Award No. 3966
Docket No. CL-3947

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Fred L. Fox, Referee

PARTIES TO DISPUTE:

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

FLORIDA EAST COAST RAILWAY COMPANY (SCOTT M. LOFTIN AND JOHN W. MARTIN, TRUSTEES)

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood that the Carrier violated the Clerk's Agreement.

1. When it required Check Clerk C. E. Graham, Jr., Jacksonville Freight Agency to leave Jacksonville at 10:30 P. M. on March 29, 1947 and report to the Trainmaster's office at Miami at 10:00 A. M. Sunday, March 30, 1947, to attend investigation in which he was not involved or interested, and failed and refused to compensate him in accordance with provisions of overtime rules, and

2. That Check Clerk C. E. Graham, Jr., shall be compensated on a call basis for the time that he was away from his home and for services rendered at the investigation outside of his regular assigned hours on March 29 and 30, 1947.

EMPLOYES' STATEMENT OF FACTS: Mr. C. E. Graham, Jr., was regularly assigned as Check Clerk at Jacksonville Freight Agency working 8:00 A. M to 5:00 P. M. (one hour lunch period) daily EXCEPT SUNDAY AND SPECIFIED HOLIDAYS. On March 28, 1947, he received the following written instructions from the Agent at Jacksonville:

"Please arrange to report at Trainmaster's office at Miami, 10:00 A. M., Sunday, March 30, 1947, for formal investigation which is being conducted with Clerk H. A. Haywood of the Miami Freight Agency for the purpose of developing the facts and placing responsibility in connection with handling of shipment dynamite moving on Miami waybill 2817, March 4, 1947, in car TWD 8334.

"You will be furnished the necessary transportation and we have made arrangements for Pullman accomodations for you on train No. 35 leaving Jacksonville 10:30 P. M., tomorrow, March 29th."

Clerk C. E. Graham, Jr., filed claim for 22 hours 30 minutes overtime for attending investigation in which he was not involved. On April 9, 1947, the Agent at Jacksonville wrote him as follows:

"Returned hereto is your overtime ticket dated March 29 and 30th, 1947, claiming 22 hours and 30 minutes account being called to attend investigation held in Miami on March 30, 1947.

As previously stated, Clerk Graham was furnished Pullman sleeping accommodations from Jacksonville to Miami and for that portion of the time he would have, therefore, been entitled to no compensation whatever under the clear provisions of Rule 51 under any consideration.

Rule 51 makes no provision for compensating an employe while waiting as some rules do, but instead provides only that time required in traveling will be paid for at the pro rata rate. Under no consideration would Clerk Graham have, therefore, been entitled to compensation from the time of his arrival at Miami at 7:50 a. m. to the beginning of the investigation at 10:00 a. m. or from the end of the investigation at 11:10 a. m. until he left Miami at 1:15 p. m. Likewise, under the provisions of Rule 51 he would have under no consideration been entitled to the time and one-half rate for the return trip from Miami.

While it is difficult to understand how the Employes ever arrived at the conclusion that there is anything in Award 2223 which would justify their attempt to abrogate their duly negotiated word in Rule 52, it is even more difficult to understand how they could arrive at the conclusion that if compensation rules apply at all to those who attend investigations as witnesses for the Railway only once such compensation rule would apply to the exclusion of all others. Such a fantastic contention simply has no foundation anywhere and amounts to nothing more or less than an attempt to abrogate the entire Agreement and establish employment relations between the Railway and Clerks on no firmer foundation than fanciful ideas. Even in Award 2223 on which the Employes rely the employes involved only claimed time and one-half rate for attending the investigation outside of assigned hours and pay at the rate of the Travel Time Rule for time spent in traveling outside of assigned hours.

7. While the Superintendent was under no obligation to do so, since Clerk Graham lost no time from his assignment, he nevertheless took cognizance of circumstances in this particular case which he felt warranted special consideration for Clerk Graham and he, therefore, allowed him 1 hour and 10 minutes at the pro rata rate covering the time he was in attendance at the investigation and 7 hours and 20 minutes at the pro rata rate for the time spent on the return trip from Miami to Jacksonville as a matter of equity. The decision as to whether or not to bestow such gratuities not provided by agreement rests entirely with the Railway.

The Railway has shown that by the very clear understanding of the Railway and the Employes, as well as the Third Division, Rule 52, and Rule 52 only, is applicable to the instant case in which Clerk Graham lost no time from his assignment in attending an investigation as a witness for the Railway and that even under circumstances where this would not have been true the claim would still be contrary to the provisions of the Agreement.

The claim is entirely without merit and should be denied.

Exhibits not reproduced.

OPINION OF BOARD: The Claimant, C. E. Graham, was employed by the Carrier as a Check Clerk in its Jacksonville Freight Agency. His hours were from 8:00 a. m. to 5:00 p. m., with one hour for lunch, daily except Sunday and specified holidays. On March 28, 1947, he was requested to report at the Carrier's Trainmaster's office in Miami, Florida at 10:00 a. m., on Sunday, March 30, 1947, to attend an investigation for the purpose of developing facts and placing responsibility in connection with the handling of a shipment of dynamite in March, 1947. Claimant was not charged with any responsibility in connection with said shipment, and appeared on the request of the Carrier, and in its interest. He left Jacksonville at 10:30 p. m. on March 29, traveled to Miami, attended the investigation on March 30, and returned to Jacksonville at 8:35 p. m. of the same day. His attendance at the investigation consumed one hour and ten minutes, and the remainder of the time between leaving Jacksonville and his return, was consumed in travel and waiting. The claim is for 22 hours and 30 minutes overtime pay. The Carrier, while not admitting any part of the claim, allowed Claimant, as

what it calls a matter of equity, pro rata rate pay for one hour and ten minutes spent in the investigation, and 7 hours and 20 minutes spent in traveling from Miami to Jacksonville, allowing nothing for waiting time, or time spent in traveling from Jacksonville to Miami, because it is said that such latter travel time was spent in a Pullman berth furnished by the Carrier.

