Award No. 6736
Docket No. CL-6581

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Curtis G. Shake, Referee

PARTIES TO DISPUTE:

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

CHICAGO AND EASTERN ILLINOIS RAILROAD COMPANY

STATEMENT OF CLAIM: Claim of the System Committee, Brotherhood of Railway Clerks, that carrier violated provisions of our General Rules Agreement, effective February 1, 1922 and supplements thereto by refusing to compensate J. R. Hadden, Caller-Clerk, Evansville, Indiana for services performed October 16, 1950 and

> that carrier shall be required by an appropriate order of your honorable Board allowing Mr. Hadden proper compensation amounting to one call (minimum 3 hrs. pay) at rate, $11.84 per day fixed by agreement for his regular position of Caller-Clerk.

EMPLOYES' STATEMENT OF FACTS: Mr. Hadden is regularly assigned to position of Caller-Clerk in the Mechanical Department of the Carrier at Evansville, Indiana. His hours of service assignment are 11:00 P. M. to 7:00 A. M. with Monday and Tuesday of each week as his designated rest days. Rate of pay, $11.84 per day.

On October 14, 1950, Mr. Hadden was notified by Assistant Superintendent Rodgers and Road Foreman of Engines Whitlow to attend investigation in the Train Rule Examiner's office at Evansville set for 1:30 P. M., Monday, October 16, 1950 "relative to conduct of C. & E. I. Herder, Howard Fairchild, Thursday, October 12, 1950." Employes' Exhibit No. 10.

Mr. Hadden attended the investigation as directed by his employing Officer. His attendance, however, was not as a party to be investigated but solely as a witness for the Carrier that involved the conduct of another employe being investigated by carrier officers.

Mr. Hadden filed formal claim with his employing officer, Master Mechanic Haynes for compensation for services performed for Carrier on his designated rest day, Monday, October 16, 1950. The claim was declined and subsequently processed with Carrier's officers designated for handling appeals in accordance with the requirements of the Railway Labor Act. It was discussed in conference with Manager of Personnel, Mr. F. J. Zobac on November 14, 1951 whereat we cited several of the numerous awards rendered by your honorable Board that employes attending investigations in which they had no mutuality of interest as in this case that they are to be paid for their services performed upon direction of the management.

gation on October 16, 1950, and no contention has been made by the employe that he did. There is no rule in the Agreement which provides for compensation such as petitioner is requesting in this case, nor is there anything in the Agreement which in any way indicates that the parties thereto intended that an employe shall be compensated for time spent in attending an investigation when the employe did not lose time from his regular position.

The rules cited by petitioner in defense of its position do not apply. They apply only to employe taken away from their regular assigned duties. Since there is nothing in the Agreement providing for compensation as requested in the instant claim, it is respectfully submitted that your Honorable Board deny the claim.

Carrier affirmatively states that all data contained herein has been handled with the employe's representatives.

(Exhibits not reproduced.)

OPINION OF BOARD: On and prior to October 16, 1950, Claimant was a Caller-Clerk in the Carrier's Mechanical Department at Evansville, Indiana, Wednesday through Sunday, with Monday and Tuesday as rest days. On October 14, Claimant was notified by his superior to report at the Train Rule Examiners Office at 1:30 P.M. on Monday, October 16, (one of his rest days), to attend an investigation relative to the conduct of a Herder. Claimant responded to the notice, attended the investigation, and testified as a witness for the Carrier. The investigation in no way involved the Claimant.

The claim is that the Claimant be compensated for a call (three hours at his $11.84 per day rate) under Rule 53(e) and 54. Rule 53(e) provides that, "Service rendered by an employe on his assigned rest day or days will be paid for under the call rule, Number 54 . . .," and Rule 54 says that with certain exceptions not here involved, "employes notified or called to perform work not continuous with, before, or after the regular work period shall be allowed a minimum of three (3) hours for two (2) hours work or less."

In resistance of the Claim the Carrier says: (1) that the Claimant performed no "work" within the coverage of Rule 54; (2) that Claimant was under no obligation to attend the hearing for which he could have been disciplined if he had refused to attend; (3) that Rule 66 precludes allowance of the claim because Claimant was not taken away from his regular assigned duties, at the request of the management, to attend court or to appear as a witness for the railroad; (4) that this is the first instance of an employe making a claim for attending an investigation on a rest day that has been made on this railroad; (5) that in three instances cited employes attended investigations under comparable circumstances and made no such claims; and (6) that a demand on the part of the Organization for an amendment of Rule 66, calculated to provide a contractual basis for sustaining claims of this character, through mediation is now pending.

We shall consider Carrier's propositions in the order stated above.

1. We are concerned with the meaning of the word "service", as used in Rule 53(e), rather than "work" as used in Rule 54. Rule 53(e) provides for payment for "service" rendered on rest days, in accordance with the formula set up in Rule 54 for compensating for a call. Some of the awards cited by the Carrier can be distinguished because they involved "work", rather than "service". While the books contain no precise definition as to what constitutes "service" that may be uniformly applied to the many situations under which that word is employed, there is respectable authority to the effect that "service" embraces more than "work" or "labor". We think the Claimant performed service within the meaning of Rule 53(e).

