Award No. 5823

Docket No. TE-5748

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Paul N. Guthrie, Referee

PARTIES TO DISPUTE:

THE ORDER OF RAILROAD TELEGRAPHERS

THE BALTIMORE AND OHIO RAILROAD COMPANY

STATEMENT OF CLAIM: Claim of the General Committee of The Order of Railroad Telegraphers on The Baltimore and Ohio Railroad that:

(1) The Carrier violated the terms of the agreement between the parties when it required Operator N. R. Keene to attend a Company investigation at Newark, Ohio on his assigned rest day, June 7, 1948 without compensation therefor, instead of giving him a day of rest in accordance with the agreement; and, that

(2) N. R. Keene shall be compensated for one day's pay at the rate of time and one-half for having been required to attend said investigation at Newark, Ohio, on his assigned day of rest June 7, 1948.

EMPLOYES' STATEMENT OF FACTS: An agreement bearing date July 1, 1928 as to working conditions and memorandum agreement dated January 17, 1946, covering Rest Day, Sunday and Holiday Work were in effect at the time this claim arose. Claimant N. R. Keene occupied and was regularly assigned to the second trick telegraph position at Barnesville, Ohio which was a seven day a week position with one rest day each week. Monday was the assigned day of rest for the occupant of this position.

Claimant was instructed by the Carrier to attend a Company investigation at Newark, Ohio on Monday, June 7, 1948. Pursuant to these instructions, claimant attended the above mentioned investigation on Monday, June 7, 1948, his assigned rest day.

Claim for pay for eight (8) hours at time and one-half rate was made in behalf of the claimant. The Carrier agreed to pay the claim but later reversed its decision.

POSITION OF EMPLOYES: The following quoted Section 1(a) of the Memorandum of Agreement dated January 17, 1946 establishing one rest day in each consecutive period of seven days for employes occupying a position requiring a Sunday assignment of the regular week day hours, is invoked in this dispute:

> "An employe occupying a position requiring a Sunday assignment of the regular week day hours shall be given one (1) rest day without pay in each consecutive period of seven (7) days. The

(1) He was summoned to attend a company investigation.

(2) He was "* * * not directly involved, * * *."

(3) He lost time on his regular assignment. Carrier emphasizes the mutually agreed upon interpretation to the expression "* * * and thereby losing time, * * *" to mean "* * * they lose time on the regular assignment, * * *."

When applied to the case of the claimant, it is apparent that the claimant did not meet the qualifications contained in the rule.

The Carrier submits that the seriousness of the matters being investigated evidences the absolute necessity for requiring the claimant to attend this investigation. As to the date and time of the investigation, the availability of witnesses, i.e., operator at Cambridge, the claimant, crew members of the 97 and Extra 4207 West, was an important consideration. The Carrier recognizes that one portion of the Note specifies: "* * * care should be exercised to see that the employes are caused the least inconvenience consistent with the requirements." The Carrier submits that the requirements of the service demanded the claimant's participation at the investigation and that he was caused the "* * * least inconvenience consistent with the requirements."

CARRIER'S STATEMENT AS TO THE AWARDS OF THIS DIVISION:

The Carrier submits that this Division was held on many, many occasions that, in the absence of a valid working rule, this Division is without authority to uphold wage claims. The Carrier submits that the employes are without any adequate contractual basis for the claim as now made.

In Award No. 3918, this Division, with Referee Douglas participating, denied a wage claim holding in part:

"That the petitioner is not entitled to recover under Agreement."

In this Division's Award No. 5188, this Division with Referee Robert O. Boyd, denied a wage claim, holding in part that:

"The claim is not supported by the Agreement."

Also, in Award 5238, this Division, again with Referee Boyd, denied a wage claim, holding in part:

"The facts and the current agreement do not support the claim."

In view of all that is contained herein, the Carrier respectfully requests this Division to find this wage claim as being one without merit and to deny it accordingly.

(Exhibits not reproduced.)

OPINION OF BOARD: This docket is concerned with a claim of Operator N. R. Keene for one day's pay at the rate of time and one-half because of his being required to attend an investigation in Newark, Ohio on his regular day of rest, June 7, 1948.

The parties are in substantial agreement on the relevant facts, with the exception of whether Keene attended as a principal or as a witness on the Company's behalf. Hence the case involves mainly the task of interpreting the relevant rules. The Carrier denied the claim under its interpretation of Rule 26 (b), whereas the Petitioner argues that the claim should be sus-

tained on the basis of Section 1-A of Memorandum of Agreement dated January 17, 1946, which is the rest day rule.

Over the years this Division has made a substantial number of awards dealing with the central issue posed in the instant case. It is unnecessary to review all of these awards, since some of the more recent ones have attempted that task. Awards 4909, 4569.

We cannot escape the conclusion in the confronting case that both Rule 26 (b) and Section 1-A of the Memorandum of Agreement of January 17, 1946 must be considered. They are both parts of the relevant Agreement. Therefore it is essential that in so far as possible these provisions be reconciled. Rule 26 (b) states in part as follows:

> "Employes summoned to attend Company investigations in which they are not directly involved, * * * and thereby losing time, will be paid therefor at their regular rate."

It is with respect to "losing time" that the above quoted section comes into direct relation with Section 1-A of the Memorandum of Agreement of January 17, 1946. However, in reaching a decision on the instant case it is unnecessary to develop the relationship of these rules further, since the decision turns upon whether claimant was personally involved in the investigation—whether there was a mutuality of interest.

The Petitioner contends that the claimant was not directly or indirectly involved; that he appeared as a witness for the Company in a matter of no personal interest to himself. The Carrier, on the other hand, insists that there was a mutuality of interest in the investigation; that claimant's personal interests were very much involved.

The answer to this problem must be sought in an analysis of the facts as disclosed by the record before us. If the record shows that there was mutuality of interest, then claimant is not entitled to a sustaining award in view of the applicable rule and in view of the previous awards of this Division.

It is true that the notification to Keene to report for invstigation on the date in question did not specify that he was a principal. However, the implication was there nevertheless, as evident from the following notice: "You are hereby notified * * * to report * * *, for hearing on the following matter—violation of Rules 317 and 326 May 20, 1948, in the blocking of Trains 97 and Extra 4207 West." The record indicates further that the claimant regarded himself as a principal and not just a witness in the proceeding, as evidenced by the fact that he had a representative from the Orgnization present at the hearing to represent his interests.

The investigation was concerned with the alleged violation of the above mentioned rules. Claimant held a position which made it quite possible for his actions to be the cause of the alleged violations. The investigation was for the purpose of determining who was at fault among those employes who were exercising duties which could have caused the violations. It so happened that claimant was found to have been free of blame, but this was determined by the investigation, and was not known in advance. Under these circumstances it cannot be said that he did not have a personal interest in the investigation, since had he not been found to be blameless in the matter, he would have been subject to discipline.

The transcript of the investigation shows clearly that he was appearing as a principal and not as a witness, in that the questions asked of claimant were directed mainly at the matter of his own performance, and his own possible guilt of rule violation.

In view of these facts of record which lead to the inescapable conclusion that claimant was a principal in this proceeding, we must find that there was

a mutuality of interest involved which relieves the Carrier from payment under the terms of Rule 26 (d). Numerous awards of this Division have made the same decision when the record revealed mutuality of interest. Awards 4909, 4910, 4911, 4912, 4916.

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 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 did not violate the Agreement.

AWARD

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

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

Dated at Chicago, Illinois, this 24th day of June, 1952.