

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

LeRoy A. Rader, Referee

PARTIES TO DISPUTE:

AMERICAN TRAIN DISPATCHERS ASSOCIATION

GRAND TRUNK WESTERN RAILROAD COMPANY

STATEMENT OF CLAIM: Claim of the American Train Dispatchers Association that:

(a) The Grand Trunk Western Railroad Company (hereinafter referred to as "the Carrier") violated the current agreement between the parties to this dispute, particularly Article 2 (b) and Article 7 (b), when:

1. It failed and refused and continues to refuse to compensate Train Dispatcher R. W. Timmons of its Battle Creek, Michigan train dispatching office at the rate of time and one-half for overtime service performed by him at the orders of and for the benefit of the Carrier on November 11th and 12th, 1953, and
2. When it made deductions from the compensation of Train Dispatchers E. T. Dunn and L. C. O'Connor of its Durand, Michigan train dispatching office, for ten hours and thirty-five minutes at overtime rate, which had been paid them for service performed by them at the order of and for the benefit of the Carrier on November 11th and 12th, 1953.

(b) The Carrier shall now:

1. Pay to Train Dispatcher R. W. Timmons at the overtime rate for trick train dispatcher for service performed by him between 12:05 P. M., November 11, 1953, and 3:55 A. M., November 12, 1953, which was in excess of 8 hours service that began at 4:05 A. M., November 11, 1953, as required by Article 2 (b) of the current agreement, and
2. Refund to Train Dispatchers E. T. Dunn and L. C. O'Connor the overtime rate for ten hours and thirty-five minutes, which represents what was deducted from their compensation that had been paid them for service performed by them between 2:10 P. M., November 11th, 1953 and 12:45 A. M., November 12,

1953, which was in excess of eight hours service that began at 6:10 A. M. November 11, 1953, as required by Article 2 (b) of the current agreement.

EMPLOYES' STATEMENT OF FACTS: There is an agreement between the parties, effective May 14, 1942, and a revision thereof effective September 1, 1949, copies of which are on file with your Honorable Board, and by this reference are made a part of this submission the same as though fully set out herein.

For the convenience of the Board the rules of said agreement pertinent to this claim are quoted as follows:

"ARTICLE 2—Hours of Service.

- "(a) **Basic Day.** Eight (8) consecutive hours service exclusive of time required to make transfer, shall constitute a day's work for Train Dispatchers.
- "(b) **Overtime.** Effective April 1, 1942 (as per Mediation Agreement dated March 14, 1942) time worked in excess of eight (8) hours on any day, exclusive of the time required to make transfer, will be considered overtime and shall be paid for at the rate of time and one-half on the minute basis.
- "(c) The term 'time required to make transfer' (as used in Article 2 (a) and (b)), includes the time it is necessary for the train dispatcher who is being relieved, to turn over to the relieving train dispatcher the information necessary to permit the relieving train dispatcher to fully and completely begin dispatcher service on the trick to which he is assigned. A train dispatcher who is required to remain in charge during the time transfer is being made will not be considered as having accrued overtime. **Except to extent provided herein with respect to transfer time, a train dispatcher required to remain on duty after the expiration of his tour of duty will be paid for such time as overtime.** (Emphasis supplied.)

"ARTICLE 7—Miscellaneous.

. . .

- "(b) Train dispatchers will be assigned to established headquarters and when away from such headquarters in Company's service shall be allowed necessary actual expenses in addition to regular salary."

At the time the instant dispute arose, Train Dispatcher R. W. Timmons was a regularly assigned trick train dispatcher in Carrier's Battle Creek, Michigan train dispatching office working the following weekly schedule:

Saturday	1:00 A. M. to 9:00 A. M., E. S. T.
Sunday	1:00 A. M. to 9:00 A. M., E. S. T.
Monday	1:00 A. M. to 9:00 A. M., E. S. T.
Tuesday	1:00 A. M. to 9:00 A. M., E. S. T.
Wednesday	1:00 A. M. to 9:00 A. M., E. S. T.
Thursday	regularly assigned rest day
Friday	regularly assigned rest day

Dunn who attended the investigation on his rest day was also allowed eight hours straight time, although he lost no time, and by a strict interpretation of the Agreement was entitled to no compensation. The payment of eight hours to Dispatcher Dunn was in error, and should not be considered as a waiver of Carrier's position as to compensation provided for by the Agreement.

The attendance of an employe at an investigation where he is under charges is a matter that has been many times passed on by the Third Division, which has consistently held that when an employe is personally concerned in the case under investigation, mutuality of interest exists, and such employe is not rendering service to the Carrier. The fact that the claimants had their representative present to defend them at the investigation, is evidence that they considered themselves to be directly involved in the case.

In Award 4909, Order of Railroad Telegraphers, New York Central System, the Board denied the claim of a Tower Director called to appear at an investigation to fix responsibility for motor car running through a switch. The employe was not found guilty but the Board held the Carrier had a right to inquire as to whether his dereliction or that of some other employes was the proximate or concurring cause of the accident, and denied the claim. In Award 5376, Dispatchers—Virginian Railway, a dispatcher, together with eleven other employes, was charged with responsibility in movement of two colliding trains. The Board denied claim for compensation, and found in part:

"Until the facts were adduced upon hearing, he stood upon the same footing as the conductor and telegraph operator ultimately found guilty of the common charge. Clearly there was a mutuality of interest which defeats the possible application of Article 3. (Awards 487, 4909.)"

