

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Mortimer Stone, Referee

PARTIES TO DISPUTE:

THE ORDER OF RAILROAD TELEGRAPHERS

**THE DELAWARE, LACKAWANNA AND WESTERN
RAILROAD COMPANY**

STATEMENT OF CLAIM: Claim of the General Committee of The Order of Railroad Telegraphers on the Delaware, Lackawanna and Western Railroad Company that:

1. Paul Rushin, having been required to utilize seven hours and seventeen minutes of his time on October 31, 1947, outside of his assigned hours, in connection with an investigation concerning a derailment which occurred on October 23, 1947, shall be paid therefor at the time and one-half rate of his position under the provisions of Rules 5 and 13 of the May 1, 1940 Telegraphers' Agreement, less three hours at time and one-half rate which has been allowed, and

2. Paul Rushin, having been required to utilize seven hours and seventeen minutes of his time on each day November 10 and 20, 1947, outside of his assigned hours, in connection with an investigation concerning a derailment which occurred October 23, 1947, shall be paid therefor at the time and one-half rate of his position under the provisions of Article 5 (a) and Article 10 (f) of the November 1, 1947 Telegraphers' Agreement, less six hours at time and one-half rate which has been allowed.

EMPLOYEES' STATEMENT OF FACTS: Agreements (Telegraphers' Agreements) by and between the parties, bearing effective dates of May 1, 1948 and November 1, 1947, are in evidence; copies thereof are on file with the National Railroad Adjustment Board.

At or about 2:45 A.M., October 23, 1947, a derailment occurred on the Carrier's line at or near Gravel Place Tower. James Reynolds was the towerman on duty at Gravel Place at the time of the accident. The Carrier precisely charged Mr. Reynolds and a hearing was held by Trainmaster Finnerty on October 29, 1947 in connection therewith.

Paul Rushin, the claimant in the proceeding, at the time of the accident was on duty at Stroudsburg. Mr. Rushin was not instructed to nor did he attend the hearing of October 29, 1947. Subsequent to the October 29 hearing, Mr. Rushin was instructed by an officer of the Carrier to report to the Trainmaster's office at Scranton, Pa., on October 31, November 10 and November 20, 1947, outside of his regular hours, to be interrogated about the derailment of October 23rd.

Mr. Rushin was not held responsible in any way for the derailment, therefore, in accordance with appropriate rules of the Telegraphers' Agreements, claim was filed in his behalf for seven hours and seventeen minutes

Article 10-(f) of the Agreement of November 1, 1947, provides that:

"Employees instructed to attend hearings or investigations on days not working, or outside of regularly assigned hours, on matters for which they are not held responsible will be paid on a call basis for time consumed and in addition will be allowed actual necessary expense incurred."

The Carrier has paid Paul Rushin for his attendance at investigation held on October 17, November 10 and 20, 1947, strictly in accordance with the provisions of Article 10-(f) and Article 5-(a) of the November 1, 1947, and as provided in Article 5 of the May 1, 1940, Agreements.

The Employees have produced no evidence that Paul Rushin utilized seven hours and seventeen minutes on October 1, November 10 and 20, 1947, while attending an investigation after the arrival at his recognized home terminal, Scranton, Pa., which is the nearest station to his home, and from which point Rushin is regularly called to perform service. It is true that Rushin was called outside of the hours of his assignment at Stroudsburg. It is also true that had Rushin been called to actually perform service at a point within the Scranton Terminal, he would have been paid as provided under the Call Rule. The Call Rule makes no provision to pay employees for attending investigations other than was done in this case, nor is there any other agreement rule to support the position which the Employees have taken in this case.

Paul Rushin was paid for the attendance of investigations in accordance with rulings of the Third Division, National Railroad Adjustment Board, where a similar Call Rule was involved.

For reasons stated above, claim should be denied.

