NATIONAL RAILROAD ADJUSTMENT BOARD

Award Number 21033
THIRD DIVISION Docket Number CL-20997

Irwin M. Lieberman, Referee

PARTIES TO DISPUTE: (Brotherhood of Railway, Airline and Steamship Clerks, Freight Handlers, Express and Station Employes
(The Baltimore and Ohio Railroad Company

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood (GL-7704) that:

(1) Mr. C. R. Brown shall be paid an additional 3 hours at pro rata rate for June 7, 1973 and

(2) Mr. C. K. Yoe shall be paid an additional 3 hours at pro rata rate for June 12, 1973 and

(3) Mr. O. R. Randolph shall be paid an additional 3 hours at pro rata rate for June 7, 1973.

OPINION OF BOARD: The three Claims herein, all related to the issue of proper compensation under Rule 65, are each factually somewhat different.

Claim #1

Two train orders were relayed by Claimant and were copied by two different train crews approximately five minutes apart: at about 2:25 A.M. and at 2:30 A.M. on June 7, 1973. Claimant was allowed a three hour payment at pro rata rate for the first train order incident and was not allowed an additional payment for the second copying of train orders.

Claim #2

Claimant was the second trick Operator at Holloway, Ohio. On June 12, 1973 a train order was copied by a conductor at 2:16 P.M. and the first trick operator was allowed a three hour payment. At 3:58 P.M. the second trick operator, Claimant, relayed a train order to a conductor and was denied a payment.

Claim #3

On June 7, 1973 Claimant, a second trick operator, relayed two train orders to a conductor at 5:50 P.M. at Kaiser, West Virginia. He was allowed one three hour payment under Rule 65 and was denied a second payment.

Rule 65 provides in pertinent part:

"Copying train orders, clearance forms or blocking trains at stations where an employee qualified to do so under this agreement is employed will be confined to such employee (provided he is available and can be promptly located). When such an employee is not used in conformity with this rule he shall be promptly notified by Chief Dispatcher and paid three hours at pro rata rate. This rule does not apply to Train Dispatchers performing such duties at/or in the vicinity of the dispatcher's office location in the normal course of their regular duties.

"Except in emergencies, when employees not covered by this agreement are required to copy train orders, clearance forms or block trains at a location where no qualified employee covered by this Agreement is employed, the proper qualified employee at the closest location where a qualified employee covered by this agreement is employed shall be promptly notified by Chief Dispatcher and paid three hours at pro rata rate."

The parties entered into a Memorandum Agreement on July 23, 1973 for the purpose of clearly identifying the proper employe specified in Rule 65. That agreement provided in part:

"A. Locations where employees under the Agreement are employed:

1. The senior qualified employee on duty at the time of the incident will be allowed the three hour pro rata payment.

2. If no such employee is on duty at the time of the incident, the senior qualified employee off duty will be allowed the three hour pro rata payment.

B. Locations where no employees under the Agreement are employed:

1. The senior qualified employee on duty at the time of the incident at the closest location on the seniority district will be allowed the three hour pro rata payment.

2. If no such employee is on duty at such closest location at the time of the incident, the senior qualified employee off duty at such location on the seniority district will be allowed the three hour pro rata payment."

Carrier's call Rule (Rule 8) provides generally for three hours pay for two hours work on days other than Sundays and holidays; there are certain exceptions and added provisions.

Petitioner argues that Rule 65 is clear and unambiguous in that a qualified employe is entitled to three hours' pay at the pro rata rate whenever a noncovered employe performs the work. It is urged further that the language of the July 23, 1973 interpretative agreement refers repeatedly to "the time of the incident" and is controlling: a separate three hour payment must be made for each incident. It is contended that Carrier is incorrect in construing the antecedent rules and the current call rule in justifying its position. Further, the parties did not include language in the Agreement limiting the payments for multiple incidents within a stipulated time period and the Board has no authority to rewrite the Agreement.

