Award No. 18136
Docket No. TE-17304

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

David L. Kabaker, Referee

PARTIES TO DISPUTE:

TRANSPORTATION-COMMUNICATION EMPLOYEES UNION

SOUTHERN PACIFIC COMPANY
(Pacific Lines)

STATEMENT OF CLAIM: Claim of the General Committee of the Transportation-Communication Employees Union on the Southern Pacific (Pacific Lines), that:

1. Carrier violated and continues to violate an Agreement between the parties hereto when it includes deadhead allowances in its computation of the guarantee of forty (40) hours a week for extra employes provided for in Paragraph 7 of the October 29, 1966 Mediation Agreement.

2. Carrier shall, because of the violations charged above, be required to compensate each extra employee a minimum of forty (40) hours each week, Monday through Sunday, excluding allowances for deadheading, commencing Monday, September 18, 1961 and continuing thereafter until the violations are corrected.

3. Extra employes on the San Joaquin Division as of September 18, 1961 were:

A. V. McIntosh
J. Graziani
R. C. Hale
H. A. Johnston
B. L. Duncan
W. C. Ehler
E. S. Partian
D. J. Biggs
R. I. Bayley

4. In addition to the extra employes shown above, the Carrier shall compensate each extra employe a minimum of forty (40) hours each week, Monday through Sunday, excluding allowances for deadheading, subsequent to September 18, 1961, account reduction in the number of positions or because the employe reverts to the extra list.

5. Permit and cooperate in a joint check of the Carrier's records, to determine the facts in any dispute of facts which may develop in the course of final settlement, including but not limited to the determination of the identity of claimants not listed by name in the foregoing and the amounts due each claimant.

The above claim applies to all extra employes with a seniority date on or prior to September 15, 1961.

EMPLOYES' STATEMENT OF FACTS: The claim in this case is based upon the provisions of an Agreement effective December 1, 1944, as amended and supplemented, and more specifically a Memorandum of Agreement effective October 29, 1961, made between the Southern Pacific Company (Pacific Lines), hereinafter referred to as Carrier, and The Order of Railroad Telegraphers, now renamed the Transportation-Communication Employees Union, hereinafter referred to as Employes and/or Union. Copies of these Agreements are on file with your Board and by this reference are made a part hereof.

The issue involved in this claim is simple and undisputed. It is whether Carrier is entitled under the provisions of paragraphs 7 and 11 of the Memorandum of Agreement effective October 29, 1961, to include deadhead allowances as provided by Rule 8 (Deadheading – Extra Employes) in its computation of the guarantee of forty (40) hours a week for extra employes.

At the outset, because of the long delay in submitting this dispute to your Board for adjudication, some explanation seems to be in order. It would appear at first blush that the uncertainty as to the validity of the claim was a factor in the delay in submitting the unadjusted dispute to this tribunal for disposition. However, this is not the case. When the parties were confronted with the herculean task of implementing what is commonly referred to as the first protective (job) agreement in the railroad industry, there simply was insufficient time to promptly progress claims arising thereunder. In this connection it may be noted in the statement of facts, hereinafter set forth, that this particular claim (and there are a number of others) was instituted on June 10, 1962, with Superintendent Robinson. He acknowledged receipt of same on June 19, 1962, with a promise to give the matter attention. In a letter August 7, 1962, Superintendent Robinson disallowed the claim. His disallowance of the claim was rejected by the District Chairman in a letter dated August 11, 1962. On September 17, 1962, the claim was appealed to Assistant Manager of Personnel L. W. Sloan, and acknowledged by him on September 18, 1962. On December 4, 1962, the Director of Personnel wrote the General Chairman to the effect that the case "will be discussed with you in conference at the first available opportunity." Following this, a series of extensions of the time limits (too voluminous to be included in the record) were granted, and nothing further transpired until October 7, 1966, when conference was had by the parties. (Mr. Larson's letter of November 2, 1966 set out the facts.) In his letter of November 2, 1966, confirming conference, Mr. Larson disallowed the claim for the first time. The handling on the property was terminated by the General Chairman's letter of November 3, 1966. The Employes feel that the foregoing explanation as to the reason for the delay in submitting this dispute to your Board will not prejudice the majority of your Board as to the validity of this and other similar claims.

Attached hereto and made a part hereof as TCU Exhibit 1, pages 1 through 13, are copies of schedule of work assignments or guarantee hours claimed by Extra Telegrapher H. A. Johnston, one (1) of the nine (9) Claimants involved in the dispute. These exhibits cover a representative period of several months during which Carrier included deadhead allowances in computing the guarantee of forty (40) hours a week for extra employes. By way of explanation of the exhibits, it may be noted that Extra Telegrapher Johns-

OPINION OF BOARD: The issue involved in this claim is whether or not the Carrier may deduct deadhead allowances, set forth in Rule 8 of the Labor Agreement, in the computation of the guarantee of forty (40) hours a week for extra employes under the provisions of Paragraph 7 of the Mediation Agreement between the parties effective October 29, 1961.

This matter was heard jointly by this Board with Award 18135.

We conclude herein, for the reasons set forth in the Opinion in Award 18135, that deadhead payments made to extra employes cannot be regarded as time paid for in the computation of the forty (40) hour week guarantee set forth in Mediation Agreement of October 29, 1961, and therefore cannot be offset, as wages, in the determination of the payment required by Paragraph 7 of the Mediation Agreement effective October 29, 1961.

In relation to the procedural defense raised by the Carrier which is identical to that defense raised by it in Award 18135, it must be the conclusion that the claim herein is vague and indefinite for the reasons cited in Award 18135. We further find that the Employes have not sustained the burden of proof and, accordingly, the claim must be denied.

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 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 30th day of September 1970.

STATEMENT OF LABOR MEMBERS — AWARD 18136, DOCKET TE-17304

See Dissent of Carrier Members to Award 18135.

G. L. Naylor
R. E. Black
P. C. Carter
W. B. Jones
G. C. White

DISSENT TO AWARD 18136, DOCKET TE-17304

This Award is an absurdity in that the majority which adopted it, the Carrier Members and Referee, after finding that the agreement was violated as alleged in Paragraph 1 of the Statement of Claim, nevertheless, went on to make a contradictory finding that the agreement was not violated.

Of course, the agreement was violated — as stated here by the majority — in the same manner as was found to be the case in Award 18135, q.v. What the Referee intended was to maintain consistency with said Award 18135. In order to do that he should have held that Paragraph 1 of the claim was sustained and the balance denied, all in conformity with the Opinion and Findings in Award 18135.

The anomaly was brought to the attention of the Referee before the proposed award came up for adoption, but he declined to make the obviously required correction, necessitating these explanatory comments.

The net effect of this Award can only be the same as that of Award 18135; that is, the Carrier may not properly use deadhead payments to offset the weekly guarantee provided by the Mediation Agreement for extra employes, but a class action is not a proper means of securing redress.

With this latter notion, the Labor Members do not agree. This point is more thoroughly discussed in the Labor Member's Concurring Opinion, Award 18135 which, by this reference, is incorporated into this dissent.

C. E. Kief
Labor Member

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