

Award No. 10509

Docket No. TD-10297

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Charles W. Webster, Referee

PARTIES TO DISPUTE:

AMERICAN TRAIN DISPATCHERS ASSOCIATION

**THE NEW YORK, CHICAGO AND ST. LOUIS
RAILROAD COMPANY**

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

(a) The New York, Chicago and St. Louis Railroad Company, hereinafter referred to as "the Carrier" violated the currently effective Agreement between the parties to this dispute, particularly Article 2-(d), when it failed and refused to compensate Train Dispatcher E. E. Eggleston, Lima, Ohio, in accordance with the provisions of Article 2-(d) on Tuesday, March 12, 1957, for service performed when required to attend an investigation as witness for the Company.

(b) The Carrier shall now compensate Train Dispatcher E. E. Eggleston at time and one-half trick train dispatchers' rate for three (3) hours service performed on Tuesday, March 12, 1957, such service being after his regular assignment.

EMPLOYES' STATEMENT OF FACTS: There is in effect an Agreement between the parties, effective August 1, 1951, on file with your Honorable Board and by this reference is made a part of this submission as though it were fully set out herein.

Article 2 (a), (b), (c) and (d), and Article 7-(d) which are particularly pertinent to the instant dispute are quoted here for ready reference:

"ARTICLE 2.

"(a) — HOURS OF SERVICE

"Eight consecutive hours on duty, exclusive of the time required to make transfer, shall constitute a day's work.

"(b) — OVERTIME

"Time worked in excess of eight hours on any day, exclusive of the time required to make transfer, will be considered overtime and

When train dispatchers are notified by the Carrier to appear as witnesses at investigations or hearings, the notice shall state that purpose, and their cross-examination, if any, shall be limited to the subject-matter covered by their direct examination. They shall be privileged to have their organization representatives present who shall have the right to participate in the examination of witnesses."

*Article II(b) was at that time the overtime rule.

The Employees' proposal was not acceptable to the Carrier and the negotiations that followed resulted in the adoption of Article 7(d) which the Employees are now attempting to repudiate, thus hoping to secure from your Board by indirection that which they were unsuccessful in securing by negotiation.

The Carrier repeats that Article 7(d) is a duly negotiated rule and is binding on both parties.

Although no citation of awards appears necessary to support the Carrier's contention that Article 7(d) is controlling and that the claim is entirely without merit, attention is directed to the following:

In Award 6908, Referee Coffey, it was stated:

"We find and hold that Claimant, at the time in question, was a witness within the meaning of Rule 50(a). He was paid what he would have earned had he worked at his regularly assigned duties on the day in question and while more time was consumed in the rule of a witness than would have been devoted to his regularly assigned position, it is nevertheless true that he performed no service for which the other pay rules of the Agreement, including those relied on by Petitioner, were designed.

The Employees have agreed that when the Carrier requires of them that they appear as witnesses in its behalf, they will claim no compensation over and above what they would have earned in performing their regularly assigned duties. If they find the rule is imposing undue burdens they are not privileged to look to this Board for relief."

In the instant case, Rule 7(d) is comparable to Rule 50(a) in that award. The specific rule governs.

Award 7090, Referee Whiting, is of the same import as Award 6908.

The Carrier has shown that Article 7(d) is a duly negotiated rule of the agreement. It is clear and unambiguous and covers the precise situation of the claimant when he was required to attend an investigation on March 12, 1957. The rule has in the past always been applied in the same manner as in this instance. Your Board is required to give effect to the rule as written.

The claim is without merit and should be denied.

All that is contained herein is either known or available to the Employees or their representatives.

(Exhibits not reproduced.)

OPINION OF BOARD: The facts in this case are not in dispute. The Claimants assigned hours of duty from 12 midnight until 8:00 A. M. On March

12, 1957 the Claimant was ordered to appear as a witness in an investigation starting at 8:00 A. M. This investigation lasted until 11:00 A. M. The Claimant was in no way involved in the investigation and appeared as a witness for the Carrier.

