Award No. 3089
Docket No. CL-3064

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Edward F. Carter, Referee

PARTIES TO DISPUTE:

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

THE OGDEN UNION RAILWAY AND DEPOT COMPANY

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employes that the Ogden Union Railway and Depot Company and/or its officers violated the terms of the existing agreement between the parties by:

(a) Refusing to compensate Mr. D. C. Murdock, Chief Crew Dispatcher at Ogden, Utah, for time spent at investigation acting as witness for the Company, after he had completed his regularly assigned tour of duty from 12:01 AM until 8:00 AM, August 4, 1944. Investigation beginning at 8:15 AM and ending at 9:30 AM; and

(b) The Company shall now compensate Mr. D. C. Murdock for one hour and 30 minutes at the overtime rate of his regular assigned position for the above service rendered.

EMPLOYE'S STATEMENT OF FACTS: Mr. D. C. Murdock established seniority with the Ogden Union Railway and Depot Company on the clerical roster in the Yard Office, October 11, 1936. At the time of the instant claim, was regularly assigned to position of Chief Crew Dispatcher with hours of assignment from 12:01 AM until 8:00 AM daily.

The duties of the claimant's position are the calling, registering and otherwise handling of train crews for one of the parent lines, the Southern Pacific, in line with the schedule agreement between the S. P. Company and the Brotherhood of Railroad Trainmen and the Order of Railway Conductors.

On August 2, 1944, Mr. Murdock was handed written notice by the Assistant Chief Clerk on duty at the Depot Company Yard Office, which notice was signed by Mr. D. W. Tanner, Southern Pacific Trainmaster, directing Mr. Murdock to appear at the office of the Trainmaster at 8:15 AM, MT, August 4, 1944, as witness at formal investigation to be conducted with a Southern Pacific Brakeman.

Mr. Murdock himself was not being investigated, instead was acting as a witness for the Company against Brakeman L. W. Winn, who failed to report for work after being called.

On August 4, 1944 Mr. Murdock worked position of Chief Crew Dispatcher from 12 Midnight until 8:00 AM and at 8:15 AM reported to the Southern

One additional feature of the instant case should be noted. The claim on behalf of Chief Crew Dispatcher Murdock assumes that the investigation of the brakeman missing the call was a service in the sole interest of the carrier. As a matter of fact, investigations are required in discipline cases by provision of agreement incorporated at the instance of the employes and for the primary benefit of the employes. In numerous cases the carrier would gladly forego the proceedings of a formal investigation on behalf of its individual interests. The instant case is a practical illustration. The facts were simple and instantly available. The carrier knew without formal investigation that Brakeman L. W. Winn was called, had failed to report, had neglected his duty, and caused unnecessary delay to an important train. Nevertheless (expressed in the language of the several Boards), Brakeman Winn was "entitled to his day in court," a formal investigation was required and held, and Chief Crew Dispatcher Murdock provided testimony on behalf of the crew calling forces responsible for the actual calling of Brakeman Winn.

It is the carrier's position that Crew Dispatcher Murdock is not entitled to payment claimed in this case under any provision of existing agreement.

OPINION OF BOARD: In the case before us, the Claimant was notified in writing by the Trainmaster to appear and provide testimony at an investigation of a Southern Pacific brakeman who had failed to report for his run when called. Claimant worked his regular assignment, 12:00 midnight to 8:00 a.m. and then attended the investigation at 8:15 a.m., as directed and remained there until 9:30 a.m. Claimant contends that he is entitled to overtime for one hour and thirty minutes under Rule 7 of the current Agreement covering the situation where an employe was released and required to return to work.

The Organization relies on the Overtime Rule to sustain its position. It is set forth as Rule 5 of the current Agreement as follows:

> "Except as provided for in Rules 4 and 12, time in excess of eight hours, exclusive of meal period, on any day shall be considered overtime and paid on the actual minute basis at the rate of time and one-half."

The Carrier relies on Rule 13 of the current Agreement, and the mutual construction of that rule by the parties, in sustaining its position that there is no basis for the claim. Rule 13 provides:

> "Employes taken away from their regular assigned duties at the request of the management, to attend court or to appear as witnesses for the company, shall be furnished transportation and shall 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. Any fee or mileage accruing shall be assigned to the company."

Assuming, but not deciding, that the Overtime Rule would apply except for the existence of Rule 13, we are obliged to determine, as between the parties to the current Agreement, the effect to be given to the latter rule. It is the contention of the Organization that Rule 13 has no application under the wording of the rule to the appearance of employes at investigations and that it applies only to court proceedings. The Carrier contends that it applies to all cases where employes are called to provide testimony whether in or out of court.

In considering the wording of the rule, particularly the words "to attend court or to appear as witnesses for the company," it is evident that the intent of the rule is not free from doubt. If the rule was to apply only to employes attending court there is no reason for the use of the words, "or to appear as witnesses for the company" because "to attend court" clearly would include employes attending court in the capacity of witnesses. Consequently, it could be said with considerable justification that the addition of the words "or to appear as witnesses for the company" contemplated something more than

appearing in court as witnesses. The Carrier argues that it was intended to include employes who appear as witnesses at investigations or other similar hearings where the taking of testimony is contemplated. We think that the least that can be said about this language of the rule is that it is indefinite and ambiguous. Under such circumstances the construction placed upon the language of the rule by the parties becomes highly important in determining what was meant by their use.

The Carrier asserts that overtime has not been paid in such cases in the twenty-five year history of the rule. This is not denied by the Organization except that it denies that any such situation has ever arisen in the last five years. In addition thereto, it is pointed out in the record that a similar case arose in 1938 and during its pendency, it was withdrawn by the Organization after having been discussed on the merits. In 1940 when the Clerks' Agreement was under revision, the Organization through its General Chairman proposed the following rule:

> "Employes attending court or acting as witnesses at home point or headquarters outside of their assigned hours will be paid at pro rata rate for the time devoted to such attendance."

It is evident to us that this proposal was made for the purpose of providing compensation for attending trials and acting as witnesses. Certainly there would have been no purpose in the proposal unless it was intended to provide compensation for service which had not theretofore existed. That this was the mutual understanding of the parties is borne out by a letter by the General Chairman under date of August 30, 1944, in which it was said:

> "We cannot longer recognize they should not be paid for this service or work any differently than if they were performing any other class of service upon instructions of the management."

This statement infers the existence of an understanding along the lines set out by the Carrier. If the parties up to that time administered the rule in accordance with such a mutual understanding of its meaning, as we believe they did, then the rule must be treated as having had such a construction from the beginning. This being so, it is a fundamental conception of the duties of this Board that its powers involve the interpretation and not the making of agreements, however beneficial they might be. We are obliged to say, therefore, that whatever interpretation may have been placed upon similar rules in other contracts, the parties here have fixed the meaning of Rule 13 by mutual interpretation and conduct as including employes attending court or appearing as witnesses at investigations. It necessarily follows that the contentions of the Organization cannot be sustained and a negative award is required.

FINDINGS: The Third Division of the Adjustment Board, after giving the parties to this dispute due notice of hearing thereon, and upon the whole record of all the evidence, finds and holds:

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 current Agreement was not violated.

AWARD

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST. H. A. Johnson,
Secretary.

Dated at Chicago, Illinois, this 29th day of January, 1946.