Award No. 3823
Docket No. 3439
2-MP-MA-'61

NATIONAL RAILROAD ADJUSTMENT BOARD

SECOND DIVISION

The Second Division consisted of the regular members and in addition Referee Mortimer Stone when the award was rendered.

PARTIES TO DISPUTE:

SYSTEM FEDERATION NO. 2, RAILWAY EMPLOYES' DEPARTMENT, A. F. of L.-C. I. O. (Machinists)

MISSOURI PACIFIC RAILROAD COMPANY

DISPUTE: CLAIM OF EMPLOYES: 1. That under the current agreement Machinist E. W. Rhoads was unjustly dealt with when the Missouri Pacific Railroad Company declined to compensate him for service required outside of his bulletined hours on April 29, 1958.

2. That accordingly, the Missouri Pacific Railroad Company be ordered to additionally compensate the aforementioned employe in the amount of five (5) hours at the punitive rate for the service required of him outside his bulletined hours between 8:00 A. M. and 1:05 P. M., April 29, 1958.

EMPLOYES' STATEMENT OF FACTS: Machinist E. W. Rhoads, hereinafter referred to as the claimant, was regularly employed as airman by the Missouri Pacific Railroad Company, hereinafter referred to as the carrier, in the diesel facilities at Kansas City, Missouri, on the 12:00 midnight to 8:00 A. M. shift.

On April 25, 1958, the carrier summoned the claimant as a witness at the investigation of Machinist C. L. Gunn, which was scheduled to be held on Tuesday, April 29, 1958, and the employes herewith submit Master Mechanic J. W. McCaddon's letter of April 25, 1958, addressed to Machinist Gunn, showing copies to those being called as witnesses, among which Claimant Rhoads' name appears. However, when the carrier became aware of the fact that they would have to pay the claimant the overtime rate for appearing as witness at this investigation, they wrote the claimant under date of April 28, 1958, advising they were correcting the letter of April 25th to include the claimant being cited for investigation along with Machinist Gunn.

The claimant reported as requested and was required to remain at the investigation from 9:00 A. M. to 1:05 P. M. (4' 5"); however, inasmuch as the claimant finished his regular tour of duty at 8:00 A. M., one (1) additional hour is claimed to cover the waiting time prior to the beginning of the hearing, making a total claim of five (5) hours and five (5) minutes.

During the course of the investigation it was brought out that the claimant had no connection with the charges as outlined in the caption of the hear-

gation outside of their regularly assigned hours either as a witness or a principal but that the argument is strengthened in the case of an employe attending an investigation as a principal by reason of the provisions of Rule 32 (e), which is a special rule applicable in such cases and the rule does not provide for the compensation requested.

The carrier respectfully submits that claim must be denied.

FINDINGS: The Second Division of the Adjustment Board, upon the whole record and all the evidence, finds that:

The carrier or carriers and the employe or employes involved in this dispute are respectively carrier and employe within the meaning of the Railway Labor Act as approved June 21, 1934.

This Division of the Adjustment Board has jurisdiction over the dispute involved herein.

Parties to said dispute were given due notice of hearing thereon.

Right of management to take disciplinary action is necessary to effective operation. It can be enforced only as to employes called for investigation as principals rather than as witnesses, hence fair latitude of action should be allowed in noticing an employe as principal for investigation where there is reason to believe that he might have committed or participated in rule violation or neglect of duty.

Claimant made air inspection only and no defect was claimed therein, but he not only signed for that work but also the Form A-2 Inspection Report as Inspector and admittedly at the time of his inspection he went through the engine room of the diesel. On inbound inspection it had been reported: "Cab floor very dirty, L-5 overhead cover leaking", and after the outbound inspection report signed by claimant and departure from Kansas City the Federal Inspector found that oil leaks were spreading over the walkway of the engine compartment and it was being flooded with oil, creating a slipping and fire hazard.

If that situation existed when claimant walked through the engine room he must have seen it and should have noted it on the outbound report which he signed as inspector. Even though he later was absolved from any responsibility there appears to have been sufficient ground for including claimant as principal in the investigation, and the fact that he had been summoned as witness did not preclude noticing him as principal.

AWARD

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of SECOND DIVISION

ATTEST: Harry J. Sassaman
Executive Secretary

Dated at Chicago, Illinois, this 19th day of September 1961.

DISSENT OF LABOR MEMBERS TO AWARD No. 3823

The majority excuses the carrier from paying the claimant on the ground that he was a principal in the investigation stating that "* * * fair latitude of action should be allowed in noticing an employe as principal for investigation where there is reason to believe that he might have committed or participated in rule violation or neglect of duty." This is not in accord with paragraphs (a) and (c) of Rule 32 which prescribe:

> (a) **No employe** shall be disciplined without a fair hearing by a designated office of the railroad.
>
> (c) At a reasonable time prior to the hearing such employe will be apprized of the precise charge against him.

The claimant was neither apprized of any charge against him (this is evident from the fact that he was summoned as a witness) nor was he given a hearing.

The instant decision is based neither on the record in the case or on the governing agreement. The dispute is based on the fact that the claimant was required to perform service outside his regular bulletined hours and it is an elementary principle of the law of contract that if the employer calls upon the employe to perform any service the employer thereby creates an obligation to pay for such service if the employe responds. The claimant was called by the carrier to attend an investigation. He responded and unless he is compensated for such service he is being unjustly dealt with. The service performed lies within the scope of the collective agreement and we submit that a reasonable interpretation of existing agreement requires that claimant be compensated in accordance with its terms.

Edward W. Wiesner

C. E. Bagwell

T. E. Losey

E. J. McDermott

James B. Zink