

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

E. L. McHaney, Referee

PARTIES TO DISPUTE:

**BROTHERHOOD OF RAILROAD SIGNALMEN OF AMERICA
ATCHISON, TOPEKA AND SANTA FE RAILWAY SYSTEM**

STATEMENT OF CLAIM: "Claim of V. C. Houser for three hours at the time and one-half rate (9:30 A. M. to 12:30 P. M.) July 23, 1940, for service performed account being required to attend investigation in connection with derailment on July 20, 1940."

EMPLOYEES' STATEMENT OF FACTS: "Mission Tower is maintained by one or more maintainers on each of the three shifts 365 days in the year. V. C. Houser is the regularly assigned signal maintainer (second shift, 4:00 P. M. to 12:00 Midnight, daily except Monday) and W. O. Dunn is the regularly assigned relief maintainer, whose duties are to relieve the regular shift maintainers and to perform certain other assigned signal maintenance duties at this tower.

"V. C. Houser and W. O. Dunn were instructed in writing by Assistant Superintendent Murphy to attend an investigation in his office Tuesday, July 23, 1940, 10:30 A. M., as witnesses account derailment of Engine 3750, July 20, 1940.

"Neither Houser nor Dunn was involved in the derailment other than that Houser was on duty at the time of the derailment and Dunn reported for duty about the time of the derailment.

"Both Houser and Dunn attended the investigation as instructed and each turned in a time card for three hours at the overtime rate. Dunn's time claim was promptly allowed, but Houser's time claim for attending the investigation was definitely denied."

POSITION OF EMPLOYEES: "The Brotherhood contends that Houser be paid three hours at the time and one-half rate for attending the investigation, Tuesday, July 23, 1940, and bases its contention on the provisions of the current agreement, effective June 1, 1939, with particular emphasis on Sections 1, 10, 11-(a), 12-(b), 13 and 24 of Article II, and which for ready reference are as follows:

'Section 1. Where one (1) shift is worked, or for the first shift where two (2) shifts are worked, eight (8) consecutive hours, exclusive of the meal period, shall constitute a day's work. For the second of two (2) shifts, or where three (3) shifts are worked, eight (8) consecutive hours, including an allowance of twenty (20) minutes for lunch without deduction in pay, shall constitute a day's work.'

'Section 10. 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 Christ-

Division, wherein it had been held that pay schedules were inapplicable to employes attending investigations, is evident from the 'Opinion of Board' as expressed in Third Division Award 605 (Docket TE-593) also rendered with Referee Frank M. Swacker participating, which stated:

'As stated by the Referee in Award 134, were this a new question the disposition of the Board would be to hold that services of the nature involved in this case are such as would fairly come within the contemplation of the word "work" as used in the rules, however, the weight of authority is to the effect that it is not "work" as so used and numerous agreements have been re-written since many of these decisions were rendered without making any change to cover situations of this sort. See Award 588. Consequently the Board is indisposed to overrule this line of authorities.' (Emphasis supplied.)

"Award No. 588, Docket No. SG-600, is dated March 21, 1938. Following the issuance thereof, the Employes through their representative, Brotherhood of Railroad Signalmen of America, entered into negotiations with the Carrier under the Railway Labor Act for revision of 'Rules for Signal Employes effective February 1, 1929.' As a result of such negotiations an agreement was reached between the parties, identified as 'Rules for Signal Employes effective June 1, 1939.' That agreement does not contain any provision requiring the Carrier to make payment to employes for attending investigations; and bearing in mind the basis upon which Award No. 588 was rendered, it is significant, as it is evident, that the employes in the person of their representative did not negotiate such a rule. The lack of a rule to sustain the claim will continue until one is negotiated between the parties in the manner prescribed by Article VII, Section 11 of the 'Rules for Signal Employes effective June 1, 1939.'

"The Carrier submits that the following conclusions warrant a complete denial of the instant claim:

- (1) Work as defined in the governing agreement was not performed by Signal Maintainer Houser in attending the investigation July 23, 1940.
- (2) Signal Maintainer Houser lost no time on July 23, 1940, as a result of attending the investigation.
- (3) Neither Section 13, Article 2 or any other rule of the current Rules for Signal Employes effective June 1, 1939, supports the claim.
- (4) Previous awards of this Division support the action of the Carrier.

"The Carrier has not been served with a copy of the Employes' submission and, as a consequence, has not been informed of what it contains; therefore, while reserving the right to make answer before or at the hearing of this dispute, in such manner as may in its judgment be warranted, to the contents of the Employes' ex parte submission when copy thereof is before it, the Carrier now deals only with the contentions and allegations so far presented to it by the Employes."

OPINION OF BOARD: The facts are not in dispute. Claimant, Houser, is the regularly assigned second trick Signal Maintainer at the Carrier's Mission Tower, Los Angeles, California, with hours of duty from 4:00 P. M. to 12:00 Midnight daily except his day off or his Sunday which is from 4:00 P. M. Monday to 4:00 P. M. Tuesday each week. W. O. Dunn was a Relief Signal Maintainer at the same place. Both were directed by the Assistant Superintendent of the Carrier to attend an investigation at his office from 10:00 A. M. to 12:30 P. M. on Tuesday, July 23, 1940, as witnesses for the Carrier of a derailment of an engine, with which incident neither had any connection or responsibility. Each presented his claim to the Carrier for 3 hours' overtime at the rate of time and a half. Dunn's claim was allowed and paid and Houser's was refused.

The mere fact that Dunn was paid for the identical service is not of controlling importance in determining the validity and justice of Houser's claim.

The claim is based on Section 13 of Article II which provides:

"Employees called to perform work outside of and not continuous with their regularly established working hours will be paid a minimum allowance of three (3) hours for two (2) hours work or less; if held longer than two (2) hours they will be paid at rate of time and one-half computed on the actual minute basis. The time of employees so called will begin at the time required to report and end upon return to designated point at home station; if called for immediate service, time will begin at time called. This Section does not apply to employees paid under the provisions of Sections 15, 16 or 17."

The Carrier contends that "Houser, having performed service on that date, would not be entitled to time attending the investigation which was held outside of his assigned hours. Dunn, not having performed any service on that date and having been required to attend the investigation on his regular day off as witness, should be paid under the call rule." But, as stated above Houser was "required to attend the investigation on his regular day off."

It was recognized in Award 588 by Referee Swacker that, "There is a sharp conflict in decisions concerning payment of employees 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 employee 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 employee was in no way involved and was merely a witness," so the claim was there allowed.

So, here, the employee was ordered to attend on his day off Call duty—his Sunday—and concerning a matter with which he had no connection. The reason assigned for paying Dunn and declining to pay Houser is not convincing.

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 employee involved in this dispute are respectively carrier and employee 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 claim is ruled by Award 588 and should be allowed.

AWARD

Claimant V. C. Houser shall be paid for three hours' work at the time and one-half rate.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: H. A. Johnson
Secretary

Dated at Chicago, Illinois, this 5th day of August, 1941.