Corrected Copy

Award Number 17370

Docket Number CL-17888

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Louis Yagoda, Referee

PARTIES TO DISPUTE:

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

ERIE LACKAWANNA RAILWAY COMPANY

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood (GL-6470) that:

1. Carrier violated the rules of the Clerks' Agreement at Scranton, Pa., when on June 6, 1967 it instructed Miss M. McGovern to attend an investigation on June 12, 1967 and refused to compensate her for service performed on her rest day.

2. Carrier shall now compensate Miss McGovern for service rendered on June 12, 1967, one of her regular assigned rest days, at her regular rate of pay. (Claim 1969)

EMPLOYES' STATEMENT OF FACTS: The claimant, Miss M. McGovern was regularly assigned to position of Crew Clerk at Scranton, Pa., assigned hours 4 p.m. to 12 Midnight, rest days Monday and Tuesday. On Monday, June 12, 1967, Carrier was conducting an investigation commencing at 10:15 A.M., involving a train service employe and Miss McGovern was required to attend this investigation as a Carrier witness on instructions contained in letter dated June 6, 1967 addressed to Miss McGovern by Superintendent Packer. (Employes' Exhibit A). Carrier refused to compensate employe McGovern for service performed on her rest day for the Carrier by attending the investigation as a Carrier witness after being instructed to attend.

The claimant "time slipped" the Carrier for service performed on her rest day, June 12, 1967, however, payment was declined by General Yardmaster Decker (Employes' Exhibit B) in letter addressed to the claimant dated June 22, 1967. Under date of August 11, 1967, claimant wrote the General Yardmaster informing him his decision was not acceptable as she had been ordered by Superintendent Packer to appear as a witness, therefore, the decision of the General Yardmaster would be appealed. (Employes' Exhibit C). On August 12, 1967 the Division Chairman appealed the claim to Superintendent R. A. Packer (Employes' Exhibit D) who denied the claim on September 13, 1967 (Employes' Exhibit E) giving as his reason for denial, "Miss McGovern is a regularly assigned employee * * *." On September 15, 1967, the Division Chairman notified the Superintendent his decision was not acceptable and would be appealed. (Employes' Exhibit F).

On October 4, 1967, the General Chairman progressed the claim to General Manager-Labor Relations Carroll, the highest officer of the Carrier desig-

nated to handle labor disputes. (Employes' Exhibit G). Conference was held on February 14, 1968, however, the parties were unable to resolve the dispute and on March 14, 1968, Mr. Carroll denied the claim. (Employes' Exhibit H), to which the General Chairman replied on April 8, 1968 (Employes' Exhibit I).

(Exhibits not reproduced)

CARRIER'S STATEMENT OF FACTS: On May 30, 1967, Mary B. McGovern, hereinafter referred to as claimant, was on duty as second trick crew caller, Scranton, Pa. Claimant stated that about 11:20 P.M. she called Engineer G. A. Shawger for a unit coal train to depart Scranton at 1:30 A.M. June 1, 1967. Engineer Shawger stated claimant did not give him a specific call and did not report for the assignment. He had to be called again at 2:20 A.M., reported at 2:50 A.M. and train departed at 3:15 A.M., 1 hour and 45 minutes late. Based upon the incident, Engineer Shawger and claimant were ordered to appear for investigation on June 12, 1967, which was one of claimants assigned rest days. The investigation started at 10:15 A.M. and concluded at 11:45 A.M., copy thereof attached as (Carrier's Exhibit A.)

On August 10, 1967 (Carrier's Exhibit B), claim was instituted on behalf of claimant for a day's pay on the basis that all rules of the Clerks' Agreement were violated. Claim was denied and thereafter handled on appeal *without citing any specific rules until it was appealed to Carrier's highest* officer designated to handle such matters when the General Chairman cited Rules 20 and 25 as allegedly supporting the claim. The case was discussed in conference and denied, with denial confirmed by letter dated March 14, 1968, (Carrier's Exhibit C.) Subsequent correspondence is attached as Carrier's Exhibit D and E.

