Award No. 3968
Docket No. CL-3949

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Fred L. Fox, Referee

PARTIES TO DISPUTE:

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

FLORIDA EAST COAST RAILWAY COMPANY (SCOTT M. LOFTIN AND JOHN W. MARTIN, TRUSTEES)

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood that the Carrier violated the Clerks' Agreement

1. When on January 9, 1947, it required Caller O. T. Shirk to report at Trainmaster's office at New Smyrna Beach at 3:00 P. M. as a witness for the carrier in an investigation in which he was neither involved nor interested, and failed and refused to compensate him in accordance with provisions of overtime rules, and

2. That Caller O. T. Shirk shall be compensated on a call basis for the service rendered at the investigation outside of his regular assigned hours on January 9, 1947.

EMPLOYES' STATEMENT OF FACTS: Caller O. T. Shirk was regularly assigned to work from 11:59 P. M. to 7:59 A. M. On January 7, 1947, he was instructed by the carrier's Trainmaster to be present in the Trainmaster's office at 3:00 P. M. January 9 to attend investigation called for the stated purpose of developing facts and placing responsibility for failure of Fireman J. O. Cook to protect service for which he was called on January 2, 1947. Caller Shirk went on duty at 11:59 P. M. January 8 and worked until 7:59 A. M. January 9. He reported at the investigation as directed at 3:00 P. M., after having been off duty only seven hours and one minute.

Claim was filed by Caller O. T. Shirk for three hours under provisions of the call rule. On January 16, 1947, the carrier's Superintendent wrote him as follows:

> "Your overtime slip January 9, 1947, claiming three hours overtime based on attending an investigation as a witness for the Railway in Trainmaster's Office at New Smyrna Beach from 3:00 P. M. to 3:30 P. M. has been corrected to allow 30 minutes at pro rata rate, as your claim for three hours overtime is not supported by any rule of Clerks' Agreement."

The claim then became a matter of correspondence and conference between officers of the Brotherhood and carrier's Superintendent, the latter declining the claim on May 9, 1947, whereupon it was appealed to the Chief Operating Officer and handled in correspondence and conference until August 15, 1947, when the claim was finally declined by the Chief Operating Officer on August 28, 1947.

required to attend investigations and hearings for the purpose of giving evidence even though it is not a court proceeding as that term is generally understood."

5. The Employes rely on Third Division Awards 588, 1545 and 2223 in support of their claim, but how they can possibly do so is not apparent. Those Awards dealt with Signalmen on other railways, and in no one of them were there involved rules in which those railways and employes had provided the compensation for employes attending investigations as witnesses for the railway such as is present in the instant case. In those Awards, in the absence of such a rule, the Findings were, therefore, made on a determination of whether attendance at investigations as witnesses for the railway was work as contemplated in the Basic Day, Overtime and Call Rules. While in those three Awards made with the assistance of Referees the Third Division held that it was, they comprise a very small minority of the cases in which the Third Division has passed on that question, and in a vast majority of its awards the Third Division has held just the opposite, namely, Awards 134, 409, 1032, 1816, 2132, 2508 and 3230. Awards 588, 1545 and 2223 constitute nothing more, therefore, than three awards interspersed among a far greater number of awards which directly contradict them. Even if Rule 52 were not present in the instant case, reliance on the three minority awards would, therefore, be of little or no value.

The determination that attendance at investigations as witnesses for the Railway is not work as contemplated under rules covering work of the craft is not one peculiar to the Third Division. The First and Second Divisions have done so also. The Carrier involved in Third Division Award 3089 has made a comprehensive analysis of the First, Second and Third Division Awards in which this determination has been made, and, since, due to the presence of Rule 52 in the instant case, the question is not particularly pertinent, the Railway will not unduly lengthen its submission here, beyond referring the Third Division to the Position of the Carrier in Award 3089.

6. While the Superintendent was under no agreement obligation to do so, he did allow Caller Shirk 30 minutes at pro rata rate for the time spent in the investigation as a matter of equity. The decision as to whether or not to bestow such gratuities not provided by agreement, of course, rests entirely with the Railway.

The claim is entirely without merit and should be denied.

(Exhibits not reproduced.)

OPINION OF BOARD: On January 7, 1947, the claimant, O. T. Shirk, was a Caller at New Smyrna Beach, Florida, with assigned hours of work from 11:59 P. M. to 7:59 A. M. with Sunday as his day off. On said date he was notified by the Carrier, and in effect instructed to appear as a witness for the Carrier in an investigation to be held at the Trainmaster's office, on Thursday, January 9, 1947, at 3:00 P. M., about seven hours after his assignment of that day had ended, to assist in developing facts and placing responsibility in connection with the alleged failure of a named fireman to protect a service for which he had been called. The claimant was neither interested nor involved in the said investigation. He attended said investigation solely in the interest of the Carrier. The claim is for three hours work at the overtime rate. There is no showing in the docket as to the actual time claimant spent in responding to this call. The Carrier, on the theory of equity, was willing to pay claimant for thirty minutes spent in the investigation, at the pro rata rate, and though not denying that more time was spent in traveling to and from the investigation, declined to pay the claim as presented.

Claimant contends that the case is controlled by Rule 46 of the Clerks' Agreement. The position of the Carrier is that it is governed by Rule 52 of the same Agreement. We had the question thus raised before us in Award No. 3966 this day made. There the employe was called to attend an investigation on his day off, in that case Sunday; here the claimant was

called for special service, outside his regularly assigned duties, on one of his regular work days, but seven hours after he had completed his regular assignment for that day. In principle, there is no difference in the two situations.

In Award No. 3966 we held that Rule 46 should be applied and dealt at some length on our reasons for so holding. We now reaffirm our holding in that case. Claimant is entitled to be paid for three hours work at the overtime rate.

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 Carrier violated the Agreement in the respect charged by the petitioner.

AWARD

Claims (1 and 2) sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: H. A. Johnson
Secretary

Dated at Chicago, Illinois, this 30th day of June, 1948.