(Exhibits not reproduced)

OPINION OF BOARD: Claimant, an extra telegrapher, assigned twelve midnight to eight A.M., at Stroudsburg, residing at Scranton, was required as a witness to attend an investigation at Scranton, on October 31, November 10, and November 20, 1947, outside the hours of his regular tour of duty. He was paid for two hours at penalty rate on the basis of a call for each trip, under the contention that since his residence was at Scranton he was entitled to compensation only for the time actually involved in the hearing. Claim is here made for compensation on the basis of seven hours, seventeen minutes, for each day of attendance, based on the fact that going by train from Stroudsburg and return to Stroudsburg on the earliest available train required that length of time.

Claim (1) is for attendance at the investigation on October 31. The Telegraphers' Agreement of May 1, 1940, was amended effective November 1, 1947. As a result the applicable rule involved for attending the investigation on October 31 was Rule 13 of the 1940 Agreement, reading as follows:

"(a) Employees temporarily engaged in business of the Company outside the line of their regular duties, at court or otherwise, will be paid their regular wages and necessary expenses while so engaged, court fees and mileage to be assigned to the Company.

(b) Employees required to attend investigations, will be paid for all time lost if not at fault."

This identical rule has been at least twice construed in connection with similar claims arising on the same property and resulting in Award Nos. 2778 and 343. Consistent with the interpretation of this rule in those awards, we believe that claim (1) for compensation for service on October 31, 1947, must be denied. Whether or not claimant was entitled to the compensation he has already received for attendance on that day, we need not consider, since it was voluntarily paid under Carrier's interpretation of the applicable rule.

Claim (2) is for attendance on November 10 and November 20. This is controlled by the 1947 Agreement. Claimant relies on Article 10 (f). That

Article is entitled "Discipline and Grievances" and we think it applies only to "affected" employees. Article 13, entitled "Court Duty, etc." controls as to other witnesses. It reads as follows:

"(a) Regularly assigned employees required to attend Court, inquests, or act as witnesses in connection with their employment with the Company, or perform other Company business, will be furnished transportation plus legitimate expenses, and be paid for actual time lost from their positions, and on the pro rata basis with a minimum of three hours for time devoted outside of assigned hours or on days not working. All witness fees to accrue to the Company. Such service, including examinations, performed on rest days will be paid for at time and one-half rate. In all cases, actual necessary expenses incurred while away from home will be allowed.

"(b) Extra employees, then filling positions, when used for such purposes will be compensated as provided in paragraph (a) hereof. Extra employees when used for such purposes on days not filling positions will be allowed a minimum day of eight hours at the minimum rate of the class of positions normally covered, for each calendar day so used, plus legitimate expenses and transportation."

Since attendance was outside claimant's assigned hours and not on his rest day he was entitled to payment on the pro rata basis. It is contended by Carrier that since claimant resided at Scranton, where the investigation was held, he was entitled to pay only for the actual time spent at the hearing. We think his time allowance should be based on the place of his assignment rather than his place of residence. As noted in Award 2604, "An employee's place of residence is ordinarily a matter of his own choice and of no concern to his employer. It may be near or far removed from the place of work and it may be changed at will from time to time. On the other hand, places of employment, of the character here involved, are usually definite and certain. It seems reasonable to conclude, therefore, that when the parties provided in the Agreement for travel time "to and from the temporary assignment," they had in mind factors which could be readily understood and uniformly applied, rather than those which would lead to confusion and uncertainty." So computed claimant was entitled to compensation at pro rata rate for seven hours and seventeen minutes on each of the two days and should be paid that amount less the amount already paid.

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 Employees involved in this dispute are respectively carrier and employees 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 as to claim (1), there was no basis for an affirmative award; that as to claim (2), the Agreement was violated in denying payment at the pro rata rate for the time required.

AWARD

Claim (1) denied. Claim (2) sustained, as indicated in the Opinion and Findings.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: (Sgd.) A. I. Tummon
Acting Secretary

Dated at Chicago, Illinois, this 21st day of March, 1950.