(Exhibits not reproduced)

OPINION OF BOARD: At the time of the events giving rise to this dispute, Claimant was regularly assigned to position of Crew Clerk at Scranton, Pa., assigned hours 4 P.M. to 12 midnight, rest days, Monday and Tuesday.

On Monday, June 12, 1967, one of her rest days, Claimant was a witness at request of Carrier at an investigation at Scranton, commencing at 10:15 A.M. and closing at 12:05 P.M. The subject of the investigation was a delay of one hour and 45 minutes incurred to a unit coal train on June 1, 1967. The employe accused, was an Engineer who, in being summoned to the investigation, was charted "with the alleged violation of the 4th paragraph of the General Notice and Rule O-1, Rules of the Operating Department, effective October 25, 1964".

Claimant's testimony was required because it had been contended by the accused Engineer that Claimant had not given him a specific call and he was therefore delayed in reporting for the assignment.

The particular rule invoked by Employes in the claim before us, is Rule 25 (Notified or Called). It reads:

> "(a) Employees notified or called to perform work either before or after, but not continuous with, their regular work period shall be allowed a minimum of three (3) hours for two (2) hours' work or less and if held on duty in excess of two (2) hours, time and one-half shall be allowed on the minute basis.

(b) Employes notified or called to perform work either before or after, but continuous with their regular work period, shall be allowed time and one-half on the minute basis for such time worked.

(c) Employes notified or called to perform work on their rest days or specified holidays shall be allowed a minimum of four (4) hours at the rate of time and one-half for the four (4) hours' work or less. Employes worked in excess of four (4) hours will be allowed a minimum of eight (8) hours at the rate of time and one-half."

Carrier contends that the presence of Claimant was dictated by the "mutual interest" of Carrier and Claimant, in that the accused Engineer was blaming Claimant for the delay and on this basis denying the charges against him. Employes deny that the Claimant became a party to the action taken by Carrier from the mere fact that the accused Engineer implicated her in his defense. They argue that the calling of the hearing and of the witnesses including subject Claimant, were completely in the hands of Carrier and in the interests of trying another. In their view, it was Carrier who caused the presence of Claimant on her rest day by instructions to her to be present. She was therefore in the service of the Carrier during the time involved and should be paid therefor.

This Board has frequently ruled on this general subject. Divergent lines of opinions have resulted.

One line of awards holds that the concept of "work" for which compensation is provided in the Agreement is the performance of conventional on-the-job service. Appearance as a witness at an investigation is regarded in these awards as not conforming to a reasonable intended concept of "performance of work". These awards have sometimes invoked the rule of contract interpretation that "to express one thing is to exclude others". This principle is addressed to the fact of existence of a specific rule (in this case Rule 43) expressly requiring payment for employes who appear as court witnesses at request of management. We have held that this expression of a specific condition for compensation as a witness (i.e. in court proceeding) must be held to have shown absence of an intent to provide for compensation as a witness in other proceedings.

On that basis we concluded that we could not read into the controlling Rule (attendance at court, etc., identical with Rule 43 in the instant matter) a derived application to attendance at an investigation. Awards 2512, 2778, 3089, 6266, 7090. Following this reasoning, 2nd Division Award 3807 added the following comment in denying the claim:

". . . in the absence of errors or omissions, a written contract is conclusively presumed to constitute the entire agreement, and therefore leaves no room for implied understandings."

We find, however, also, a more persuasive line of decisions which is based on the general grounds that requirement by Carrier of employee as a witness at times outside of assigned schedule, is a service performed on behalf of Carrier and should therefore be paid for as such.

