Award No. 18381

Docket No. TE-18501

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Francis X. Quinn, Referee

PARTIES TO DISPUTE:

TRANSPORTATION-COMMUNICATION DIVISION, BRAC

DULUTH, MISSABE AND IRON RANGE RAILWAY COMPANY

STATEMENT OF CLAIM: Claim of the General Committee of the Transportation-Communication Division, BRAC, on the Duluth, Missabe and Iron Range Railway, that:

1. Carrier violated the Agreement when it failed to properly compensate Telegrapher H. T. Olson at Two Harbors, Minnesota on April 12 and 19, 1968.

2. Carrier shall compensate Telegrapher H. T. Olson additional 45 minutes of the operator's rate at Two Harbors, Minnesota on April 12 and 19, 1968.

EMPLOYES' STATEMENT OF FACTS:

(a) STATEMENT OF THE CASE

An Agreement between the parties, effective January 1, 1953, as amended and supplemented, is available to your Board and by this reference is made a part hereof.

This claim was timely filed, progressed under the provisions of the Agreement to the highest officer designated by the Carrier to receive appeals, including conference, and has been denied.

This claim arose when Carrier refused to compensate an extra employe for time in excess of one hour spent waiting for his shift to start.

(b) ISSUES

Compensation for time in excess of one hour spent by an extra employe waiting for his shift to start.

(c) FACTS

The status of the Claimant at the time these claims arose was that of an extra telegrapher. The assigned hours of the position in issue were 10:30 P. M. to 6:30 A. M. On the dates of the claims he was required to

at the straight time rate of the job to which traveled. When employees are traveling by private automobile time shall be computed at the rate of two minutes per mile traveled."

In accordance with these rules, the claimant was compensated on each of the dates of claim, as follows:

(1) 8 hours at the straight time rate for his regular assignment.

(2) 2 hours at the overtime rate for the call.

(3) 4 hours and 40 minutes (2 hrs. and 20 minutes each way) at the straight time rate under the provisions of Paragraph D of Arbitration Award No. 298.

(4) $18.00 (200 miles x 9 cents per mile) transportation expense for use of his private automobile.

Copies of the correspondence involved in the handling of the claims on this property are attached and marked as Carrier's "Exhibit A."

(Exhibits not reproduced.)

OPINION OF BOARD: The facts are clear and not in dispute. Claimant, an extra employe, was properly directed by Carrier to travel 100 miles from his headquarters and work two tours of duty. The regular shift started at 10:30 P. M. and extended to 6:30 A. M. However, it was necessary to work a "call" of two hours from 6:45 P. M. to 8:45 P. M. Claimant was properly compensated for the time spent — in excess of one hour — in travel to the location of his work assignment; he was properly paid for the two hour "call" and he was properly paid for working the regular shift. He was not paid anything however, for the one hour and forty-five minutes between completion of the "call" at 8:45 P. M. and the beginning of the regular shift at 10:30 P. M.

The applicable rules in this case are Article 5(a) of the agreement between the Duluth, Missable and Iron Range Company and employes represented by the Transportation-Communication Division of the Brotherhood of Railway and Airline Clerks, and Section II(D) of the Award of Arbitration Board No. 298. They are quoted as follows:

"(a) When notified or called to work outside of assigned hours, employees will be paid a minimum allowance of two (2) hours at the overtime rate."

"AWARD OF ARBITRATION BOARD NO. 298

"(D) If the time consumed in actual travel, including waiting time enroute, from the headquarters point to the work location, together with necessary time spent waiting for the employee's shift to start, exceeds one hour, or if on completion of his shift necessary time spent waiting for transportation plus the time of travel, including waiting time enroute, necessary to return to his headquarters point or to the next work location exceeds one hour, then the excess

over one hour in each case shall be paid for as working time at the straight time rate of the job to which traveled. When employees are traveling by private automobile time shall be computed at the rate of two minutes per mile traveled."

After careful study of the record and the Agreement it is clear that this Board has jurisdictional responsibility over the dispute involved herein.

We have studied the argument that special provisions regarding travel by private automobile take precedence over more general provisions. However, this Board must assert that all language of the Agreement must be read in context and given reasonable effect. Mindful that effect should be given to the entire language of the agreement, we are concerned with the intent of the rule.

