

Award No. 4570  
Docket No. CL-4527

**NATIONAL RAILROAD ADJUSTMENT BOARD**

**THIRD DIVISION**

Dudley E. Whiting, Referee

**PARTIES TO DISPUTE:**

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

**THE ATCHISON, TOPEKA AND SANTA FE RAILWAY  
COMPANY**

**STATEMENT OF CLAIM:** Claim of the System Committee of the Brotherhood that S. A. Shotwell, Yard Checker, Barstow, California, shall be compensated on basis of a call (3 hours) at the rate of his regular assignment account being required to attend investigation as a Company witness April 10, 1947, his assigned day of rest.

**EMPLOYEES' STATEMENT OF FACTS:** S. A. Shotwell occupies position of Yard Checker, hours 11:00 p.m. to 7:00 a.m., assigned day of rest Thursday. On April 7, 1947, Agent Morgan notified him to report at 2:00 p.m. Thursday, April 10, 1947, as a Company witness in a formal investigation involving a sideswipe accident in the Barstow yards. Mr. Shotwell was not involved in the accident concerning which investigation was being held. Trainmaster Crawford's notice of April 7, 1947, calling the investigation, read as follows:

"Barstow, California  
April 7, 1947  
File 1001-E

"Mr. H. M. Katterjohn,  
Engine Foreman

Yardmen: G. D. Miller  
F. E. Bokelman

Engineer W. L. Curlis  
Fireman T. B. Bailey

"Gentlemen:

"Formal investigation will be held in Trainmaster's office, Barstow, at 2 p.m. Thursday, April 10, 1947 to determine the facts and place the responsibility in connection with sideswipe occurring approximately 2:15 a.m., April 5, 1947, resulting in damage to car on east end of old caboose track, violation Rules 106, 108, 416 and good switching practice.

"Those addressed arrange to be on hand with witnesses and representative if desired.

a claim. A sustaining award in this dispute would not only support the Employees in their present attempt to revise Article IV, Section 1-i, but would also encourage them to initiate similar attempts to revise other agreement rules through the medium of claims before the Adjustment Board. In other words, the Employees and their representatives have nothing to lose and everything to gain in such attempts, and any encouragement would not only be violative of the amended Railway Labor Act but would also be a major blow to the processes of collective bargaining.

The Employees will no doubt cite one or more of the comparatively recent awards of the Third Division which have sustained similar claims of the Brotherhood on other carriers on the premise that the claimant employee did not have a mutuality of interest with the Carrier in the investigation. Aside from the fact the majority's decision in those awards completely ignored the weight of authority as expressed in a majority of the Third Division's awards on the subject that attendance of an employee at an investigation or at court was not "work" as contemplated by the overtime and call rules, their reasoning with respect to the claimant's mutuality of interest in the investigation was not only speculative but entirely without foundation under the agreement rules. In other words, the sustaining decision in those awards was apparently based on the fallacious reasoning that attendance at an investigation was not "work" as contemplated by the overtime and call rules if the claimant had a mutuality of interest with the Carrier in the investigation, but was "work" if the claimant did not have such a mutuality of interest. The fallacy of such reasoning should be apparent to all. Both situations involve attendance at investigations, and if any distinction was intended as between the two situations it would have been expressed in the agreement rules. In any event, the question of mutuality of interest has no bearing on the instant dispute, and cannot take precedence over the provisions contained in Article IV, Section 1-i, of the Clerks' Agreement which expressly provide that employees attending investigations will only be guaranteed against any loss of earnings on their regular assignment by reason thereof.

The failure of any tribunal to recognize and be governed by the principle it has enunciated in a majority of its decisions on a subject can only lead to confusion and continued disagreement with respect to the application of similar agreement rules, a circumstance which the amended Railway Labor Act was primarily intended to eliminate. It is fundamental that the application of any agreement rule or rules cannot be changed from day to day to meet the conclusions expressed in such conflicting awards. In the instant case, the language of Article IV, Section 1-i, was incorporated into the current Clerks' Agreement to express the Carrier's then well established method of compensating employees for attendance at investigations, the non-payment of employees for attendance thereat outside their assigned hours being in accord with the then well established principle expressed in Awards Nos. 134, 409, 605, 773 and 1816. The Carrier's non-payment of the employees named in 198 of the 228 instances of record listed in the Carrier's Exhibit "A" supports the Carrier's position with respect to the meaning and intent of Article IV, Section 1-i, and is, moreover, in conformity with the principle expressed in the abovementioned and other awards of the Third Division, as well as the language of the rule. It is only reasonable to assert that comparatively recent awards on the subject which may be in conflict with that principle may not and cannot properly be used at this late date as authority to revise the provisions of Article IV, Section 1-i, and nullify the well established application of that rule on this Carrier's property.

In conclusion, the Carrier reasserts that the Employees' claim in this dispute is entirely without support under the agreement rules and should be denied for the reasons heretofore expressed.

Exhibits not reproduced.

**OPINION OF BOARD:** Disposition of this claim is governed by our Opinion in Award No. 4569 and the reasons there stated need not be repeated.

**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

The Carrier violated the agreement.

AWARD

The claim is sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD  
By Order of Third Division

ATTEST: A. I. Tummon  
Acting Secretary

Dated at Chicago, Illinois, this 29th day of September, 1949.