal may be important in solving conflicts in evidence, it is not sufficient to overcome a lack of proof. See Award 4939."

There is no violation of the Agreement.

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 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 15th day of March 1963.