Our study indicates that time spent at the direction of the Carrier is compensable under the rule. Award No. 15 of Public Law Board No. 429 would add weight to our finding. The decisive factor in that case was that the Claimant could not have returned to his headquarters during the time between the two work periods and thus the time was necessarily spent in waiting for his shift to start.

In the instant case, the Claimant was waiting for his regular shift to start after working the "call". We are persuaded that Claimant was required to remain, was held at Carrier's discretion and after careful study of the record, Agreement, Award of Arbitration Board 298 and Award No. 15 of Public Law Board No. 429 we find the claim is valid and should be sustained.

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.

AWARD

Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 29th day of January 1971.

on instructions of the Chief Dispatcher to protect a 'call' at or about 8:25 p.m.

"The **Employees submit that Claimant O'Quinn performed a specific service for the Carrier and is entitled to be compensated for three (3) hours and twenty-five (25) minutes standby service** 5:00 p.m. to 8:25 p.m. October 22, 1967 **under the provisions of the current Agreement,** in addition to the amount he has already been paid for service performed on that date.

"In Third Division Award 1675, the Board held:

> 'It is admitted by the Carrier that Ashford was definitely told by his superior officer on the evening of December 23rd that he would be subject to call and that **he could not leave** his home station. **He was not released** from being subject to call until 7:30 p.m. Sunday, December 24th 1939. Thus we find that Ashford was required to be ready for service during this period of time. **It was stand-by service.** It was of value to the Carrier or otherwise it would not have required Ashford to have been subject to call during this period of time. As someone has said 'They also serve who only stand and waits.' Ashford performed a specific service for the Carrier and is entitled to be compensated for this service under the provisions of the current agreement, for the 23½ hours' stand-by service performed from 8:00 P. M., Saturday, December 23rd to 7:30 p.m., Sunday, December 24th, 1939.'

"A sustaining award is in order, and it is prayed that your Honorable Board will so find.

"Carrier is apprised of all data contained herein." (Emphasis ours.)

Manifestly, the "sand-by service" involved in this Division's early Award 1675 is something entirely distinct, supported by agreement provisions totally unrelated to travel-and-waiting time provisions of the Award of Arbitration Board 298. As we have already noted, Carrier defended the claim on the basis that the arbitration award was applicable and did not provide for the payment claimed. The essence of Carrier's position in that case is stated as follows in "Position of Carrier" therein:

> "The Organization is here attempting by Board action to obtain a monetary allowance not contemplated by rules of the current agreement and certainly not granted in Award of Arbitration Board No. 298 . . ."

The pertinent portion of Award 15 reads:

> ". . . **It is the position of Carrier that under Award No. 298** it has no requirement to pay the claim.
>
> "We are impressed with the fact that Carrier and the Organization at hearings agreed it was not possible for Claimant to have

DISSENT OF CARRIER MEMBERS TO AWARD 18381, DOCKET TE-18501 (Quinn)

The first paragraph of the Opinion correctly states the essential facts of the case, most essential of which is that the time involved in the claim is the period "between completion of the 'call' . . . and the beginning of the regular shift . . ." We are thus dealing with a period of time when Claimant was admittedly at his next work location, having completed a "call" shift there, he was waiting for a "regular" shift to commence there.

Neither the award of Arbitration Board No. 298 nor any rule of the agreement expressly provides that an employe shall be paid for time spent waiting between shifts at a location where his next service is to be performed, yet the Opinion concludes: "Claimant was **required to remain, was held at Carrier's discretion** and after careful study of the record, Agreement, Award of Arbitration Board 298 and **Award No. 15 of Public Law Board No. 429** we find the claim is valid . . ."

The absence of any provision in the agreement or the arbitration award for payment for off-duty time between shifts at the same work location, plus the absence in the agreement or the arbitration award of any reference to an employe who is "required to remain" or "held at Carrier's discretion," plus the repeated reference to Award 15 of Public Law Board 429 which does deal with time held waiting between shifts and which does contain these quoted expressions, all compel us to conclude that the Opinion is based squarely on Award 15 and must be read in light of the issues actually presented and decided in that award.

