Award No. 3343

Docket No. TE-3349

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Fred W. Messmore, Referee.

PARTIES TO DISPUTE:

THE ORDER OF RAILROAD TELEGRAPHERS

THE DELAWARE, LACKAWANNA & WESTERN RAILROAD COMPANY

STATEMENT OF CLAIM: Claim of the General Committee of The Order of Railroad Telegraphers on The Delaware, Lackawanna & Western Railroad Company, that W. F. Helriegel, regularly assigned second trick towerman at Dover, New Jersey, who was required by the Carrier to spend four hours and forty-five minutes of his time outside of his regular assigned tour of duty to attend an investigation on November 11, 1944, in which he was not at fault, shall be paid under the provisions of Rule 5 of the Telegraphers' Agreement for the time spent by him in this service.

EMPLOYES' STATEMENT OF FACTS: An agreement by and between the parties, bearing effective dates of May 1, 1940 as to rules, and December 27, 1943 as to rates of pay, is in evidence; copies thereof are on file with the National Railroad Adjustment Board.

Mr. W. F. Helriegel on the dates involved was regularly assigned to the second trick tower position at Dover, N. J., assigned hours 3:00 p.m. to 11:00 p.m.

At, or about 5:30 p.m., November 10, 1944, Mr. Helriegel, while on duty at Dover Tower, was notified by telephone to be present, as a witness, outside of his assigned hours, at Hoboken, N. J., 10:15 a.m., November 11, 1944, account an investigation to determine the cause for failure of traffic circuits on Track No. 2 between Denville and Dover; such failure having occurred several days prior to November 11.

Mr. Helriegel complied with instructions, leaving home at 9:00 a.m., returning 1:45 p.m., which consumed four hours and forty-five minutes of his time. Claim was made for payment under the provisions of Rule 5 of the telegraphers' agreement on the first half of November payroll. Payment was declined by the Carrier.

It was held that Mr. Helriegel was in no way responsible for the traffic circuit failure.

POSITION OF EMPLOYES: The claim of Mr. Helriegel not having been allowed on the regular November payroll, the matter was placed in the hands of the Organization's Local Chairman for handling. Local Chairman, Mr. J. H. Morris, under date of December 27, 1944 directed the following letter to the Carrier's Superintendent, Mr. J. R. Thexton:

> "On November 10, 1944 about 5:30 P.M., Mr. W. F. Helreigel, second trick towerman at Dover, N. J., was instructed to be present in Hoboken at 10:15 A.M. on November 11th at an investigation in

Third: No time was lost or expense incurred.

Fourth: The claim contemplates a new rule entirely inconsistent with practices of long standing, not only so far as the Telegraphers' Organization is concerned but applying to other groups of employes having the same general rules.

OPINION OF BOARD: Claimant on November 8, 1944, was working in the capacity of a towerman at Dover, New Jersey, between the hours of 4:00 p.m. and 12 midnight. On account of a traffic circuit failure between Danville and Dover, New Jersey, investigations were held by the Superintendent in his office on November 11, 1944. The investigation was held at 10:15 a.m., which was outside of the Claimant's regular assigned tour of duty and his attendance as a witness was considered necessary.

The Employes rely on Rule 5 and Rule 13-(a) and (b) of the applicable Agreement.

"Rule 5—Call Rule: Employes notified or called to perform work not continuous with the regular work period will 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 will be allowed on the minute basis."

"Rule 13—Court Duty and Investigation:

(a) Employes temporarily engaged in business of the Company outside the line of their regular duties, at court or otherwise, will be paid their regular wages and necessary expenses while so engaged, court fees and mileage to be assigned to the Company.

(b) Employes required to attend investigations, will be paid for all time lost if not at fault."

The Employes' contention is that when the Claimant is off duty his time is his own and may be used as he sees fit. Should he be required to attend an investigation as a witness where he is not at fault he is entitled to be paid in accordance with Rule 5, as set out in the claim.

This is the third time this particular question has been presented from this property under the same Agreement and rules.

Award 2778 held that Rule 5 is the Call Rule; that it covers employes called to perform work, and does not cover a situation where an employe was attending an investigation during a period of time the employe was not working. With reference to Rule 13-(a) and (b) thereof, it was held that the rule was specific in its provisions for compensation to employes attending court or investigations. In the face of it, rules relied upon by Claimant can have no bearing on the issue. Citing Award 2132 wherein the Opinion in substance states, in part: The attendance of an employe at an investigation or at court constitutes the exceptional case and is not work performed outside his regular duties. The claim was denied.

In Award 2842, this Board held just the opposite to the holding in Award 2778. Award 2842, adopted and cited as controlling Award 2824, which holds with the Employes' contention, and made the same a part of Award 2842 by reference.

Our attention has been directed to fourteen Awards—134, 409, 487, 605, 773, 1032, 1816, 2132, 2508, 2512, 2778, 3089 and 3302—by the Carrier as constituting the majority rule, i.e., that attendance upon investigations, rules and examinations, does not constitute "work" in contemplation of the Basic Day, Overtime and Call Rules. While on the other hand, the Employes submitted Awards 588, 1545, 2032, 2223, 2640, 2824 and 2842 as sustaining their position in this case.

The conflict of authority is apparent and admitted to be so by the parties. The Carrier makes the assertion that the construction given to Rule 13 over a

period of 23 years, when the first claim was presented, and denied under Award 2778, was concurred in by the employes and established its meaning on the property. The Employes do not deny or affirm the assertion, but state if true, a gross miscarriage of justice has been perpetrated. It must be conceded that long continued acquiescence of the employes cannot operate to alter the Scope Rule of the Agreement but such acquiescence is clearly relevant to a determination of the intent of the parties as to the applicability of the Scope Rule to the situation here in dispute. Award 1145. The Employes admit they have proposed a revision of Rule 13 to read as follows:

> "Regularly assigned employes required to attend court, inquests, or act as witnesses in connection with their employment with the Company, or perform other company business will be furnished transportation plus legitimate "expenses and be paid actual time lost from their positions and on "Call" basis for time devoted outside of assigned hours or on days not working. All witness fees to accrue to the Company."

The reason for the proposed revision is obvious. Rule 5 of the present Agreement as now worded does not apply. See Award 2778. Rule 13 is the applicable rule and does not cover pay for employes attending investigations outside of regularly assigned tours of duty.

On the general principle involved we believe the language in Award 134 (decided in 1936) meets the situation with which we are confronted. If this were a controversy of first impression, it might properly and justly be decided that the petitioner's service was "work" within the meaning of the rule. The rule there considered was similar to Rule 5 in the instant case. In view of the fact, however, that the term, as it has been used in collective agreements in the railroad industry, has been construed to mean "work of the type to which an employe is regularly assigned * * * ", Rule 13-(b) does not apply to special services of the kind performed by the petitioner, even though they were performed at the request of the Carrier. This holding is the majority rule. The parties in the instant case could have specifically provided by rule for payment for time spent on such day, or in the alternative as the Employes have expressed, the subject matter in their proposed revision of Rule 13. In the absence of a rule which authorizes pay for time so spent, and there is no such rule on this property, we are not privileged to write into the contract between the parties or to interpret its effect, to that which is not contained therein. We are obliged to hold that this claim must be denied for the reasons stated in this Opinion.

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 and 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 there is no basis for an affirmative award.

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 November, 1946.