NATIONAL RAILROAD ADJUSTMENT BOARD

Award Number 25306
THIRD DIVISION Docket Number TD-25207

Marty E. Zusman, Referee

PARTIES TO DISPUTE: (American Train Dispatchers Association
(
(The Atchison, Topeka and Santa Fe Railway Company

STATEMENT OF CLAIM: Claim of the American Train Dispatchers Association:

Claim #1 - R. J. Alexander, Ft. Madison, IA for 10/14/81

"...payment of 13 hours 30 minutes pay at time and 1/2 rate favor of Dispr. R. J. Alexander for attending formal investigation as a Company witness at Moberly, Mo. at the request of the N&W Railroad, on October 14, 1981."

Claim #2 - J. T. Sevier, Ft. Madison, IA for 11/17/81

"...payment of 12 hours and 27 minutes at time and one-half, favor Dispr. J. T. Sevier for attending formal investigation as a company witness at Jefferson City, Mo. at the request of the MOP Railroad on Nov. 17, 1981."

OPINION OF BOARD: This dispute involves two similar claims in which Claimants were requested by the Carrier to attend formal investigations as Carrier witnesses. Two preliminary points need to be addressed. First, the Carrier argues that these claims must be viewed as separate and distinct inasmuch as the petition of Claimant Alexander was denied by letter of October 20, 1981, by Mr. Smelser and followed thereafter by a late appeal. Finding no supporting evidence to substantiate this line of reasoning, this Board rejects that argument. Secondly, a review of the record as handled on property not only fails to substantiate a letter of October 20, 1981, but similarly finds that ex parte arguments presented to this Board were not discussed on property and as such, this Board will not consider them now. All such arguments, lines of reasoning and supporting documentation not discussed on property are inadmissible. This position is a firmly established position of the National Railroad Adjustment Board, codified by Circular No. 1 and consistent with numerous Awards in this Division (Third Division Awards 20841, 21463, 22054). Carrier discussions of Section 6 Notices as well as Exhibits pertaining thereto are inadmissible.

The case at bar reflects two similar circumstances, wherein in instant Claim one, Claimant R. J. Alexander after completing eight consecutive hours of work was required by Carrier to attend a disciplinary investigation as a Carrier witness. On October 13, 1981, immediately after completion of his regular assignment, he drove to the locality and stayed overnight so as to attend the investigation of October 14th. After being dismissed he returned to his origination. Instant Claim two occurred on November 16th and 17th, 1981. After completing eight consecutive hours of work on November 16th, Claimant J. T. Sevier traveled to Jefferson City, MO for the purpose of being available at 9:00 A.M. as a Carrier

witness at a disciplinary investigation. Transportation was provided. Upon arrival, Claimant stayed overnight, attended the investigation and then returned the approximately 470 miles to his origination. It is the position of the Organization that payment in both cases should have commenced from the end of the eight (8) hour consecutive work day until return to origination following the investigation on the next day.

The Organization bases its claim for payment to be addressed by Article III, Sections 1 and 2 upon past decisions of the Third Division of the National Railroad Adjustment Board, Awards 6679 and 6695, as well as Ruling No. D-3 and a Carrier letter of December 17, 1973, allowing a claim and reiterating the applicability of Ruling No. D-3. In Award 6679 between these same parties the issue was joined as to payment for travel time and for waiting time and the decision was reached that sustained the Organization's position that such time was work time. A strong Dissent was issued and the Carrier brought the issue back to the Board, even involving the same Claimant to the earlier June, 1952, case. In this very similar case the Board in Award 6695 sustained the Organization. Shortly thereafter Carrier issued letters of June 28, 1955, and July 1, 1955, of a Ruling No. D-3 which read in pertinent part:

> "Effective June 1, 1955, train dispatchers should be paid in accordance with Article III, Sections 1 and 2 of the Train Dispatchers' Agreement, effective September 1, 1949, for time spent in waiting and traveling outside regularly assigned hours in attending investigations as a witness for the Company."

By letter of December 17, 1973, a claim was allowed by the Carrier and in correspondence stated in part "your attention is directed to Ruling D-3, dated June 28, 1955, issued from this office, which ruling is still applicable and indicates that for time spent in waiting and traveling...should be paid in accordance with Article III, Sections 1 and 2...". As such, the Organization now pursues these two instant claims for compensation following Article III, Sections 1 and 2 which read in pertinent part:

> "Section 1. Eight (8) consecutive hours shall constitute a day's work.
>
> Section 2. Time worked under this Agreement in excess of eight (8) hours, continuous with, before and after, regular assigned hours will be considered overtime and paid for on the actual minute basis at the rate of time and one-half."

The Organization maintains the issue to have been previously decided and that the instant claim should be sustained on the basis of "stare decisis". That in addition, the Carrier's payment was based on a Rule that is not applicable.

The Carrier based compensation as indicated in the letter of January 18, 1982, from Superintendent Gill upon Article VII, Section 10 which reads in part:

> "...Train dispatchers acting as witnesses in investigations for and at the request of the Company will suffer no deduction in pay for actual time lost from regular assignments by reason thereof. If so used outside their assigned hours, they shall be paid at the pro rata rate for actual time required to be in attendance; if on their rest days, payment for actual time shall be at a rate of time and one-half."