The Claimant filed a claim for 3 hours at the overtime rate claiming the right to this compensation under Article 2(d), the Call Rule. The Carrier denied the claim contending that Article 7(d) of the Agreement controlled and that there was no payment due the Claimant under Article 7(d).

Articles 2(d) and 7(d) provide:

“2(d) — CALLS

Except as otherwise provided in these rules, a regularly assigned train dispatcher who is required to perform work not continuous with (before or after) his regular assignment shall be paid for such work at rate of time and one-half, with a minimum of two hours.”

“ARTICLE 7.

(d) — ATTENDING COURT, INQUESTS, INVESTIGATIONS,
HEARINGS.

A regularly assigned train dispatcher who is required by the company to attend court or inquests, or who is required to attend investigations or hearings when he has committed no offense, shall be paid the earnings of his assignment for all time lost while he is required to be in attendance, provided, that if his presence is required on the rest days assigned to his position he shall be paid in accordance with Article 3(b).”

The Organization's position is that when Claimant was ordered to attend the investigation he was performing service compensable under Article 2(d) and that Article 7(d) is in no way applicable.

The Carrier, on the other hand, contends that Article 7(d) is a specific rule governing compensation for investigations and that unless the claim falls within Article 7(d) there is no right to compensation. It is their contention that Article 7(d) being a specific rule it must take precedence over general rules.

The Carrier also contends that the Organization had specifically requested that the contract be modified to include a situation such as here presented and this was refused, and in its place the present Rule 7(d) was negotiated. It is therefore their contention that the attempt to negotiate such a rule is evidence of the absence of any provision governing such a situation.

As to this latter contention of the Carrier this position would be sound if we were dealing with a new proposal. See First Division Awards 11878 and 13078. However, in view of the fact that the decisions of this Division were so conflicting as to the right of compensation for attending investigations an attempt at clarification can mean no more than an attempt to eliminate controversy. See Award 4506.

While Article 7(d) of the Agreement provides for certain payments to be made in case of a person required to attend an investigation it cannot be construed to provide the exclusive and only times that payment is required under the Agreement. Article 7(d) is drafted to deal with payment in two circumstances, (1) where the employee is required to attend an investigation during his regular working hours and provides that he shall be paid his regular earnings and (2) when he is required to work on his rest day and provides that he should be paid at time and a half in accord with Article 3(b), Article 7(d) is completely silent as to payments in any other situations which may arise. While Article 7(d) could have been drafted to provide that these were the only payments which would be made for attending of investigations and would thus control, absent such limiting language it cannot be construed to be exclusive. Awards 6908 and 7090 are not controlling as in both of those cases this Division was dealing with claims for additional compensation on rest days over and above that which the specific rule provided and in those cases this Division held that the compensation was limited by the specific rule. The situation presented here is not analogous.

Article 7(d) not being controlling, the Claimant was entitled to payment under Article 2(d). See Awards 4569, 6679 among others.

FINDINGS: The Third Division of the Adjustment Board, upon the whole record and all the evidence, finds and holds:

That the parties waived oral hearing;

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: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 4th day of April 1962.

DISSENT TO AWARD NO. 10509, DOCKET NO. TD-10297

The error of Award 10509 is self-evident in holding that a rule dealing with pay for attending investigations, etc., is not controlling over the instant claim for pay account attending an investigation. In providing payment specifically for time lost attending investigations during regular working hours

and on rest days, the parties indicated that no other payments on this account were intended. The record shows that there was no previous controversy between the parties concerning the intent of the rule in this respect.

For the foregoing reason, among others, we dissent.

/s/ **W. H. Castle**

/s/ **P. C. Carter**

/s/ **R. A. Carroll**

/s/ **D. S. Dugan**

/s/ **T. F. Strunck**