Claimant's case is based on Rule 46 of the Agreement, which reads:

"Employes notified or called to perform work not continuous with, before, or after the regular work period or on Sundays and specified holidays shall 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."

If attendance at investigations, at the request of the Carrier, and in its interest, be termed "work" within the meaning of Rule 46, then we would have no difficulty in applying that rule to the case before us. But on this question the awards of this Division are in conflict. Early in the history of this Board, in Award No. 134 of this Division, and in dealing with a rule not materially different from Rule 46 here dealt with, it was held:

"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 Rule 24 (b) of the agreement. In view of the fact, however, that the term, as it has been used in collective agreements on the railroad industry, has usually been construed to mean work of the type to which an employe is regularly assigned, the Third Division is of the opinion that Rule 24 (b) does not apply to special service of the kind performed by the petitioner, even though they were performed at the request of the Carrier."

The special service referred to in that award was attendant at an investigation at the request of the Carrier.

Award No. 134, aforesaid, has been followed in many awards of this Division, among which are Nos. 409, 726, 1816, 2132, 2508, 2512, 3230, 3302 and 3343.

But this construction of agreements has not been allowed to pass without protest, as is shown by many awards of this Division, among which are the following Nos. 558, 1545, 2032, 2223, 2824, 3478, 3722 and 3911, in which it was held, in effect, if not directly, that where an employe is called on his off day to testify in an investigation in which he is not involved he is performing work or service for which he is entitled to be paid. Thus it will be seen that the question remains unsettled.

In this conflict of decision, this Division is unwilling to apply to this case the awards which hold that an employe, called by the Carrier on his day off, to testify in its interest, in an investigation directed by it to be made, and in which the employe called is neither interested nor involved, is not entitled to be compensated for the time involved in thus upholding the Carrier's interest. In such a situation, we think the employe should be paid. We do not believe the agreement should be, or was ever intended to be, construed as requiring employes to render any character of service to the carrier without compensation. The contention made in the Carrier's submission that "if the investigation is held outside of his assigned hours and he would not have made overtime during those hours had he not been required to attend the investigation as a witness, he is not paid anything," entirely ignores the very important fact that the employe's time is being appropriated, possibly against his will, for he must respond to a call for his services on pains of being disciplined. It constitutes a species of involuntary servitude, which we do not believe was ever contemplated by the parties to the Agreement. We have not observed any disposition on the part of employes to donate to the Carrier any time or service, nor do we think they are called upon to do so. We are, therefore, of the opinion that the Claimant is entitled to be compensated for

the full 22 hours and 5 minutes consumed in traveling to and from Miami, and attending the investigation there held. The question arises under what rule of the Agreement he shall be paid, for it is recognized that this Division may not make awards on theories and principles not fairly within a reasonable construction of the Agreement.

The Carrier contends that Rule 52 of the Agreement covers the compensation to be paid employes for attendance in courts and investigations. The rule, headed "Attending Court," and "Witnesses," reads:

> "Employes taken away from their regular assigned duties, at the request of the management, to attend court or to appear as witnesses for the Railway, 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 Railway."

It will be observed that this rule covers the case where an employe is taken away from his "regular assigned duties," and the word "interruption" is used to describe what occurs. The rule is plain and, in our opinion, covers attendance on both courts and investigations, because there is no other rule in the Agreement which separately refers to attendance at investigations, though Rule 29 prescribes how they may be held. We would have no difficulty with the case were it one in which the employe had been interrupted in the performance of his "regular assigned duties." But does the rule cover the case before us where the employe had finished his "regular assigned duties," and after he had entered on his rest period, which included a part of Saturday, March 29, after the end of his work for that day, and all of the following day which was Sunday, was called up for a special duty, entirely out of the line of his "regular assigned duties." We think it does not, and having said that Claimant is entitled to be paid on the claim here presented, the question follows as to what rule justifies an award in favor of the Claimant.

Rule 46 of the Agreement has been quoted. It contains the expression "notified or called to perform work not continuous with, before or after the regular work period," and it is argued that the use of the word "work" and "regular work period" indicate that what was meant to be covered by the rule was work of the type of his regularly assigned duties. The contention should not be lightly cast aside, and it has had the support of numerous awards of this Division; but we are convinced that the sounder and better rule is that the Agreement should not be construed to require any character of service to the Carrier without pay, and that the word "work" as used in Rule 46, should be construed to mean any character of work or service which the Carrier has the right to require of its employes. The Carrier had the right to require the Claimant to go to Miami, a distance of several hundred miles, and in so doing deprived him of the free use of his day off. The Agreement should be interpreted to require payment therefor under Rule 46, and such will be our award.

In making this ruling we harmonize and make workable Rules 52 and 46. Rule 52 covers cases of attendance on courts and investigations, where the employe is not himself involved in the investigation, and where the work of his regularly assigned duties is interrupted; and Rule 46 covers cases of like nature where he is called on his day off.

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 the Carrier violated the Agreement as charged by the Petitioner.

AWARD

Claims (1 and 2) sustained in accordance with Opinion and Findings.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: H. A. Johnson
Secretary

Dated at Chicago, Illinois, this 30th day of June, 1948.