In Award 5823, Order of Railroad Telegraphers—B&O RR, the Board denied the claim of a telegraph operator required to attend an investigation to fix responsibility for a rule violation, and found, in part:

"Claimant held a position which made it quite possible for his action to the cause of the alleged violation. 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 circumstances as above outlined, indicate that the Articles cited by the employes are not applicable. However, nothing in the cited rules makes provision for payment to claimants on a continuous basis when called away from headquarters, even if they had been in Company's service. Article 7(b) provides that employes will be allowed regular salary plus necessary expenses. Nothing in the rule makes any provision for travel time.

This claim has been handled on the property in the usual manner up to the Vice President & General Manager, the highest officer designated to handle claims and grievances, and has been declined.

All data contained herein have in substance been presented to the employes and are a part of the instant dispute.

OPINION OF BOARD: The facts are not in dispute. The only question presented for our consideration is an interpretation of rules cited on behalf of the parties in support of the positions taken.

In brief, Claimants attended an investigation and no fault was found with any of them as to responsibility for the matter being investigated. At

the time in question Timmons held regular assignment in Carrier's Battle Creek, Michigan dispatching office as Trick Dispatcher, 1:00 A. M. to 9:00 A. M. Dunn and O'Connor held regular assignment of Relief Dispatcher in Carrier's Durand, Michigan office. Wednesday, November 11 was one of Dunn's regular assigned rest days and O'Connor's assignment was 8:00 A. M. to 4:00 P. M. Both Timmons and O'Connor were held off their regular assignment on November 11. It was necessary for Timmons to leave Battle Creek at 4:05 A. M., November 11, and he returned to Battle Creek at 3:55 A. M., November 12, a lapse of 23 hours and 50 minutes. Dunn and O'Connor left Durand at 6:10 A. M., November 11 and returned to Durand at 12:45 A. M., November 12, a lapse of 18 hours and 35 minutes.

Carrier paid Timmons a day's pay account held off his assignment, and actual expenses incurred; it paid Dunn total elapsed time, 18 hours and 35 minutes, at overtime rate, this being his regularly assigned rest day, and actual expense incurred; and O'Connor was paid total elapsed time, 18 hours and 35 minutes, eight hours pro rata rate for time held off his assignment, and 10 hours and 35 minutes at overtime rate, plus actual expenses incurred. However, at a later date, the Carrier deducted the 10 hours and 35 minutes at overtime rate previously paid Dunn and O'Connor, thus making actual payment to Dunn for eight hours at time and one-half rate and O'Connor eight hours at pro rata rate.

The claim asks pay to Timmons for 15 hours and 50 minutes and to Dunn and O'Connor for 10 hours and 35 minutes, each at the rate of time and one-half.

Petitioners claim that Carrier is basing its denial on Article 5(e) and on the mutuality of interest theory erred. Also on the proposition that time spent by Claimants was not in the performance of the service. That Article 5(e) has no application or effect in this case as no one here was removed from the position held, and contend that Articles 2 and 3 do provide basis of pay for service rendered in excess of eight hours, or on rest days, and that the time claimed was in performing a service for the Carrier. Cited are Articles 2(b) and 3(a)2; also Awards 3462, 3966, 4569, 4790, 6679, 6736 and 6846. And it is further alleged that Carrier has previously paid for service as here claimed.

Respondent Carrier contends that this is a discipline case and the investigation was held to determine the responsibility for poor performance of duty of a train crew, citing the notice given of the purpose of the investigation, and that under the facts herein there was mutuality of interest, also that Claimants were represented at the hearing by representatives of their own choice, which shows that they were not merely present as witnesses for Carrier. Cited are Awards 4909, 4910, 4912, 5376, 134, 409, 2132, 2512, 3230 and 3343.

While there is a conflict in the Awards of this Division on matters under consideration here, we believe the majority rule to be at this time to interpret the use of the word "service" as used here to mean any service performed at the instance of the Carrier connected with the business of the Carrier. We do not believe that Article 5(e) applies to the facts here as no one of the Claimants were suspended and therefore, no reinstatement is involved. It is true that the notice stated the purpose of the investigation to be, "* * * to determine your responsibility for poor performance of train 529, Extra 6336 * * *." However, no blame was attached to any of the Claimants. As we understand the theory of Carrier's position, it is that no compensation should have been paid to Claimants. However, payments were made which were not consistent in application.

Under previous Awards of this Board we believe payment of compensation as claimed herein is consistent and is the intent of the rules of the Agreement on the factual situation presented.

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 the Agreement was violated.

AWARD

Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: (Sgd.) A. Ivan Tummon
Secretary

Dated at Chicago, Illinois, this 29th day of June, 1955.

DISSENT TO AWARD 7029, DOCKET TD-7215

The majority in this Award correctly quotes from the notice sent Claimants herein which irrefragably made them principals and not witnesses at the investigation; as such they were liable to discipline. Thus, "mutuality of interest" obviously was established and Article 5, the discipline rule applied. Accordingly, the majority erred in distinguishing the instant case from precedent awards based on the "mutuality of interest" theory.

The majority also erred in its conjecture of Carrier's position concerning compensation due Claimants. The Carrier's position is that the specific rule, Article 5(e), takes precedence over the general overtime and rest day rules, Articles 2(b) and 3. The Carrier stated that Claimants Timmons and O'Connor were compensated under Article 5(e) for the assigned working hours they actually lost and that Claimant Dunn was allowed eight hours at straight time rate notwithstanding the claim date was his rest day and he lost no time.

For the above reasons, the instant award is in error and we dissent.

(signed) **W. H. Castle**
(signed) **R. M. Butler**
(signed) **C. P. Dugan**
(signed) **J. E. Kemp**
(signed) **E. T. Horsley**

Carrier Members.