Carrier's argument is essentially that when two or more orders are copied within a period of two hours, for which payment is made at time and one-half rate or for three hours, then the one payment meets the requirements of the rule. Carrier explains its version of the derivation of Rule 65 and the reason that three hours pay at pro rata was used rather than the term "call". Carrier contends that the July 23rd Memorandum Agreement was entered into only to clarify "who" would be entitled to payment and did not attempt to clarify "when" such payments were appropriate. By the same token, it is urged that the clear language of Rule 65 refers to "train orders" and not to a train order; such language is not subject to modification by this Board. Carrier states further that the first paragraph of Rule 65 contemplates calling out an employe (under the Agreement) to perform the work; if this were done such employe could be used for the full two hour period (provided in the call rule) with no additional payments due regardless of the number of train orders he might be required to copy during that time period. Carrier concludes that it is not logical to assume the parties intended to pay more when an employe is not called out to perform the work in question than would have been paid had he been called out.

In its rebuttal statement, Petitioner apparently agrees with Carrier that when an employe is called out in accordance with Rule 65 he would only be entitled to the payments provided in the call rule regardless of his activity. However, Petitioner alleges that employes have never been called out to copy train orders on this Carrier since it would probably be more expensive than the current method of making payments under Rule 65.

Although Carrier's position is sound with respect to its logic, it does not deal with the obvious punitive aspect of Rule 65. We cannot agree with Carrier that the parties intended to condone repeated violations of the Rule falling within a given two hour time span. We can only speculate that the parties did not contemplate this situation when the language of Rule 65 was drafted. As Referee Garrison held, in a related dispute involving the same parties, in Award 244, our conclusion produces a result "....which is burdensome to the Carrier, and uneconomical, and which the parties might have guarded against had they constructed the necessary formula ..... The result, by which the Carrier is compelled to pay for more than it receives, is the kind of result which frequently occurs when written contracts must be applied to changing circumstances." The only sound remedy in the long run, is the modification of the Rule itself, which is not within our province.

The identical problem to that herein was considered by Public Law Board No. 352 in its Award No. 79, which held in part:

> "Carrier maintains that it complied with the provision just quoted by paying a single call to Claimant since both of the train orders involved fell within a two-hour period of a call and the distance from point to point where the orders were copied is four miles. We disagree.
>
> There were two separate and distinct violations and we do not find persuasive Carrier's theory that a single payment is sufficient for both breaches of the rule. If Carrier's position were upheld, a rule could be violated repeatedly, with impunity after the initial violation, so long as the violations occur within a two-hour period. No such result is contemplated by the Agreement in our judgment, and the rules must be enforced and violations avoided."

We must conclude that the reasoning expressed above is applicable to this dispute. For that reason, Claims #1 and 2 must be sustained. With respect to Claim #3 however, we view the incidents stemming from one telephone call as one violation and that Claim will 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 violated.

A W A R D

Claims #1 and 2 sustained; Claim #3 denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: A. W. Paulos
Executive Secretary

Dated at Chicago, Illinois, this 15th day of April 1976.

DISSENT OF CARRIER MEMBERS
TO
AWARD NO. 21033, DOCKET CL-20997

It is unfortunate that the Referee saw fit to rely upon the bare bones of one award of a Public Law Board involving other parties, another rule, a different factual situation, with no knowledge as to what the record leading up to the Public Law Board award contained, or how the award was arrived at. Such a procedure is no substitute for an interpretation of the rule involved based upon the record before the Board in this docket. Parties to disputes before this Board are entitled to an interpretation of the rule involved based upon the record that they submit to the Board.

The second paragraph of Rule 65 provides for a payment of three hours at pro rata rate when, except in emergencies, employes not covered by the Agreement are required to copy train orders, clearance cards or block trains at a location where no qualified employe covered by the Agreement is employed. The rule simply does not provide for a three hour payment for each order copied. The rule should have been applied as written and the claims denied, as the language of the rule is not subject to modification by this Board.

Award 21033 is also contrary to the principle that penalty provisions of a contract are strictly construed. As stated in Award 12558 (Dorsey):

> "Penalty provisions of a contract are strictly construed; and, it is beyond question that we may not add to an agreement. Further, it is established that our jurisdiction is confined to interpreting and applying agreements in accord with the principles of contract law. We may not inject our predilictions as to what is fair, just and equitable. Nor can we engage in speculation as to what might have been in the minds of the parties, but not evidenced in the Agreement as executed, or otherwise proven."

Having found Carrier's position sound with respect to its logic, the claims herein should have been denied in their entirety. Award 21033 only serves to create further confusion out of what was settled when Rule 65 was agreed upon. It is in error, and we must register our dissent thereto.

DISSENT TO
AWARD 21033
(DOCKET CL-20997)