

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

H. Nathan Swaim, Referee

PARTIES TO DISPUTE:

**BROTHERHOOD OF RAILWAY AND STEAMSHIP CLERKS,
FREIGHT HANDLERS, EXPRESS AND STATION EMPLOYES**

GREAT NORTHERN RAILWAY COMPANY

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employees that the Carrier violated the Clerks' Agreement:

1. When it failed to compensate A. L. Salisbury for two hours at the rate of time and one-half (2:00 P. M.—4:00 P. M.), May 21st, 1946, for services performed account of being requested by the Management to attend an investigation in the case of Yardmaster Wallen.

EMPLOYEES' STATEMENT OF FACTS: A. L. Salisbury, Yard Clerk at Minneapolis Junction, Minneapolis, Minnesota with regularly assigned working hours 4:00 P. M. to 12:00 P. M. was instructed by the Carrier to attend an investigation held at Minneapolis outside of the tour of his regularly assigned working hours on May 21, 1946, in connection with the investigation of R. E. Whalen, Yardmaster at Minneapolis Junction relative to his failure to properly perform the Yardmaster's work and to handle promptly cars of perishables from the Minneapolis Eastern which were to go out on the Fargo Fast Freight, May 17, resulting in a delay to this train.

Mr. Salisbury was not involved in the failure of the Yardmaster to properly perform his work which was under investigation. There was no charge that he was in any way at fault, and, therefore, he turned in a time slip for two hours at the overtime rate of pay, which was declined. Mr. Salisbury attended this investigation at the request of the Carrier as per the following notice:

"Minneapolis, Minn., May 20, 1946.
Mr. R. E. Wallen, Yardmaster

Arrange to report at General Yardmaster's Office, Minneapolis Junction at 2:00 P. M., May 21, 1946, for investigation to establish facts and place responsibility relative to your failure to properly perform yardmaster's work and to handle promptly car of perishables from the Minneapolis Eastern which were to go out on the Fargo Fast Freight May 17, resulting in delay to this train.

You may have representative present if desired.

Cy—Mr. J. E. Gorman
Mr. P. D. Fraser
Mr. A. L. Salisbury*
Signed: F. C. Spencer
Superintendent Terminals

*Please arrange to be present at this investigation."

or witnesses, attending investigations, inasmuch as the word "work", as used therein refers to work of the type to which an employee is regularly assigned and not to special services such as attending investigations either as principal or witness. The Carrier refers your Board to your Awards Nos. 134, 409, 1032, 1816, 2132, 2512, 2778 and 3089 as sustaining this position.

The Carrier, therefore holds that your Board cannot do otherwise than deny the claim of the employees in this case for the reasons that:

First: To do otherwise would, in fact write into the schedule between this Carrier and its employees represented by the Brotherhood of Railway and Steamship Clerks a rule which they tried to write into the agreement in negotiation but which they are unable to get through that process.

Second: Rule 38, upon which the employees base their claim, was at no time intended to apply to either witnesses or principals attending investigations, and the word "work" as used therein was and always has been held to mean work of the nature of his regular assignment as has been repeatedly confirmed by awards of your Board.

Exhibits not reproduced.

OPINION OF BOARD: The claimant, A. L. Salisbury, is claiming pay under Rule 38 of the current Agreement for time which he was required to spend outside of his regularly assigned hours at an investigation to establish facts and place responsibility relative to the failure of R. E. Wallen, Yardmaster, to properly perform his Yardmaster's work.

Rule 38 provides as follows:

"NOTIFIED OR CALLED. Employees notified or called to perform work not continuous with, before, or after the regular work period or on Sundays and specified holidays shall be allowed a minimum of three (3) hours for two (2) hours' work or less and if held on duty in excess of two (2) hours, time and one-half will be allowed on the minute basis. If such service is required within one hour after the regular work period, it shall be deemed to be continuous therewith."

There is a conflict in the awards of this Division as to the intended meaning of the terms "work" and "service" as used in this and other rules.

It is the contention of the Carrier, which they support by citing awards numbered 134, 409, 487, 605, 773 1032, 1816, 2132, 2508, 2512, 2778, 3089, 3230, 3302 and 3343, that the words "work" and "service" as used in this Rule only refer to work of the type to which an employee is regularly assigned.

The Employees on the other hand contend that the words cover service, such as that rendered in this case, as a witness appearing on the order of the Carrier as a witness for the Carrier. The Employees point out that in this case the claimant was required to appear at the investigation outside of his regularly assigned hours and that if he had not complied with the order he would have been subject to discipline.

The Employees support their contention by citing Awards numbered 2032, 2824, 3302 and 3478.

The Employees also apparently place some reliance on Rule 46(b) of their current Agreement which provides:

"(b) Employees held from regular assignment for any other business of the Company will be compensated as provided in Section (a) of this Rule."

