



Award No. 15676
Docket No. CL-16157

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

(Supplemental)

Thomas J. Kenan, Referee

PARTIES TO DISPUTE:

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

MILWAUKEE-KANSAS CITY SOUTHERN JOINT AGENCY

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood (GL-6002) that:

1. Carrier violated the current Agreement when it failed to pay Clerk A. M. Latta, who was called as a witness at an investigation on February 24, 1964.
2. Carrier shall now be required to allow Clerk A. M. Latta eight (8) hours at pro rata rate for February 24, 1964.

OPINION OF BOARD: Prior to a disciplinary investigation, the employe charged with the offense requested the Carrier to secure the presence at the investigation of twelve named employes, who were to be witnesses for him.

The Carrier replied that it would not secure the attendance of these persons, as it did not believe the twelve employes could offer testimony pertinent to the incident under investigation.

The employe charged with the offense obtained the presence of four of the twelve desired witness-employes. They testified, and their cumulative testimony was apparently a material factor in the determination by this Board, in Award No. 14333 (Hall), that there was no factual basis for the discipline which the Carrier assessed after the investigation.

Now before the Board is another claim arising from the foregoing disciplinary investigation. Clerk A. M. Latta, one of the four witnesses who testified in behalf of the charged employe, whose paid presence at the investigation had been requested by the charged employe, but denied by the Carrier, attended the investigation at his own expense. Although the Carrier did relieve Latta of his regular assignment the day of the investigation, it did not pay him compensation for that day as if he had worked his assignment.

The Employees contend that the Carrier should not only have secured the attendance at the investigation of this employee who knew pertinent facts about the incident under investigation, but that the Carrier should now compensate him as if it had itself called him as a witness, pursuant to the provisions of Rule 50 of the Working Agreement.

Rule 50 of the Agreement provides, in pertinent part, as follows:

"WITNESSES

Rule 50. Employees taken away from their regularly assigned duties at the request of the Railway to attend Court or to appear as witnesses for the Railway, or to attend investigations and/or hearings, will be furnished transportation and will be allowed compensation equal to what would have been earned had such interruption not taken place, and, in addition, necessary actual expenses while away from headquarters." (Emphasis ours.)

Another rule, Rule 24(c), provides as follows:

"DISCIPLINE AND GRIEVANCES

Rule 24.

* * * * *

(c) Subject to paragraphs (a) and (b) of this rule, before an employee who has been in service more than sixty (60) days is discharged, suspended for a definite term, or notation is made against his record for an alleged offense, he shall, unless he admits his guilt in writing, have a fair and impartial investigation. He shall have a reasonable opportunity to secure the presence of duly accredited representatives and for necessary witnesses. He and the duly accredited representatives shall be permitted to examine witnesses." (Emphasis ours.)

The language of the two cited rules is too clear to allow the interpretation denied by the Employees. Only those witness-employees taken away from their duties at the request of the Carrier will be allowed compensation. An employee who is the subject of an investigation is still guaranteed that the investigation must be fair and impartial and that he will have a reasonable opportunity to secure witnesses and counsel. But, the Carrier is not obligated to pay the witnesses or compensate the counsel of the employee charged with an offense.

This Board knows of no previous awards supporting the Employees' contention. Award No. 15368 (Lynch) involved a prospective witness who was present at an investigation but not permitted by the Carrier to testify. This is not the situation at hand.

Award No. 12242 (Coburn) was a determination by this Board that there had simply been no fair and impartial investigation in a case when the prospective witness-employee not called by the Carrier, although requested by the Claimant, could have offered "crucial" testimony. Again, that is not the case at hand: Latta appeared and testified.

Second Division Award No. 1965 is the same ruling as our Award No. 15368, and First Division Award Nos. 16333 and 18847 are the same as our Award No. 12242.

Award Nos. 8504 (Daugherty), 12492 (Ives), 13295 (Zack) and 13643 (Bailer) are four instances where the Employees did not request the attendance of certain witness-employees at the investigation, but later charged that the Carrier's failure to call them deprived the employee being investigated of a fair and impartial investigation. In all four awards, this Board first determined that the presence of the prospective witness-employees was not necessary to a fair and impartial investigation, and then this Board stated that the claimant could have called the desired witnesses himself.

The Carrier's burden is to conduct a fair and impartial investigation. Whether the Carrier does or does not call the witnesses demanded by the employee charged with an offense, the Carrier still must carry this burden. The Carrier's failure to call a witness whose testimony is material, and not merely cumulative and repetitive of other testimony, has always been held by this Board as fatal to a fair and impartial hearing. But, this still does not require the Carrier to compensate witnesses called by an employee charged with an offense, even if the failure of such witnesses to appear would have deprived the investigation of its fair and impartial character.

The "due process of law" clause of the U. S. Constitution's Fifth Amendment applies its force on the Federal government. The "due process of law" clause of the Fourteenth Amendment applies its force on the governments of the States. Those who are employed by railroads must look to their collective bargaining agreements or to legislation for rights such as are sought in this proceeding. The Agreement now in force clearly does not provide what is asked.

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 not violated.

AWARD

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 23rd day of June 1967.

Keenan Printing Co., Chicago, Ill.

Printed in U.S.A.