

Form 1

**NATIONAL RAILROAD ADJUSTMENT BOARD  
THIRD DIVISION**

Award No. 37855  
Docket No. MW-37041  
06-3-01-3-670

The Third Division consisted of the regular members and in addition Referee Joan Parker when award was rendered.

**PARTIES TO DISPUTE:** (Brotherhood of Maintenance of Way Employees  
(Union Pacific Railroad Company [former Southern  
( Pacific Transportation Company (Western Lines)]

**STATEMENT OF CLAIM:**

“Claim of the System Committee of the Brotherhood that:

- 1) The Carrier violated the Agreement when it failed and refused to compensate Mr. F. Robles for time and expenses for July 12 and 13, 2000 in connection with his appearance as a witness at an investigation concerning Mr. G. Gonzales at Nampa, Idaho. (Carrier's File 1250799 SPW)
- 2) As a consequence of the violation referred to in Part (1) above, Claimant F. Robles shall now ‘. . . be compensated for two (2) days lost wages, and two (2) days per diem at his Carrier assigned position during the time of the violation. Also in addition to the above we are requesting travel mileage that Mr. Robles incurred from Manteca, California to Nampa, Idaho, round trip, at the Carrier's rate of pay of 32.5 cents per mile.”

**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.

The issue in this case is whether the Carrier violated the parties' Agreement when it refused to compensate a witness called by the Organization to testify at a disciplinary Investigation. When the case arose, the Claimant was regularly assigned to the position of Track Welder on Steel Gang 8501, a mobile gang, to which employee G. Gonzales was also assigned. The Claimant regularly worked eight hours per day, Monday through Friday, and reported to Supervisor H. Stowell.

By letter dated June 23, 2000, G. Gonzales was instructed to attend a Hearing based upon allegations that he had been dishonest in claiming pay for weekend travel in connection with trips that he had made to his residence and for which he was reimbursed pursuant to Article XIV of the BMW National Agreement. The Notice of Investigation further advised Gonzales:

"This investigation and hearing will be conducted in conformity with the current Schedule Agreement Rule between the Company and the Union representing your craft or classes. You are entitled to representation per the applicable Schedule Agreement Rule and may produce such witnesses, as you desire at your own expense."

In response to the Notice of Investigation, Gonzales elicited the assistance of the Organization to provide representation. By letter dated July 10, 2000, the General Chairman requested a postponement of the Hearing and a change of location. He also asked that employee F. Robles be summoned as a witness, but with "... the understanding that his appearance thereat will be at no expenses to the accused, nor loss of earnings or other benefits of the witness." Gonzales' Hearing went forward as scheduled on July 13, 2000 in Nampa, Idaho. Claimant Robles

traveled to that location and appeared as a witness for Gonzales. Thereafter, the Claimant submitted an expense report claiming two days' pay; roundtrip mileage from Manteca, California, to Nampa, Idaho; and two days' per diem in connection with his appearance at the Hearing.

The Carrier refused to honor the Claimant's request, and on September 8, 2000, the Organization filed a claim seeking compensation for the Claimant due to his attendance at the July 13, 2000 Hearing.

The Organization contends that the Claimant was improperly denied compensation and reimbursement for expenses that he incurred in connection with his attendance at the Investigation which was held on July 13, 2000.

Preliminarily, the Organization emphasizes that the General Chairman made a written request that the Claimant be allowed to appear at the Hearing at no expense to either Gonzales or the Claimant. According to the Organization, the Carrier never informed it or the Claimant that the request would not be granted. The Organization further argues that the Claimant received instructions from his immediate supervisor, Stowell, to report for the scheduled Hearing in Nampa, Idaho, and that Stowell advised him that he would be compensated for attending the Hearing. At no time was the Claimant told that he would not be compensated for presenting himself at the Investigation.

In response to the Carrier's contention that there has been a past practice on the Union Pacific of not compensating witnesses called by the Organization to testify at Investigations, the Organization asserts that such practice, if it exists, is irrelevant to the instant case. In the Organization's view, this dispute does not involve the Union Pacific Agreement. Rather, it involves the Agreement between the Southern Pacific Western Lines and the BMWE, effective October 1, 1973 (revised January 1, 1993) and the practice under that Agreement has been to compensate all employees who attend Investigations.