It is the Carrier's position that this is a specific rule that takes precedence over a general rule. The Carrier further argues that Awards 6679 and 6995 are "erroneous and improper Awards for the reason that they exceeded the statutory authority of the Board". It further asserts that these claims are based on "travel time" and/or "rest time" for which there are no rules in the Dispatcher's Agreement. Carrier also asserts that such time has not been maintained by this Board as "work time" and cites support (Third Division Award 18377).

The weight of the evidence for any claim is the responsibility of the moving party. This Board has carefully reviewed the one paragraph Opinion of Award 6679, the Dissent and the Award 6995 which states little more than "it is clearly evident the Carrier is attempting to secure a rehearing of Awards 6679...." A careful review of Award 6679 indicates that the circumstances in the instant case differ substantially in that the case at bar involves "rest", "sleeping" and "eating" time wherein Award 6679 only involved "travel" and "waiting" time. As such, this Board sees no established precedent for the case at bar.

The strongest support for the Organization's case is the presentation of Ruling No. D-3 and its subsequent use on December 17, 1973. This Board notes that such evidence does lay weight to the claim. However, in the mind of this Board there has been entirely too much time elapsed with no evidence of record of the same situation having arisen since 1954 or after 1973 to provide substantiation that, barring Agreement support the employes had come to count on this action being other than gratuitous. While it had some stature, being reduced to written Rule, it lacked support, in that there is insufficient evidence of record to substantiate that it was other than a unilateral position or to document that the application of Ruling No. D-3 had become an established practice of a constant response to a recurring set of circumstances.

It is the determination of this Board that Article VII, Section 10 is the Rule germane to attendance at investigations. That Rule is silent on the issue at bar. Neither past Awards nor Ruling No. D-3 have strong enough support in the record to establish a firm practice to which Carrier would be restrained from abandoning. As such, this Board finds that the Carrier did not violate the Agreement and as we are not permitted to expand upon the Agreement negotiated by the parties, we must assume that the absence of language covering this issue is intended.

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.

A W A R D

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Attest: Nancy J. Dever - Executive Secretary

Dated at Chicago, Illinois, this 28th day of February 1985.

Labor Member's Dissent
to
Third Division Award 25306 - Docket TD-25207
Referee Zusman

In Third Division Award 22206, the majority wrote: "It must be disquieting, both to labor and management, when neutrals vascillate on basic issues."

In Third Division Award 24547: ". . . we do not think it proper for the Board to issue conflicting awards involving the same provisions of the same agreement between the same parties."

In Second Division Award 9234: "It would be illogical and inconsistent with the time honored doctrine of stare decisis for us to relitigate that issue here. Predictability and consistency, which are of value to all concerned, would be destroyed."

In Fourth Division Award 3443: "Whether phrased in terms of 'res judicata', 'stare decisis' or any other legal terminology, the fact remains that the best ends of labor-management relations are served by a basic predictability of Awards, especially when a dispute involves the same parties, same rules and same basic evidence."

In light of these thoughts on the subject of precedent, let us consider Award 25306.

Third Division Award 6679, which considered the same dispute on the same carrier, same agreement and rules, cited Award 2223: "We think the time has come when we should say that where the employe is not himself involved in a matter being investigated, and he is called by the Carrier, in its own interest, to attend an investigation, he should be paid, whether we call what he does 'work' or 'services,' and whether he is called on his rest day or otherwise is not controlling. . . ." (Emphasis supplied in Award 6679).

Since the instant case involves appropriation of the employee's own, off duty time, for the Carrier's benefit, even as did the same Carrier in Award 6679, (there was no mutuality of interest), it is difficult to comprehend just why a distinction was drawn between rest, sleeping, and eating time, as opposed to travel and waiting time. Surely,

it is illogical to conclude that time spent in traveling and waiting may not be employed as time to rest, eat, or sleep.

Third Division Award 6995 reinforced the decision of Award 6679.

More perplexing is the majority's rejection of Ruling No. D-3. Third Division Award 14229 states:

> ". . . once a practice is established and adopted by both parties as the proper interpretation of a Rule neither party unilaterally should be allowed to abandon that practice anymore than he should be allowed to abandon a written rule."

Ruling No. D-3 had more stature than an unwritten practice, being reduced to writing and expressing specific intent. As recently as December 17, 1973, Ruling No. D-3 was cited by the Carrier itself as support for sustaining a similar claim.

What would have convinced the majority? Would it have been necessary to show reliance on Ruling No. D-3 on a <u>daily</u> basis since 1954? The record does not indicate that the Carrier repudiated Ruling No. D-3 until these disputes arose. There is no evidence of any change in agreement or interpretation between December 17, 1973 and October 14, 1981, when the first of these two claims came into being. Yet, for some undisclosed reason, the majority finds that the absence of a dispute in that eight-year period somehow fails to substantiate the Carrier's own understanding of the Agreement's application as being other than gratuitous.

In short, there is no rationale for abandonment of the application of Article III, Sections 1 and 2, to these circumstances, as determined by Award 6679, reaffirmed in Award 6995, applied by the Carrier itself for future guidance in Ruling No. D-3, and demonstrated in settlement of a claim in 1973. To say, ". . . we must assume that the absence of language covering this issue is intended", is to ignore Article III, Sections 1 and 2, and all the evidence entered in support of the claims.

This Award errs in overturning the application of agreement provisions already determined by prior Awards and the accepted practice

on-property derived from these Awards. We must, therefore, register dissent to Award 25306.

R. J. Irvin
Labor Member