Our reasoning for such rulings has been that such attendance is a compelled imposition for the benefit of Carrier and escapable only at the risk

of disciplinary penalty. We have decided therefrom, that this is compensable activity as (a) an underlying premise of the employer-employe relationship not expressly altered by the Agreement terms and/or (b) protected by public *policy against "involuntary servitude"* without compensation, and/or (c) covered by or to be properly inferred from the Agreement provision that employees "called to perform work" are to be compensated.

In Award 3911 an unassigned rest day was involved. We sustained on the ground that "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" and therefore such appearance should be regarded as service for Carrier.

in Award 12522, overturning a previous award—No. 8, Special Board of Adjustment No. 319, we acknowledged that it had involved an identical fact situation and the same parties but found Award No. 8 in "palpable error" inasmuch as it was mistaken in not regarding an employee required to appear as witness on rest day as having performed "service" and "work" within the meaning of the applicable rules.

In Award 14124, we sustained a claim for requirement to be a witness on an assigned rest day, stating: ". . . Although there exists a short line of authority to the contrary, the overwhelming majority of the cases decided by this Board support the position of the Claimant. We approve of the majority decisions in this area of controversy, and therefore, sustain the claim."

Other Awards sustaining claims of this nature are Award 3966 and Award 6736. We included the following comment in the latter:

> ". . . . 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."

There has also been a line of reasoning addressed to a variant which has been raised in the dispute now before us. This is, the consideration of whether where there is "mutuality of interest" between the Carrier and the employe, said employe is not to be deemed as "performing work" for Carrier *and therefore not entitled to compensation.* Awards 4569, 4570, 4573, 4790, 4910, 4916, 5376, 5823. However, in some of these foregoing dockets, there was present a Rule not present in the instant Agreement, to the following effect:

> "Employes summoned to attend Company investigations in which they are not directly involved . . . and thereby losing time, will be paid therefor at their regular rate". (Rule 26(b), quoted in Award No. 5823).

The determinations therefore turned on whether the claimant was "directly involved".

However, in other of these Awards, the controlling rules were essentially as here and the denial of claim, nevertheless, based on the "mutuality of interest" consideration. As an example, Second Division Award 1632.

On the basis of the procedural facts in this matter and in the light of our most persuasive past posture for such circumstances, it is our considered opinion that there has not been established for this Claimant that determ-

ining character of "mutual interest" in the investigation with the Carrier, which would justify an identity for her other than as a witness summoned by Carrier in the service of a Carrier-conducted proceeding.

It cannot be said with realistic accuracy that the Crew Clerk was in the nature of either a "co-accurer" or a "co-respondent" or a "co-tryer", at this investigation. The charges were against another; they were so announced as the subject of the hearing. The investigation was initiated solely by Carrier and for Carrier's benefit and interest, albeit an Agreement obligation on the employer. Carrier was in sole control of procedure, place and time. The investigation was for the purpose of testing Carrier's earlier indictment against the Engineer.

We have sometimes found a linkage of interest between witness and Carrier where the announced subject of the investigation did not charge a specific defendant and when the record established that the witness stood alongside another as the possible culprit in the eyes of Carrier. There is no showing in this record that this was the basis of the hearing here.

In circumstances such as those present here, we have found the absence of such a "mutuality of interest" in the proceedings and sustained claim for compensation. Awards 2032, 2223 and particularly Awards 3478, 3722 and 11585. In Award 11585, where the fact situation was very similar to that in the instant controversy, and the applicable rules the same, we relied on the fact that "No charge had been made against Claimant because of his written report and he was under no obligation to defend it in an investigation".

We find this reasoning persuasive for the circumstances now before us and shall therefore sustain the claim that a violation has occurred.

Inasmuch as one hour and fifty minutes of Claimant's time was spend at the hearing, we believe that to conform to Rule 25(c), the appropriate remedy is the payment of four hours' pay at the rate of time and one-half.

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

Claimant shall be compensated for four hours' pay at the rate of time and one-half.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 1st day of August 1969.

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