The Carrier contends that it never agreed to compensate the Claimant for any lost wages or for travel expenses. Nor was it under any contractual obligation to do so. According to the Carrier, the Organization requested the Claimant to attend the Hearing as a witness on behalf of Gonzales, and from the beginning, the Carrier

made it clear that Gonzales was entitled to representation pursuant to the Agreement and could summon whatever witnesses he desired, as long as such witnesses were produced at his own expense.

The Carrier further argues that there is no documentation in the record supporting the Organization's claim that it had agreed to cover the Claimant's expenses as a witness. It is clear that the Claimant was present at the Investigation to be a witness for Gonzales; the Claimant was neither asked nor directed by the Carrier to give testimony.

In support of its position, the Carrier cites Rule 41, which requires the Carrier to pay for witnesses who are requested by management to appear for the company. There is no contractual language that expands this obligation to witnesses called by the Organization. Moreover, while the Organization maintains that it was the past practice for the Carrier to pay for witnesses requested by the Organization, the Carrier argues that any practice that might have occurred on the former Southern Pacific has no bearing on any matter pertaining to the Agreement in effect between the BMW and the Union Pacific.

The Carrier submits that the Agreement is clear and very specific as to the circumstances when it must pay for witnesses. Furthermore, even assuming *arguendo* that the Carrier was required to call and pay for witnesses who were vital to the Investigation, in the instant case, the Claimant had nothing whatsoever to contribute. In the Carrier's view, the Organization, in effect, is asking the Board to hold that the Carrier must call any and all witnesses whom the Organization demands. Such a position makes no sense. The Carrier submits that it need call only those witnesses who are necessary for it to carry its burden of proof at the Investigation.

The Record reveals that from the outset of this matter, the Carrier made it clear to Gonzales and the Organization that they were free to produce any witnesses they desired at the disciplinary investigation, but at their own expense. The Notice of Investigation, dated June 23, 2000, explicitly stated: "You are entitled to representation per the applicable Schedule Agreement Rule and may produce such witnesses as you desire at your own expense." At no time did the Carrier request that the Claimant attend the Hearing on July 13, 2000, and there is no credible

evidence that anyone in management directed the Claimant to attend or promised that he would be paid for his time and expenses.

The Organization requested the Claimant to attend the Hearing, and it appears that it was the Organization that informed him that he would be compensated by the Carrier. At the Hearing, the Claimant acknowledged that he was there to serve as a "witness for the accused." When he was asked who requested his presence at the Hearing, he replied, "either Mr. Gonzales or the Union did."

The Agreement does not contain any language requiring the Carrier to pay for the time and travel expenses of the Organization's witness. Rule 48(c) states:

"Prior to the hearing, the employee alleged to be at fault will be apprised in writing of the precise nature of the charges(s) sufficiently in advance of the time set for the hearing to allow reasonable opportunity to secure a representative of his choice and the presence of necessary witnesses. The General Chairman will be furnished a copy of the charges preferred against an employee."

Manifestly, nothing in this provision obligates the Carrier to compensate witnesses who attend Hearings at the request of the Organization. The only language found in the Agreement that requires the Carrier to pay for witnesses is contained in Rule 41. That Rule states:

"Employees taken away from their regular assigned duties at the request of management to attend court or to appear as witnesses for the company will be allowed eight (8) hours at pro rata rate each work day and eight (8) hours at time and one-half rate for rest days and holidays or actual amount they would have earned had they remained on their regular assigned positions, whichever is greater. Transportation will be furnished and actual expenses allowed while away from headquarters. Any fee or mileage accruing will be assigned to the company."

By virtue of the clear language of Rule 41, the Carrier is required to pay for only those witnesses who are requested by management to appear as witnesses for the company. If the parties had mutually intended for the Carrier also to pay for the Organization's witnesses, presumably they would have set forth that intent in clear language. Given the absence of any contractual language supporting the Organization's position, if the Board were to sustain the instant claim, it would improperly be adding new terms to the parties' Agreement through the grievance arbitration process.

While the Organization referred to the alleged practice of the Southern Pacific Western Lines in regard to paying Organization witnesses who testified at Investigations, it failed to show any such past practice on Union Pacific property. Furthermore, any practice under the Agreement between the Southern Pacific Western Lines and the BMW is irrelevant because the disputed incident occurred under the Union Pacific-BMW Agreement.

**AWARD**

Claim denied.

**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 1st day of August 2006.