Award 15 indicates on its face that the carrier in that case asserted a defense based on the award of Arbitration Board 298, and that defense was expressly rejected. Unfortunately, however, Award 15 does not disclose on its face the contractual basis for allowing the claim therein, and at first blush it may appear that the Board was interpreting and applying undisclosed provisions of the arbitration award; but the record in that case makes it perfectly clear that the allowance of the claim was based on a rejection of the carrier's attempt to bring the arbitration award into the case as a defense and the acceptance of other authorities cited by the employes. The arbitration award was neither interpreted nor applied.

While the record in Award 15 had not been filed with the NRAB Administrative officer at the time this claim was being considered, and the Carrier Members did not then have access to the same, we have since learned that the entire "Position of Employees" in that case reads as follows:

POSITION OF EMPLOYEES:

"There is of course, no dispute as to the facts in the case encompassed in this dispute. The Employees, by reference, have made the entire Agreement a part of this dispute. Therefore, we shall call specific attention to only those rules directly applicable, as follows: [Here the Employes quoted 15 full pages of rules from their collective agreement, including Rule 1 (Scope), Rule 7 (Overtime and Calls), Rule 12 (Work Week).]

"Carrier admits that Claimant O'Quinn, after completing his tour of duty at Spartanburg on October 22, 1967, was held thereat

left the place of assignment between the quitting time and the time of the call to go to his home. He would, as a practical matter, they agreed, have to remain at the work point if he was to complete his assignment of the call.

"Further, Carrier's letter to the Organization says:

> 'In the instant case Mr. O'Quinn had completed his shift at the work location to which traveled and was held there to protect a call at or about 8:25 p.m. . . .'

"We are persuaded that Claimant was required to remain, was held at Carrier's discretion and thus deprived of time in favor of his employer's direction and is so entitled to payment requested."

Thus, Carrier's defense based on the arbitration award itself was rejected. The case was decided expressly on the premise that claimant was entitled under all of the agreement rules cited by the Employes to pay because he was "required to remain, was held at Carrier's discretion". It is clear that Award 15 neither interpreted nor applied the arbitration award.

A conclusion that Board 429 was neither interpreting nor applying the arbitration award in its Award 15 is further substantiated by the fact that the claimant therein traveled in his automobile, and in its Award 1, Board 429 ruled that the parties to that board had substantially changed the terms of the arbitration award when they incorporated them into their collective agreement, with the result that an interpretation of the arbitration award by Arbitration Board 298 concerning traveling and waiting time of employes traveling in their automobiles was not applicable on that property.

Thus, we conclude that the opinion in this award, being based on Award 15 of Public Law Board 429, neither interprets nor applies the arbitration award, and thus does not run afoul of the consistent rulings of this Board and the Federal courts on the point that the interpretation of an arbitration award made pursuant to the Railway Labor Act is the exclusive function of the arbitration board that rendered the award. See **Awards 8039** (Elkouri) and **17845** (Dolnick) which expressly recognize this Board lacks jurisdiction to interpret an arbitration award made under the Railway Labor Act, and compare **Awards 13314** (Hamilton), **15940** (Heskett), and others, which expressly abstain from interpreting an arbitration award and recognize the distinction between interpreting the provisions of such an award on the one hand and determining whether there exists given facts calling for the application of undisputed provisions of the award on the other hand. Arbitration boards have refused to resolve such questions of fact and have refused to interpret rules not contained in their awards.) Also see **Western Air Lines, Inc. v. Labor Commissioner, Etc.**, 167 F.2d 566; **Certain Carriers, Etc.**, 240 F.Supp. 290; and **Certain Carriers, Etc., and BRT v. CMSt.P&P RR Co., Etc.**, 248 F.Supp. 1008, affd. 380 F.2d 605, cert. den. 389 U. S. 928.