We are of the opinion that Rule 46 does not cover the case here in question. It seems very apparent that the entire Rule is based on the idea of preventing loss to the employee by his being held from his regular assignment "to attend court or appear thereat as witnesses at request of the Company" or "for any other business of the Company."

In the instant case the claimant was required to attend the investigation at hours outside of his regular tour of duty, consequently he was not "held from his regular assignment."

An analysis of all of the Awards cited by the parties to this dispute discloses that it has been uniformly held that an employee is not entitled to pay under a "Notified or Called" rule where the service he is required to perform is service for the mutual benefit of the Carrier and of the claimant. Such cases include attending a physical examination, Awards 605 and 3302, attending rules examination, Awards 487, 773, attending safety meeting, Award 2508, and witness attending his own investigation where he was found guilty, Award 1032. In all of these awards there is discussion of various rules in which the words "work" and "service" are defined, contrary to the contention of the Employees in this case.

Awards 2132, 2512, 2778, and 3343 all involved claims for witnesses attending investigations but were under Telegraphers' Agreements and involved different rules from those here under consideration.

Award 2132 was written by Referee, Sidney St. F. Thaxter who made no distinction between cases in which only the Carrier was interested and cases in which there was a mutuality of interest between the Carrier and the employee. He cited in support of his opinion Award 409 where a witness was compensated under "Attending Court" rule for loss of time, which rule was held applicable to the case there in question. He also cited Award 605, physical examination, 773, a rules examination and 1816, which he himself had written and in which he stated that in the Agreement there in question there was a rule, "Court Service," "which provides that the employee shall be compensated at the daily rate of his assignment."

In Award 2512 the Board held applicable Rule 13 of the Telegraphers' Agreement, "Court business and investigations" reading:

"An employee required by the company to attend court or absent from his duties on business for the Railroad Company will be allowed compensation equal to what he would have earned plus necessary actual expenses while away from home."

The Board there said:

"This rule is specific in its provisions for compensation to employees attending court or investigations. In the face of it the rules relied upon by claimant can have no bearing on the issue."

In Award 2778 the Board again held that Rule 13 of the Telegraphers' Agreement expressly covered employees attending investigations and that, therefore, the Call Rule did not apply.

Award 3343 was to the same effect.

In Award 3089 the Board held:

"We are obliged to say, therefore, that whatever interpretation may have been placed upon similar rules in other contracts, the parties here have fixed the meaning of Rule 13 by mutual interpretation and conduct as including employees attending court or appearing as witnesses at investigations. It necessarily follows that the contentions of the Organization cannot be sustained and a negative award is required."

In the instant case the only evidence of interpretation of Rule 38 by the parties is that twelve "such claims" have been paid.

Award 134 gave an opinion against the Clerks' Organization on the call rule here in question. William H. Spencer, Referee, said in that case:

"If this were a controversy of first impression, it might properly and justly be decided that the petitioners service was 'work' within the meaning of Rule 24-B of the Agreement. In view of the fact, however, that the term as it has been used in collective

agreements in the railroad industry, has usually been construed to mean work of the type to which an employe is regularly assigned."

The opinion does not disclose by whom such constructions had been made or under what circumstances.

In Award 3230 Referee Thaxter again decided that the "Notified or Called" rule of the Telegraphers' Agreement did not cover time spent as witness for the Carrier at an investigation. Again, he failed to draw any distinction between awards dealing with cases where there was mutuality of interest and cases where there as not such interest.

In Award 2032 the Board held that the "Notified or Called" rule of the Signalmen's Agreement covered the case of a witness who was required to attend an investigation at a time outside of his regular tour of duty.

In Award 2832 this Division held that the "Overtime and Calls" rule of the Clerks' Agreement provided for payment for the time an employe witness was required to attend an investigation when he was off duty.

In Award 3478, this Board, with Judge Simmons sitting as Referee, held that the Carrier was required to pay a witness for attending an investigation for the Carrier outside of his regular tour of duty, under the "Overtime and Calls" rule of the Clerks' Agreement.

It is significant to not that it was this same Referee who, in Award 3302, analyzed various awards which had been made prior to that time and denied a claim of an employe who had been required to attend a physical examination, on the ground that in such a case there was mutuality of interest.

In the light of these later decisions, we are of the opinion that the claimant in this case was entitled to pay, under Rule 38, for the time he was required to spend at the investigation in question.

Here, as in Award 3478, investigation might have developed facts to show that this claimant himself had been at fault, however, the investigation was not of his conduct but of the conduct of the Yardmaster. The investigation fixed the blame on the Yardmaster. The claimant here, therefore, was attending the investigation of another employe and was attending because he was required to do so by the Carrier.

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 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 claimant should be paid under the provisions of Rule 38.

AWARD

Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: H. A. Johnson
Secretary

Dated at Chicago, Illinois, this 19th day of November, 1947.