PUBLIC LAW BOARD NO. 1844

AWARD NO. 18

CASE NO. 10

PARTIES TO THE DISPUTE:

Brotherhood of Maintenance of Way Employees

and

Chicago and North Western Transportation Company

STATEMENT OF CLAIM:

"Claim of the System Committee of the Brotherhood that:

(1) The Carrier violated the Agreement when it failed and refused to compensate Mr. Donald Harriss for work performed in going to and from his work location and assembling point prior to and continuous with his regular assigned work period on November 19, 20, 21, 24, 25, 26, 28 and December 1 and 2, 1975 (System File 81-1-237).

(2) Mr. Donald Harriss be allowed two (2) hours' pay at his time and one-half rate on each of the dates set forth within Part (1) of this claim."

OPINION OF BOARD:

Review of the record shows that there is no dispute regarding the factual background of this claim and that the controversy narrows to the question whether time spent by Mr. Harriss going to and from his work site is payable under Rule 43, as contended by Carrier, or under Rule 30 as urged by the Organization. On the claim dates in November and December, 1975, Claimant Harriss, a machine operator headquartered at DeKalb, Illinois, with assigned hours 7:00 a.m. to 3:30 p.m., was instructed by his supervisor to report to a work site at Nelson, Illinois, at 7:00 a.m. and not to leave the work site until 3:30 p.m. It is undisputed that in order to comply with these orders Mr. Harriss was required to leave his headquarters at 6:00 a.m. and did not return to headquarters until 4:30 p.m., i.e., he spent one

hour before and after his regularly bulletined hours in transit between his headquarters and the work site. For each of the nine dates in question the Claimant reported two hours of overtime, i.e., two hours at the time and one-half rate. Carrier declined to pay the overtime rate for the 18 hours involved and offered instead to pay straight time, citing Rule 43 of the Agreement. The positions of the parties are set forth with clarity in the exchange of correspondence between the General Chairman and the Director of Labor Relations (Non-operating). Accordingly, these letters are reproduced herein as follows:

> "I am hereby declining the proposal of Division Manager F. W. Yocum to compensate Mr. Don Harriss at his straight time rate for work performed in going to and from his work location and assembly point prior to and continuous with his regular work period.
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> "Mr. Harriss was instructed by the direction of Management, Mr. R. Berg, to report to Nelson, Illinois at 7:00 am and not to leave the job site until 3:30 pm. Mr. Harriss, who is a machine operator, was assigned this position by bulletin with DeKalb, Illinois as his headquarters. The assigned hours were 7:00 am to 3:30 pm with a one-half hour meal period (12:00 Noon to 12:30 pm).
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> "The assembly pint for section and/or maintenance of way crews has always been their headquarters point. Their work day as well as their time started and ended at the assembly point. Any time prior and/or following and continuous with their regular assigned work period was paid for at their overtime rate in compliance with Rules 30 and 34 of the current agreement. Therefore, by direct orders of the Carrier (Mr. R. Berg) to be at Nelson at 7:00 am and not to leave until 3:30 pm it was necessary for Mr. Harriss to leave his headquarters an hour before this regular assigned starting time and return to his headquarters an hour after his regular quitting time. This is work performed in going to and from his work location and assembly point prior to and continuous with his regular work period.
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> "Mr. Harriss, therefore, should be compensated at his overtime rate for the dates of November 19, 20, 21, 24, 25, 26, 28, December 1 and 2 and for everyday thereafter for work performed in going to and from his work location (Nelson, Illinois) and assembly point (DeKalb, Illinois) prior to and continuous with his regular assigned work period.
>
> "Please advise.
>
> Yours truly,
>
> /s/ S. C. Zimmerman
> General Chairman"

* * *

"Please refer to your letter of January 27, 1976 appealing claim that Don Harriss, Machine Operator, 'be compensated at his overtime rate for the dates of November 19, 20, 21, 24, 25, 26, 28, December 1, and 2 and for every day thereafter for work performed in going to and from his work location (Nelson, Illinois) and assembly point (DeKalb, Illinois) prior to and continuous with his regular assigned work period.'

"It is noted in your letter you cite Rules 30 and 34 in support of this claim. Your attention is called to the fact that both of the cited rules deal with 'work' while the time claimed was for traveling.

"In connection with case it is my opinion that Rule 43 of the collective bargaining agreement applies. Your specific attention is called to that part of Rule 43 reading:

> 'Travel or waiting time during the recognized overtime hours at home station will be paid for at the pro rata rate.'

"It is accordingly my opinion that the offer made to you by Division Manager Yocum to dispose of this claim by an allowance of the hours claimed at straight time rate was correct and in accordance with the applicable rule. I am therefore agreeable to the previous offer made by Mr. Yocum to dispose of this claim.

"Due to failure of the cited rules to support the claim for overtime rate I am not agreeable to an allowance of the claim as appealed in your letter of January 27, 1976. Such claim failing support of the controlling agreement is declined in it's entirety.

Yours truly,

/s/ W J Fremon
Director of Labor Relations
(Non-operating)"

From the foregoing it is clear that the dispute boils down to whether the 18 hours claimed is payable at the straight time rate under Rule 43 as "travel time" or payable at the time and one-half rate under Rules 30 and 34 as "time worked." The Rules relied upon by the parties in this dispute read in pertinent part as follows:

"Rule 25 - Beginning and Ending of Day

"Employes' time will start and end at a regular designated assembly point for each class of employes, such as the tool house, outfit car or shop.

