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**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

Award No. 37195
Docket No. SG-37098
04-3-01-3-652

The Third Division consisted of the regular members and in addition Referee Peter R. Meyers when award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Railroad Signalmen
(Port Authority Trans-Hudson Corporation (PATH)

STATEMENT OF CLAIM:

"Claim on behalf of the General Committee of the Brotherhood that:

Claim on behalf of C. Bala, for eight hours pay at the straight time rate and eight hours at the time and one-half rate at the Signal Repairman I rate of pay. Account Carrier violated the current Signalmen's Agreement, particularly Articles V and XII, when it failed to compensate the Claimant for the time he spent attending an investigation on July 25, 2000. BRS File Case No. 11999-PATH."

FINDINGS:

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

The carrier or carriers and the employee or employees involved in this dispute are respectively carrier and employee within the meaning of the Railway Labor Act, as approved June 21, 1934.

This Division of the Adjustment Board has jurisdiction over the dispute involved herein.

Parties to said dispute were given due notice of hearing thereon.

On August 24, 2000, the Organization filed a claim on behalf of the Claimant, arguing that the Carrier violated the parties' Agreement when it failed to pay the Claimant for his time spent attending a Hearing on July 25, 2000, as instructed by the Carrier, and when it failed to pay the Claimant for a vacation day that he was compelled to use the following day in order to avoid an Hours of Service Act violation under FRA regulations. The Carrier denied the claim.

The Organization contends that the Carrier violated the parties' Agreement when it denied the Claimant's request for payment for the time he spent, at the Carrier's direction, attending an Investigation on July 25, 2000. The Organization maintains that in accordance with the Agreement, the Claimant was entitled to payment for all time in accordance with the call-in Rule in that he was directed by the Carrier to attend the Investigation. Moreover, the Claimant had to request a personal leave day following the Investigation in order to comply with the Hours of Service Act as required by the FRA.

The Organization argues that the Carrier ordered the Claimant to attend the Investigation. The Organization points out, however, that in denying the claim, the Carrier asserted that it does not pay employees for attending Investigations outside of their regular tours of duty. The Organization emphasizes that the Carrier would have the Board believe that it can direct its employees at will in their off-duty hours, without regard to compensation for their personal attendance at Investigations. The Organization asserts, however, that contrary to the Carrier's argument, the provisions of Article V of the Agreement govern the use of employees during their scheduled off-duty hours, and Article V requires that employees be paid at the time and one-half rate for such service. The Organization further asserts that there is no exception in the Agreement that relieves the Carrier from compensating the Claimant for this time.

The Organization asserts that the parties could have included an exception in the Agreement if the parties had intended that payment at the overtime rate would not apply to attendance at an Investigation. No such exception is either stated or implied in the Agreement, and the Organization emphasizes that unless the Agreement expressly provides for such an exception, it cannot be inferred. The Organization contends that the Carrier deprived the Claimant of his proper compensation on the basis of a non-existent exception to the Agreement. The

Organization maintains that the parties did not provide that an employee attending an Investigation at the Carrier's direction would not be eligible for compensation under Article V of the Agreement. The Organization therefore argues that the Board lacks authority to grant the Carrier relief in this situation. The Agreement specifically provides for the payment of an employee's time spent outside of his regular assignment, and the Carrier therefore must be held to have violated the Agreement when it denied the Claimant compensation for attending the July 25, 2000 Investigation.

The Organization points out that the Claimant was found not guilty of the charges at issue during the July 25, 2000 Investigation, and he was held for eight hours past his regular tour of duty because the Carrier ordered him to be at the Investigation. The Organization asserts that the Carrier still seeks to punish the Claimant by withholding payment for the time he spent complying with the Carrier's directive. The Organization further emphasizes that under Article XII of the Agreement, time spent "attending court, Investigation, or instruction by direction of PATH will be counted as time worked." The Organization argues that there can be no doubt about the meaning of this language; if an employee attends an Investigation at the Carrier's direction, it will be counted as time worked. It is undisputed that the Claimant was ordered to attend the Investigation following his normal tour of duty, so the Claimant was performing work at the Carrier's direction pursuant to the clear language of Article XII. The Organization maintains that the Claimant should have been compensated for this work as provided in Article V. The Organization then asserts that the time spent by the Claimant in traveling to and attending the Investigation, as directed by the Carrier, was in fact the time claimed. The Organization argues that the Carrier cannot avoid its contractual obligations by attempting to minimize the time that the Claimant was required to spend on this frivolous Investigation.