We respectfully submit that the Referee gravely erred when he concluded that the record before us in the instant case supports the conclusion that the Claimant was "required to remain" or was "held at Carrier's discretion" during the period of time involved and hence he rendered service to Carrier during that period. Petitioner certainly submitted no evidence to that effect. Carrier has made no admission to that effect as did the

carrier in Award 15. We find nothing in the record that justifies the conclusion that Claimant was not off duty and entirely free to spend the time as he saw fit between these two shifts; and no rule or award has been cited that would require Carrier to compensate him for his time under these circumstances. For these reasons we respectfully submit that the award is palpably wrong and should not be enforced.

G. L. Naylor

R. E. Black

H. F. M. Braidwood

P. C. Carter

W. B. Jones

ANSWER TO CARRIER MEMBERS DISSENT TO AWARD 18381, DOCKET NO. TE-18501

The Carrier Members dissent, being a vicious distortion of fact and an improper invitation to the Carrier to ignore the Board's order to make the award effective, requires this rather detailed reply:

The simple facts giving rise to the dispute are clearly and correctly stated in the first paragraph of the Opinion of Board. The author of the dissent recognizes this fact in the first paragraph of his dissent. However, with characteristic sophistry, in the next breath he seeks to distort those facts by treating the "call" as being essentially unrelated to claimant's assignment to work on the days in question. He attempts to make the "two tours of duty", referred to in the award, synonymous with "two shifts", involving an implied waiting period between shifts.

This obvious attempt to distort the facts falls of its own weight. The claimant was required by the Carrier to travel 100 miles and work the 10:30 P. M. to 6:30 A. M. "shift" at Two Harbors. In addition, he was required to arrive at the work location in time to work a "call" of two hours beginning at 6:45 P. M. The time between completion of the "call" and the beginning of the "shift" clearly constituted time spent by the claimant waiting for his "shift" to start. Payment for such waiting time is provided for by the rule, and it was Carrier's failure to comply which precipitated the dispute.

The word "shift" was officially interpreted many years ago to mean a day's work of normal duration, or eight hours. (Interpretation No. 4 to Supplement No. 13 to General Order No. 27, United States Railroad Administration. Washington, April 30, 1919). The word "Call" connotes a work period in addition to, and outside of the hours of the "shift" to which the employe is assigned. It arose from agreement rules requiring minimum payment for a "call to duty" outside the hours of the "shift".

The mendacious attempt to make a "shift" of the "call" here involved points up the basic fallacy of the Carrier Members argument. Since only one "shift" was involved each day the claimant had to be waiting for that shift to start and was entitled to the payment provided. We wonder how this same Carrier Member would react to a claim by a telegrapher for two

days' pay for working two "shifts" on the same day when one was in fact a "call".

The dissenter goes to great lengths in an effort to establish error because of the citation of Award 15, Public Law Board No. 429. This effort provides a perfect example of the classic "straw man" fallacy. This Award was cited to the Referee by the Labor Members not as direct, controlling precedent, but as persuasive authority in support of the claim and of the Employes' understanding of the intent of the rule. And no amount of skillful sophistry by the dissenter can change the fact that Award 15 rejected the carrier's argument that "under Award No. 298 it has no requirement to pay the claim".

The Referee in Award 18381 did not err in citing Award 15 of P.L. Board No. 429. The two decisions are in harmony and correctly reflect the intent of the rule.

With disarming brevity the dissenter refers to his contention that "this Board lacks jurisdiction to interpret an arbitration award made under the Railway Labor Act (Penultimate paragraph). This contention, however, constitutes a major part of the dissenter's attempt to defeat the claim, and thus requires an extended rebuttal to set the record straight here, as well as to provide references for future use if similar improper contentions are advanced.

The basis for the contention lay in a provision of the Arbitration Agreement, which resulted in the rule in question, for review and a ruling by the Arbitration Board if any difference of opinion as to the meaning or the application of the award should arise. This provision was not made as a result of voluntary agreement between the parties. It is a mandatory requirement of the Railway Labor Act, Section 8(m), and thus appears in all agreements to arbitrate under this law.

The dispute decided by Award 18381 arose by reason of the Carrier's failure to pay claimant the full amount due under a rule which resulted from Arbitration Board No. 298. Neither party raised any question of the jurisdiction of the Adjustment Board in their four submissions to this body. No such question was raised by any member of this Board up to and including the "panel discussion" with Referee Quinn.