2. Carrier's defense that Claimant cannot recover because he was under no obligation to attend the hearing for which he could have been disciplined presents somewhat of an inconsistency. If he was under no obligation to respond, which we much doubt, the Claimant should have been so advised, in which event there would have been some basis for concluding that his attendance was voluntary rather than required. We would hesitate to conclude that, aside from the matter of compensation, the Carrier would have us say that it may not require attendance at hearings involving matters of inquiry related to the proper discharge of the duties of its employes. In Award 3911, which involved the same issue as this case, this Board said: "Admittedly, had this employe failed or refused to respond to the call for the investigation he would have been subject to discipline at the hands of the Carrier."

3. Rule 53(e) came into the Agreement in 1949 as a result of the 40-Hour Week, while Rule 66 has been in it since 1922. Under these circumstances we cannot regard Rule 66 as a limitation on Rule 53(e). Rather, Rule 53(e) must be considered as relating to a subject matter not embraced in Rule 66. If, as we concluded in paragraph 2, supra., attending a hearing is "service", within the meaning of Rule 53(e), Rule 66 is inapplicable to the facts of this case. In other words, Rule 53(e) protects an employe against being required to render service on his assigned rest days without being compensated therefor, independent of a prior existing obligation on the part of the Carrier to compensate for court attendance or appearance as a witness for the railroad.

4. That this is a novel claim on this railroad is not of much significance. At some time every type of claim was initially asserted. The fact that no such claim has previously been made cannot bar this claim, if a violation of the Agreement is established. The claim is personal to the Claimant and he cannot be denied his rights because some other employe did not see fit to press for redress, if such has occurred.

5. The three instances cited in which other employes attended hearings without making any demands for compensation occurred subsequent to this instance and, for that reason, these could not be regarded as precedents in any sense.

6. The fact that the Organization is presently seeking a clarification of the Agreement relating to claims of this character cannot be construed as any admission that the contract does not already cover the situation. If the Agreement, properly construed, justifies the claim, the Claimant should not be penalized because his Organization is seeking an amendment of the Agreement that would deprive the Carrier of the defenses it here seeks to assert.

No good purpose would be served by digesting the facts and findings in the many previous awards dealing with the subject matter of this dispute, or in a futile attempt to harmonize those precedents. We prefer to predicate our decision upon two or three conclusions which we regard as basic and fundamental.

First, as distinguished from "work" or "labor", as those terms are generally understood, we think that, nevertheless, the Claimant rendered "service" for the Carrier when, on his rest day, he attended the hearing at its direction and the hearing in no manner involved the Claimant or his position. Secondly, we cannot regard Claimant's attendance at such hearing as purely voluntary on his part. And, third, at least since the ratification of the thirteenth amendment to the federal Constitution, involuntary servitude has been regarded as repugnant to the supreme law of the land.

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 Employe involved in this dispute are respectively Carrier and Employe 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.

AWARD

Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: (Sgd.) A. Ivan Tummon
Secretary

Dated at Chicago, Illinois, this 27th day of July, 1954.

DISSENT TO AWARD NO. 6736, DOCKET NO. CL-6581

This administrative stepchild of the judiciary and its changing personnel of referees seems uncommonly prone to err. There are errors of imperfection and then there are those which are known in law as reversible error. These are clearly distinguishable and a dissenting opinion should be written for the basic purpose of pointing up the latter kind of error because the one against whom an award is entered here has no right of appeal by his own motion through which a reversal of judgment would be available upon a proper showing. Otherwise, a dissent may be an expression of vengeance and vindication.

This award is erroneous for two basic reasons.

First: The award ignores the numerous, sound pronouncements of this Division recognizing that a special rule has precedence over a general rule. That rule identified in the majority opinion here as 53 (e) was born with and is related only to those circumstances arising out of the reduction of the work week to five days. Rule 66 is a narrow, special provision of the contract going directly to the appearance of an employe in court or at an investigation or hearing as a witness for the Carrier. Whether that appearance be "service" or not is immaterial. The rule appears in labor contracts throughout this industry for the special purpose of meeting the situation it expressly covers and cannot be completely negatived by the general rule cited which would, at the same time, impugn our sound enunciations as to the effect of a special rule. Awards: **1816, 2512, 4496, 6374, 6383, 6382, 6316, 6311, 6278, 6263, 6137, 6003, 5992, 5942.**

Second: We have repeatedly held, and those awarded holdings were cited to the referee here, that rule negotiations are peculiarly allocated to dealings between the parties with the assistance, if desired, of the National Mediation Board. In many awards we have stated that the attempted negotiation of a rule is evidence, not only of the negotiable character of the subject, but of the absence of the rule sought in negotiation. Such awards have been entered through former Referee Edwards and Boyd in their respective First Division **Awards 11878** and **13076.** It is a matter of record here that Employes' desire to reform the special Rule 66 in order to meet the identical situation presented in this claim has been made the subject

of a notice under Section 6 of the Railway Labor Act and has been docketed by the National Mediation Board as its **Case No. A-4075.** In view of the record, then, the claim should have been held to be in the wrong forum rather than for our award to attempt to extricate it from the jurisdiction of the National Mediation Board and confuse the special rule with a general provision.

Therefore, we dissent.

/s/ E. T. Horsley

/s/ W. H. Castle

/s/ J. E. Kemp

/s/ R. M. Butler

/s/ C. P. Dugan