The Organization then argues that with regard to the personal leave day that the Claimant was forced to use due to his hours of service, the FRA's Hours of Service Act regulations contemplate the commingling of "covered service" with other duties that may not be of a safety-sensitive nature. The Organization points out that the eight-hour period between 7:00 A.M. and 3:00 P.M. on July 25, 2000 did not include safety-sensitive service, but the eight-hour period before that, in which the Claimant was performing the duties of his regular shift, did include

safety-sensitive service that meets the definition of commingled service under the FRA regulations. To comply with these regulations, the Claimant was required to have a minimum of ten hours' rest before engaging in covered service on July 26, 2000. The Organization contends that the Claimant had no choice but to use time off in order to comply with the FRA regulations. The Organization maintains that the Carrier directed the Claimant to attend this Investigation, so the Carrier should be responsible for the reimbursement of the Claimant's use of his personal day to comply with the FRA regulations.

The Carrier contends that the parties' Agreement does not allow, nor has the Carrier ever provided, compensation to employees for attending Investigations. The Carrier maintains that the record is completely devoid of any evidence of a violation of the Agreement's language or of any historical precedent for such remuneration. The Carrier argues that the controlling language in this instance is contained in Article X of the Agreement, and there is no provision for remuneration for attendance at Hearings.

As for the assertion that the Claimant should be reimbursed for a personal leave day that he took on July 26, 2000 in order to avoid a violation of Hours of Service Act regulations, the Carrier points out that the Claimant submitted an Hours of Service Act report reflecting a total of eight hours worked on July 25. The Organization presented an undated form that, it asserts, serves to correct the record that the Claimant originally submitted. The Carrier maintains that there is no evidence that it ever received this undated form or that it was submitted to the FRA. Moreover, the Organization did not produce any evidence from the FRA to support its assertion that the Claimant's supervisor erred in his interpretation of the regulations when he determined that the Claimant would not violate the Hours of Service Act regulations when he reported for work on July 26, 2000. The Carrier emphasizes that this matter does not take the form of a grievance requiring reimbursement, but rather should be advanced to the FRA for review and determination.

The Board reviewed the record in this case and finds that the Organization failed to meet its burden of proof that the Carrier violated the Agreement by failing to compensate the Claimant for time he spent attending an Investigation on July 25, 2000, and for taking a personal day on July 26, 2000. Although it is clear from the

record that the Claimant was compelled to attend an Investigation, there is nothing in the parties' Agreement that requires payment to employees who attend disciplinary Investigations. It is true, as the Organization points out, that there is language in Article XII that states that time of employees attending Investigations will be counted as time worked, but there is no language in the Agreement that requires payment for that time. Moreover, several Awards of this Division, as well as the Second Division, have held that "if a charged employee is to be paid for attending his own Investigation, then the Agreement must provide for this entitlement." (Second Division Award 12673. See also Third Division Award 30489.)

With respect to the request for payment for July 26, 2000, the Board must find that the Organization failed to meet its burden of proof that the Claimant was compelled to take the personal leave day on July 26, 2000, because if he would have worked, he would have violated the Hours of Service Act regulations. There is no statement in the record from the FRA that indicates that the Claimant would have violated the Hours of Service Act regulations if he had reported to work on July 26, 2000, after having worked on July 25, 2000 and then attended the Investigation for another eight hours. The Board recognizes that the Claimant took the time off on July 26, 2000 because he felt tired and unable to work. However, there is no showing that he would have been required to take that time off by the Hours of Service Act regulations simply because of his attendance at the Investigation after work the day before.

For all of the above reasons, the claim must be denied.

AWARD

Claim denied.

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ORDER

This Board, after consideration of the dispute identified above, hereby orders that an Award favorable to the Claimant(s) not be made.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Dated at Chicago, Illinois, this 28th day of September 2004.