

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

John W. Yeager, Referee

PARTIES TO DISPUTE:

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

UNION PACIFIC RAILROAD COMPANY (WESTERN DISTRICTS)

STATEMENT OF CLAIM: Claim of the General Committee of the Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employees on the Union Pacific Railroad (Western Districts) that the Carrier violated the Clerk's Agreement:

1. When on December 27, 1945 it required Clerk H. S. Garner, Albina, Oregon, to report at 10 A.M. as a witness for the Company in connection with investigation because of V. W. Stachniewicz's violation of Rule "G", the evening of December 23, 1945, and failed and refused to properly compensate employe Garner though he was in no way involved or interested and this service was performed on his regular assigned rest day.

2. That Clerk Garner shall now be compensated for a three hour call at punitive rate of pay for services rendered as witness for the Carrier on December 27, 1945, which service was rendered on Clerk Garner's regular assigned day of rest.

EMPLOYEE'S STATEMENT OF FACTS: Clerk H. S. Garner was the regular assigned relief clerk, position known as Job No. 7, with Thursday regular assigned day of rest. On December 24, 1945 Assistant Superintendent notified Clerk Garner as follows:

"Please arrange to attend formal investigation to be held because of V. W. Stachniewicz's violation of Rule 'G' the evening of December 23, 1945. This investigation will be held in Assistant Superintendent's Office at Albina at 10 A.M., Thursday, December 27th."

Garner filed claim with the General Yardmaster on December 27, 1945, and under date of February 3, 1946, the General Yardmaster wrote Garner as follows:

"In reference to your claim for time account attending investigation on December 27, 1945, Superintendent has advised as follows: 'Garner did not lose any time as a result of attending this investigation, and he should be advised that claim for time is declined.'"

On February 16, 1946, the Division Chairman of this organization wrote the Division Superintendent, Exhibit "A", and pointed out that Garner was called on his regular assigned day of rest and should be compensated on the basis of Rule 39, Notified or Called.

The claim was declined as Clerk Garner was not notified or called to perform work, but was notified to appear at the investigation as a witness for the company.

Rule 49 of the working agreement reads:

"Attending Court. Employes taken away from their regularly assigned duties at the request of the management, to attend court or to appear as witnesses for the railroad, will be furnished transportation and will 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 will be assigned to the railroad."

Rule 49 and rules similar to Rule 39 on which the Brotherhood relies to sustain its position have been in effect on this property since January 1, 1920 and this is the first claim presented by the Brotherhood for payment in such cases under the provisions of the "Notified and Called" rule (Rule 39 of the current agreement). The carrier has no knowledge of any instances where overtime has been paid to an employe for appearing as a witness for the company at an investigation during the twenty-seven year period the rules herein cited have been in effect. There is attached, copy of Assistant General Chairman Eoff's letter of May 5, 1946 to Mr. L. A. Collins, Acting General Manager, marked Exhibit "A" and made a part hereof, from which the following is quoted:

"We had an identical case over at Spokane several years ago, and the employe was paid a call without any question."

The payment alleged to have been made to an employe at Spokane is supposed to have been made ten or eleven years ago. Assistant General Chairman Eoff was unable to furnish the name of the employe to whom it is alleged payment of a call was made, and search of the records and inquiry made of employes who handle claims failed to develop any case in which such payment has been made. There have been a number of investigations conducted in the past several years at which clerical employes were in attendance as witnesses for the company; however, no claims or payments were made, except on time lost basis with personal expenses at away from home station, in conformity with Rule 49 of the working agreement.

Following is also quoted from Assistant General Chairman Eoff's letter of May 5, 1946, Exhibit "A":

"Furthermore, I think if you will investigate, you will find that Labor Board decisions uphold our position in this."

There have been a number of awards rendered by your Honorable Board which, though not uniform, have fairly consistently held that attendance at an investigation is not "work" as that word is used in the rules.

It is the carrier's position that Clerk Howard S. Garner is not entitled to payment claimed in this case under any provision of the existing agreement and the claim should be denied.

(Exhibits not reproduced.)

OPINION OF BOARD: This is a claim by the Brotherhood on behalf of Clerk H. S. Garner for three hours' time at the rate of time and one-half for a call to attend an investigation on his regularly assigned day of rest. The investigation concerned a matter in which Garner was in nowise involved except as a witness.

The provisions of the Agreement the Organization contends was violated by failure to compensate this employe is a part of the Notified or Call Rule, or Rule 39, the pertinent part of which is as follows:

"(a) Except as provided in second paragraph of this rule, employes notified or called to perform work not continuous with,

before, or after the regular work period or on Sunday and specified holidays, shall be allowed a minimum of three hours for two hours work or less, and if held on duty in excess of two hours, time and one-half will be allowed on the minute basis.

(b) Employees who have completed their regular tour of duty and have been released, and required to return for further service, may, if the conditions justify, be compensated as if on continuous duty."

The Brotherhood contends that when Garner was required to attend the investigation he received a call within the meaning of this rule and was entitled to be compensated in accordance with its terms.

The Carrier contends that this rule and no other rule or provision of the Agreement requires that the Carrier shall compensate employees covered by the Agreement for time consumed on their rest days in attendance upon investigations on call of the Carrier, hence no compensation may be exacted therefor.

This question has been before this Division repeatedly on incidents and rules the same or similar to the ones being considered at this time and the opinions on interpretation and application have been divided. Some awards have held that such a situation as this presents a compensable claim and some the exact opposite. The arguments and reasoning pro and contra appear in the opinions and we think a repetition of them here would serve no useful purpose.

Emphasis is made, however, of one argument and avenue of reasoning which has been advanced in this and other dockets. It seems that such calls as this must be considered as involving work or service to the Carrier. 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. The point of this is that if such calls do not involve work or service to the Carrier there would be no reasonable basis for discipline for failure or refusal to respond to the call.

We conclude therefore that this clerk is entitled to be compensated in accordance with the demand of the claim.

FINDINGS: This 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 employees involved in this dispute are respectively carrier and employees 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 claim has been sustained.

AWARD

Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: H. A. Johnson
Secretary

Dated at Chicago, Illinois, this 26th day of May, 1948.