"Rule 30 - Overtime

"Time worked continuous with and following a regular eight-hour period shall be computed on the actual minute basis and paid for at time and one-half rate, with double time on actual minute basis after sixteen hours of work in any twenty-four hour period computed from starting time of employe's regular shift.

"Employes will be compensated as if on continuous duty in all cases where the interval of release from duty does not exceed one hour."

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"Rule 34 - Service in Advance of Regular Assignment

"Employes required to report in advance of regular starting time for work continuous with regular assignment will be compensated at rate and one-half for such advance time, with minimum of one hour.

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"Rule 43 - Travel

"Except as provided in Rules 42 and 47, employes who are required by direction of the Company to leave their home station will be allowed actual time for traveling or waiting during regular working hours. All hours worked will be paid for in accordance with practice at home station. Travel or waiting time during the recognized overtime hours at home station will be paid for at the pro rata rate. If, during the time on the road, a man is relieved from duty and is permitted to go to bed for five hours or more such relief time will not be paid for, provided that in no case shall he be paid for a total of less than eight hours each calendar day, when such irregular service prevents the employe from making his regular daily hours at home station." (Emphasis added.)

It is evident beyond reasonable argument that the rules in dispute herein are in conflict and must be reconciled in line with the intent of the parties. Both sides cite a formidable array of Awards as authoritative and precedent for their opposing views. Close analysis shows that most of these must be rejected either because of irrelevancy or incoherency. Thus, sustaining Awards 4850 and 10686 offered by the Brotherhood are not useful because there is no competent evidence that a travel time rule such as we have before us was at issue in those cases. Award 2453

cited by Brotherhood and Award 15973 oifered by Carrier are so distinguishable on their facts from the case at bar that they are of no help to us. Awards 13305 cited by Carrier and 18033 cited by Brotherhood are both so lacking in analysis that we can only assume they were summarily decided and they are worthless as precedents.

The viable Awards which remain for consideration have reconciled the obvious conflict of overtime and reporting rules with travel time rules like those before us in this case, in one of two ways: (1) by resort to past practice to determine the intent of the parties. See Third Division Awards 4581, 6668, 8825, 9263, 9983 and 13359; or (2) in the complete absence of any evidence of practice, by resort to that rule of contract construction which holds that a "special" rule prevails over a "general" rule. See Award 13286. All of the Awards based upon practice have found that the overtime payment was required. The single case to the contrary held that the travel time rule was "specific" and governed the "general" overtime rule.

Only one of the pertinent Awards cited by the parties does not fall into either of the foregoing schools of thought. Rather, Award 18424 tries unsuccessfully to bridge both schools. In that Award the Third Division found that there was insufficient record evidence from which to determine past practice, yet also made a determination that the travel time rule was a "general" rather than a "specific" rule. In the face of those anomalous interim findings, the Division proceeded to turn the case apparently on the logistics of the travel involved, finding therein some indicia of mutual intent that the time at issue was "time worked." It is worth commenting that the Division in 18424 cited as support for its decision most of those Awards representing the "past practice school"; notwithstanding its express holding that the record was inadequately developed to make any findings relative to practice. In the face of such confusion it is little wonder that the parties find themselves at odds over the interpretation and application of rules such as we have before us.

Analyzing the record evidence in light of the cited precedents, we find initially that the "specific versus general" approach is of little utility herein. Such pigeonhole categorization has the appeal of simplicity but, leaving aside self-serving descriptions, there is no evidentiary basis to support a finding that Rule 30 is "general" and Rule 43 is "special." Even if such were proven, we cannot conceive how Rule 34 could be construed as less express and specific than Rule 43. In this latter connection we note that the Division in Award 13286 was not faced with a rule like Rule 34, but rather with only an overtime and a travel time rule.

In light of the foregoing, we might expect that this case should be governed by the principles enunciated in Third Division Awards 4581, 6668, 8825, 9263, 9983 and 13359. We have noted that the mode of travel was not placed in issue in this case as it was in some of those cited. But even in those cases the mode of transportation per se was not determinative of the outcome, rather it was discussed in order to establish the practice of paying overtime rather than straight time rates for time spent traveling to and from assembly points and work site at Carrier's direction so as to be at the work site at starting time and not to leave before quitting time.

Unfortunately, however, the apparently easy answer of reliance upon practice to resolve the conflict in the rules is foreclosed to us in this case. This is so because the record is inadequately developed to permit a clear determination relative to practice in similar fact situations on this property in the past. The Organization asserts and the Carrier denies such practice but neither offers any proof. The onus of this state of equilibrium falls upon the Organization as the party with the burden of proof on the point.

Given the state of the record and in consideration of the established precedents governing such cases, we are left no alternative but to dismiss this claim for lack of proof. In so doing we emphasize that our holding is dictated by evidentiary

inadequacies relative to past practice. We make no affirmative determination herein relative to the proper reconciliation of Rules 30, 34 and 43. Such a determination is not possible on this record.

FINDINGS:

Public Law Board No. 1844, upon the whole record and all of the evidence, finds and holds as follows:

1. That the Carrier and Employe involved in this dispute are, respectively, Carrier and Employe within the meaning of the Railway Labor Act;

2. that the Board has jurisdiction over the dispute involved herein; and

3. that the claim must be dismissed for lack of proof.

AWARD

Claim dismissed.

Dana E. Eischen, Chairman

H. G. Harper, Employe Member

R. W. Schmiege, Carrier Member

Date: 12/6/71