Award No. 12522
Docket No. CL-12271

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

(Supplemental)

Lee R. West, Referee

PARTIES TO DISPUTE:

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

KANSAS CITY TERMINAL RAILWAY COMPANY

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood (GL-4871) that:

(1) The Carrier violated provisions of the current Agreement between the parties, particularly Rules 37 (e) and 38 thereof, when it paid Edward J. Cravens less than a minimum of eight hours at time and one-half for his appearance at an investigation as a company witness Thursday, March 3, 1960; and,

(2) The Carrier pay Edward J. Cravens the difference between that paid for March 3, 1960, and the amount of pay arrived at on the basis of eight hours at time and one-half the rate of his position of Foreman.

EMPLOYES' STATEMENT OF FACTS: The facts are not in dispute. By letter dated March 1, 1960 (copy attached and marked Employes' Exhibit A), the Carrier's Superintendent addressed a letter to the members of a company switch engine crew notifying them to report March 3, 1960, for a formal investigation growing out of an alleged rough coupling. In the same letter Claimant Cravens and five other Mail and Baggage Department employes were notified to be present at the investigation as company witnesses.

Cravens was paid for 2½ hours at pro rata for attending the investigation, the date of which was Thursday and one of his rest days. Claim was not due or filed for the other 5 employes for the following reasons:

Louis J. Giamalva — Was injured in the rough coupling incident and had reported off indefinitely account of such injury. He did report for the investigation.

C. W. Merrifield and J. L. Watts — Assigned hours 7:00 A. M. to 3:30 P. M. with Tuesday and Wednesday as rest days. Attended investigation during their regular hours.

came within the provisions of Rule 14 and not under Rule 7. Rule 14, being a special rule, takes precedence over the general rules contained in Rule 7, and, under the facts here, must be held controlling.

Since Claimant is unable to claim a wage loss because he is not entitled to compensation while on his rest days, Rule 14, while applicable, provides no basis for compensation."

This recent award is proof that not all the "leading and latest" Third Division Awards adopt the position urged by the Organization in this case.

The dissent further complains that the payment to the claimant of actual time spent in the investigation must be considered "overpayment, error or gratuity." Carrier's position as to the payment remains as always; it was not an error, nor an overpayment. It could be considered a gratuity, but more properly, would be classified as an equitable payment. At any rate, when it was made, it was stated that no rule covered it and **Award** 8 confirms the fact that no rule does.

Award 8 disposed of every issue of agreement interpretation that is now sought to be presented by the instant claim. Its result is entirely sound; clearly the subject of pay for attendance at investigations is not covered by a general rule (Rule 38), when it was already covered by a specific rule (Rule 49). Mr. Cravens did not come under Rule 49, and, for time spent at the investigation, Carrier allowed him an equitable payment. He was not entitled to anything more and the claim should be denied.

(Exhibits not reproduced.)

OPINION OF BOARD: We are of the opinion that the agreement has been violated.

Edward J. Cravens was required by the Carrier to attend an investigation as a Carrier's witness on one of his regularly assigned rest days. Claimant contends that he should be paid in accordance with Rules 37 (e) (Service on Rest Days) and/or 38, (Notified and/or Called to work on his assigned rest days.)

We agree that Claimant has performed "service" or "work" on his rest day and should be compensated according to the above rules.

Carrier relies quite heavily upon Award No. 8 of Special Board of Adjustment No. 319. This award involves an identical fact situation and involves the same parties.

According to our understanding of that award, it held that the appearance of a Claimant as a witness for the Carrier on his rest day is not "work" within the meaning of Rule 38. It further held that Rule 49 was applicable only when an employe appeared as a witness during his regular work hours and not when he appeared on his rest days. In effect, such award holds that the agreement does not make any provision for payment of an employe who is required to appear as a witness at the convenience of the Carrier on his rest day. We cannot agree that the parties intended an employe could be required to appear on behalf of the Carrier on his rest day without compensation. It is our opinion that such an appearance was "service" within the meaning of Rule 37(e) and "work" within the meaning of Rule 38.

Although we are reluctant to overturn an award on this same property, involving an identical fact situation, we feel that the palpable error of such award warrants the action taken.

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 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 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 21st day of May 1964.

CARRIER MEMBERS' DISSENT TO AWARD 12522 — DOCKET CL-12271

Referee Lee West

The majority consisting of the Referee and Labor Members have reversed an award found to involve an "identical fact situation" and "* * * same parties", declaring it to be palpably in error when, as a matter of fact, Award 8, Special Board of Adjustment 319 simply followed one line of awards which was contrary to the organization's contentions.

General Chairman Shutty, who signed the employes' submission, recognized the existence of a split in authority on this subject, as evidenced by his statement appearing on page 7 of the record:

> "That there has been a conflict of Opinions and Awards on the issue in this case is well known."

The neutral who rendered Award No. 8, Special Board of Adjustment 319, was Mr. Harold M. Gilden, Attorney and Arbitrator, with a vast amount of experience, including 27 awards on the Second Division; 20 awards on the Fourth Division; 196 awards on the First Division; Special Boards of Adjustment Nos. 24, 27, 49, 73, 75, 86, 99, 105, 110, 111, 119, 122, 125, 126, 133, 138, 139, 140, 146, 152, 160, 161, 165, 173, 176, 178, 181, 189, 190, 206, 214, 230, 248, 274, 284, 291, 309, 319, 324, 325; 15 cases on the Section 13 Committee created under the Washington Job Protection Agreement; Member of four Presidential Emergency Boards, as well as service as Arbitrator on various airlines and railroads.

In comparison, Referee West's experience in this field is limited to his first list on which this docket appeared as No. 15.

Award 12522 may have been a little more palatable if Referee Gilden's Award No. 8, Special Board of Adjustment 319 had stood alone, but, admittedly, that was not the case.

If this dispute was the first involving these facts, parties and rules, the Referee would have been free to follow the line of authority which coincided with his interpretation, but such was not the case, because Award No. 8, Special Board of Adjustment 319, had settled the question on this railroad. Thus, it is inconceivable that an award which followed one of two admitted lines of authority was palpably wrong.

Under these circumstances, obviously, the award which is palpably wrong is No. 12522.

For these and other reasons, we dissent.

W. M. Roberts
G. L. Naylor
R. A. DeRossett
R. E. Black
W. F. Euker

LABOR MEMBER'S REPLY TO CARRIER MEMBERS' DISSENT TO AWARD 12522, DOCKET CL-12271

Notwithstanding the comparative experience of Referees referred to in the dissent, it is quite well known that an Award is only as sound as the logic behind it. Award No. 8 of Special Board of Adjustment No. 319 was unsound in that it left the Carrier free to require the services of its employes on their rest days **without any compensation whatsoever.**

Under such circumstances, long experience is unnecessary in order to find that such an absurdity is "palpably erroneous." Award 12522 is quite correct. It only rights a wrong that was committed by the learned Referee in Award No. 8 of Special Board of Adjustment No. 319. In fact, the Carrier involved recognized the inequity resulting from Award No. 8 for they did, in the instant case, out of a sense of equity, allow a token or gratuitous payment for the use of Claimant's time on his assigned rest day. The rules prescribe the payment to be accorded employes required to perform service for the Carrier on their rest days. There is nothing at all erroneous about requiring the Carrier to pay what it had agreed to pay, and that is all Award 12522 requires and what Award No. 8 of Special Board of Adjustment No. 319 should have required.

D. E. Watkins
Labor Member
June 30, 1964