

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Frank M. Swacker, Referee

PARTIES TO DISPUTE:

**BROTHERHOOD OF RAILROAD SIGNALMEN OF
AMERICA**

ATCHISON, TOPEKA & SANTA FE RAILWAY COMPANY

STATEMENT OF CLAIM: "Claim of J. K. Appleby for compensation for service performed on Sunday, October 4, 1936, for eight hours at rate of time and one-half time and for travel and waiting time, a total of fifteen and one-half hours at rate of seventy-eight cents per hour amounting to \$12.09."

EMPLOYEES' STATEMENT OF FACTS: "J. K. Appleby, Signal Maintainer, with headquarters at Kiowa, Kansas, was instructed by the Division Engineer in writing to attend an investigation held at Wellington, Kansas, on Sunday, Oct. 4, 1936, as a witness to an accident which occurred October 1, 1936, at Crisfield, Kansas. Appleby was not involved in the accident other than being a witness to same. Appleby attended the investigation as instructed, incurring living expenses of \$2.30 for which he was reimbursed and made time claim as above indicated. His time claim was not allowed."

EMPLOYEES' POSITION: "Mr. Appleby is regularly assigned to the position of signal maintainer with headquarters located at Kiowa, Kansas. He is regularly assigned to perform service for a period of six days per week, Sunday being his regular day off duty. Section 8, Article II, of the current agreement reads:

'Work performed on Sundays and the following legal holidays—namely, New Year's Day, Washington's Birthday, Decoration Day, Fourth of July, Labor Day, Thanksgiving Day, and Christmas (provided when any of the above holidays fall on Sunday, the day observed by the State, Nation, or by proclamation shall be considered the holiday), shall be paid at the rate of time and one-half, except that employees necessary to the continuous operation of the carrier and who are regularly assigned to such service will be assigned one regular day off duty in seven, Sunday if possible, and if required to work on such regularly assigned seventh day off duty will be paid at the rate of time and one-half time; when such assigned day off duty is not Sunday, work on Sunday will be paid for at straight-time rate. this rule does not apply to employees covered by Section 8 of Article V.'

"The position held by Mr. Appleby also requires that he come under the provisions of Section 11 of Article II. The rule reads:

'Employees assigned to, or filling vacancies, on a section or plant will be subject to call. Such employees will notify the designated officer where they may be called and will respond promptly when called.'

(1) The Signalmen's Agreement in effect on this property does not make any provisions for paying employes covered thereby for attending investigations.

(2) Signal Maintainer Appleby did not lose any time because of attending this investigation as it was held on his off-duty day.

(3) The National Railroad Adjustment Board, Third Division, in its Award Number 134 decided in substance that attending an investigation as a witness was a special service that could not be construed as work of the type to which an employe is regularly assigned and which is covered by the agreement.

(4) Due to the foregoing the claim of J. K. Appleby for compensation October 4, 1936, covered by the ex parte submission of the Brotherhood of Railroad Signalmen of America should be denied."

There is in evidence an agreement between the parties bearing effective date of Feb. 1st, 1929.

OPINION OF BOARD: Because of the conclusions about to be reached it is advisable that some more of the evidence in this case be stated. Among other things it is shown that on a previous occasion another employe of the Signal Department in a similar situation refused to attend an investigation during his time off and was discharged for insubordination. In the instant case when the employe was instructed on Saturday to appear at Wellington on Sunday, October 4th, at 1:00 P. M., he informed his supervisor that to arrive there by 1:00 o'clock would require his leaving Kiowa, his home station, at 11:30 Saturday night, whereas if he could appear at 1:15 Sunday he could catch a train leaving Kiowa at 11:00 A. M. The investigation actually occupied a total of seven hours.

The carrier here takes the position that there is nothing in the agreement of employment covering compensation for services attending an investigation. This is hardly consistent with its course in discharging a former employe for refusing to comply with like instructions.

There is a sharp conflict in decisions concerning payment of employes for time consumed in attending investigations, the majority holding in substance that it is not "work" in the sense used in the rules so as to bring into play the Call rule or other rules governing work. There may be some warrant for this view in cases such as where an employe is required to attend an investigation involving fault of his own or where he may be called upon for rules or physical examination, in which matter he has a mutual interest with the carrier. In the instant case, however, the employe was in no way involved and was merely a witness.

Considering all the circumstances particularly the peculiar rules concerning days off in the Signal Agreement, Article 2, Section 11, under which the employes are required to keep themselves available for call at all times except if and when they may be released from this obligation on alternate Sundays, and even then when released to furnish information as to where they may be found; considering that this was one of such off Sundays of the employe and that he had been previously released but was then recalled; considering the inconsiderate demand that he leave Saturday night when he could have arrived 15 minutes after the investigation started by leaving in the forenoon Sunday; it is considered that this case should not be considered as ruled by the cases holding pay schedules inapplicable to one attending investigation but rather should be treated as falling within the second paragraph of Section 11 of Article 2. He certainly was ordered to an "unusual place" and obviously "the requirements of the service would not permit" his release, nor could relief be furnished since he would be the only one who would be suitable for the service desired.

The claim seems to be in error insofar as the travel time is concerned as he appears to have been occupied five hours in traveling rather than seven hours. He accordingly is entitled to eight hours at time and one-half and five hours at one-half time, a total of 14½ hours, and reparation should be made accordingly.

FINDINGS: The Third Division of the Adjustment Board, after giving the parties to this dispute due notice of hearing thereon, and upon the whole record and all the evidence, finds and holds:

That the carrier and the employe involved in this dispute are respectively carrier and employe 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 J. K. Appleby is entitled to 14½ hours at 78 cents per hour.

AWARD

Claim sustained to extent indicated by opinion.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: H. A. Johnson
Secretary

Dated at Chicago, Illinois, this 21st day of March, 1938.