After that discussion was concluded on July 20, 1970, however, the Carrier Member of the "panel", apparently perceiving the merit of the Employes' position, began casting about for some means of overcoming that position. On the same day he submitted what he called a "revised" page of his brief to "correct an error". This revision served to change the thrust of his argument, but still there was no challenge of the Board's authority to consider and decide the dispute.

Then, before the Referee submitted a proposed award the author of the dissent demanded an opportunity to discuss the case further. Although this was extremely unsusual if not unprecedented, the demand was granted. During this discussion with the Referee, which took palce on September 8, 1970, the dissenter, in addition to expansion of his earlier arguments, raised for the first time a contention that because the rule resulted from arbitration this Adjustment Board lacks jurisdiction to render a decision. This con-

tention was rebutted orally by reference to Award 13314 and the Labor Members' arguments therein.

The contention was rejected in the proposed award submitted by Referee Quinn on September 10, 1970. The dissenter then effectively blocked adoption of the proposed award, and later requested a re-argument. This request was granted and implemented on January 18, 1971. The same contentions were repeated in amplified form. The rebuttal was similarly repeated. Still the dissenter was not satisfied. On the following day, January 19, 1971, he demanded a further discussion, and presented another written argument. The less said about this encounter the better.

The Referee obviously considered very carefully both the contention and its rebuttal. He quite properly declined to change the proposed award, and it was finally adopted on January 29, 1971.

Because of the extreme position taken by the author of the Carrier Members' dissent, and the possibility of similar efforts being made in the future to persuade referees that this Board lacks jurisdiction to decide disputes involving rules arising from arbitration proceedings, it appears necessary to consider the point in some depth.

The Railway Labor Act recognizes two main types of disputes: (1) Major disputes relate to formation of agreements, matters of interest; and, (2) Minor disputes involve application of agreement provisions to specific fact situations, matters of right.

The Act provides, with respect to major disputes, for voluntary collective bargaining about matters of interest so that agreements — providing specific rights — may be reached. If these unassisted efforts fail to result in agreement, the Act provides for mediation under the auspices of the National Mediation Board. If agreement is reached in this manner, the written accord is identified as a "mediation agreement" attested by the mediator involved. Provision is made by the Act, Section 5, Second, for interpretation by the Mediation Board if a "controversy arises over the meaning or the application of such agreement".

If no agreement results from mediation, procedures are provided for voluntary arbitration, Section 7 of the Act. Such procedures, if utilized by the parties, require a binding agreement concering the specifics to be affected. And one of the mandatory requirements of such an agreement is that it must contain a provision for interpretation by the Arbitration Board in case of a controversy arising over the meaning or the application of the provisions of the award to be made by such Board, Section 8(m) of the Act.

It must be emphasized that arbitration of major disputes is not compulsory. But when agreed to, this procedure results in rules or provisions precisely the same as if they were arrived at in mediation or by unassisted bargaining of the parties.

Once an agreement is reached, disputes about its provisions as applied to every-day fact situations are termed minor disputes, subject to the decisional procedures and jurisdiction of the Adjustment Board if the parties themselves fail to resolve them. It is well settled that jurisdiction of the Adjustment Board is exclusive and may not be encroached upon even by

the courts. (Special Boards of Adjustment, provided by the Act are merely extensions of the Adjustment Board). **Slocum v. Delaware, Lackawanna & Western RR** (339 U.S. 239).

What, then, is the purpose of the requirement in the Railway Labor Act for interpretation by the Mediation Board of Mediation agreements, and by Arbitration Boards of Arbitration awards? It must be noted that the provisions of Section 5, Second, and Section 8(m) are essentially similar, and certainly have the same intent as to the purpose to be achieved.

The Mediation Board, in its annual reports, deals specifically with this question. We quote from the current "Thirty-Sixth Annual Report of the National Mediation Board", pages 39 and 40:

"1. INTERPRETATION OF MEDIATION AGREEMENTS

"Under section 5, second, of the Railway Labor Act, the National Mediation Board has the duty of interpreting the specific terms of mediation agreements. Requests for such interpretations may be made by either party to mediation agreements, or by both parties jointly. The law provides that interpretations be given by the Board within 30 days following a hearing, at which both parties may present and defend their respective positions.

"In making such interpretations, the National Mediation Board can consider only the meaning of the specific terms of the mediation agreement. The Board does not attempt to interpret the application of the terms of a mediation agreement to particular situations. This restriction in making interpretations under section 5, second, is necessary to prevent infringement on the duties and responsibilities of the National Railroad Adjustment Board under section 3 of title I of the Railway Labor Act, and adjustment boards set up under the provisions of section 204 of title II of the act in the airline industry. These sections of the law make it the duty of such adjustment boards to decide disputes arising out of employee grievances and out of the interpretation or application of agreement rules.

"The Board's policy in this respect was stated as follows in Interpretation No. 72(a), (b), (c), issued January 14, 1959:

"The Board has said many times that it will not proceed under section 5, second, to decide specific disputes. This is not a limitation imposed upon itself by the Board, but is a limitation derived from the meaning and intent of section 5, second, as distinguished from the meaning and intent of section 3.

"We have by our intermediate findings held that it was our duty under the facts of this case to proceed to hear the parties on all contentions that each might see fit to make. That was not a finding, however, that we had authority to make an interpretation which would in effect be a resolution of the specific dispute between the parties. The intent and purpose of section 5, second, is not so broad.

"The legislative history of the Railway Labor Act clearly shows that the parties who framed the proposal in 1926 and took it to Congress for its approval, did not intend that the Board then created would be vested with any large or general adjudicatory powers. It was pointed out in the hearings and debate, that it was desirable that the Board not have such power or duty. During the debate in Congress, there was a proposal to give the Board power to issue subpoenas. This was denied because of the lack of need. It was believed by the sponsors of the legislation that the Board should have no power to decide issues between the parties to a labor dispute before the Board. The only exception was the provision in section 5, second. This language was not changed when section 3 was amended in 1934 and the National Railroad Adjustment Board was created.

"We do not believe that the creation of the National Railroad Adjustment Board was in any way an overlapping of the Board's duty under section 5, second, or that section 3 of the act is in any way inconsistent with the duty of the Mediation Board under section 5, second. These two provisions of the act have distinctly separate purposes.

"The act requires the National Mediation Board upon proper request to make an interpretation when a 'controversy arises over the MEANING or application of any agreement reached through mediation.' It would seem obvious that the purpose here was to call upon the Board for assistance when a controversy arose over the meaning of a mediation agreement because the Board, in person, or by its mediator, was present. Thus the Board was in a particularly good position to assist the parties in determining 'the meaning or application' of an agreement. However, this obligation was a narrow one in the sense that the Board shall interpret the 'meaning' of agreements. In other words, the duty was to determine the intent of the agreement in a general way. This is particularly apparent when the language is compared to that in section 3, first (i). In that section the National Railroad Adjustment Board is authorized to handle DISPUTES growing out of grievances or out of the interpretation or application of agreements, whether made in mediation or not. This section has a different concept of what parties may be concerned in the dispute. That section is concerned with disputes between an employee or group of employees, and a carrier or group of carriers. In section 5, second, the parties to the controversy are limited to the parties making the mediation agreement. Further, making an interpretation as to the meaning of an agreement is distinguishable from making a final and binding award in a dispute over a grievance or over an interpretation or application of an agreement. The two provisions are complementary and in no way overlapping or inconsistent. Section 5, second, in a real sense, is but an extension of

the Board's mediatory duties with the added duty to make a determination of issues in proper cases."

In harmony with this sound doctrine the Adjustment Board has many times decided "minor disputes" involving rules arrived at by means of arbitration. A few examples are Third Division Awards 4967, 13314, 14268, 14269, 14270, 14271, 14407, 16111, 16156, 17486. In some of these cases, as 4967, no question of the Adjustment Board's jurisdiction was raised. In others, as 13314, arguments similar to that of the dissenting Carrier Members here were considered and rejected.

It thus becomes abundantly clear that the only "palpable error" in connection with Award 18381 is the dissent, which of course has no official standing in any event.

C. E. KIEF
Labor Member

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