Award No. 3969
Docket No. CL-3950

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 Clerks' Agreement—

1. When on January 9, 1947, and on January 10, 1947, it required Caller W. J. Deasy to report at Trainmaster's office at New Smyrna Beach at 2 P. M. and 11 A. M. respectively as a witness for the carrier in investigations 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 Caller W. J. Deasy shall be compensated on a call basis for the services rendered at the investigations outside of his regular assigned hours on January 9 and 10, 1947.

EMPLOYES' STATEMENT OF FACTS: M. W. J. Deasy was regularly assigned as Caller at New Smyrna Beach from 3:59 P. M. to 11:59 P. M. On January 7, 1947 he was instructed by carrier's trainmaster to be present in the Trainmaster's office at 2:00 P. M. January 9 to attend an investigation called for the stated purpose of developing facts and placing responsibility for failure of Fireman Thornton Oliver to protect service for which he was called January 1, 1947. On January 7, 1947, Caller W. J. Teasy was also instructed to be present at investigation in the Trainmaster's office at 11:00 A. M. January 10, which was called for the stated purpose of developing facts and placing responsibility for Trainman W. E. Palmer's failure to protect service for which called on December 31, 1946.

Caller Deasy filed claim for two hours overtime on each of these dates for attending investigation in which he was not involved. On January 16, 1947 carrier's Superintendent wrote Caller Deasy as follows:

> "Your overtime slip dated January 9, 1947, claiming two hours overtime for attending an investigation as a witness for the Railway in Trainmaster's Office at New Smyrna Beach from 2:00 P. M. to 2:30 P. M. has been corrected to allow 30 minutes at pro rata rate.
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> "Your overtime slip dated January 10, 1947, claiming two hours overtime for attending an investigation as witness for the Railway in Trainmaster's office at New Smyrna Beach, 11:00 A. M. to 11:30 A. M. has been corrected to allow 30 minutes pro rata rate.
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> "Your claims for two hours overtime on each date, January 9 and 10, are not supported by any rule of Clerks' Agreement."

only give effect to the words 'or appears as witness for the Railway' by holding that it applies where the employe is required to attend investigations and hearings for the purpose of giving evidence even though it is not a court proceeding as that term is generally understood."

5. The Employes rely on Third Division Awards 588, 1545 and 2223 in support of their claim, but how they can possibly do so is not apparent. Those Awards dealt with Signalmen on other Railways, and in no one of them were there involved rules in which those railways and employes had provided the compensation for employes attending investigations as witnesses for the railway such as is present in the instant case. In those Awards, in the absence of such a rule, the Findings were, therefore, made on a determination of whether attendance at investigations as witnesses for the railway was work as contemplated in the Basic Day, Overtime and Call Rules. While in those three Awards made with the assistance of Referees the Third Division held that it was, they comprise a very small minority of the cases in which the Third Division has passed on that question, and in a vast majority of its awards the Third Division has held just the apposite, namely, Awards 134, 409, 1032, 1816, 2132, 2508 and 3230. Awards 588, 1545 and 2223 constitute nothing more, therefore, than three awards interspersed among a far greater number of awards which directly contradict them. Even if Rule 52 were not present in the instant case, reliance on the three minority awards would, therefore, be of little or no value.

The determination that attendance at investigations as witnesses for the Railway is not work as contemplated under rules covering work of the craft is not one peculiar to the Third Division. The First and Second Divisions have done so also. The Carrier involved in Third Division Award 3089 has made a comprehensive analysis of the First, Second and Third Division Awards in which this determination has been made, and, since, due to the presence of Rule 52 in the instant case, the question is not particularly pertinent, the Railway will not unduly lengthen its submission here, beyond referring the Third Division to the Position of the Carrier in Award 3089.

6. While the Superintendent was under no agreement obligation to do so, he took cognizance of the circumstances in this particular case which he felt warranted special consideration for Caller Deasy and he, therefore, allowed him 30 minutes at the pro rata rate for attending the investigation on each day January 9 and 10, 1947, as a matter of equity. The decision as to whether or not to bestow such gratuities not provided by agreement, of coruse, rests entirely with the Railway.

The claim is entirely without merit and should be denied.

(Exhibits not reproduced.)

OPINION OF BOARD: On January 7, 1947, the claimant, W. J. Deasy, was a caller at New Smyrna Beach, Florida, with assigned work hours from 3:59 to 11:59 A. M., with Saturday as his day off. On said date the carrier, through its Trainmaster, instructed Deasy to be present at his office on Thursday, January 9, 1947, at 2 P. M., for an investigation called for the purpose of developing facts and placing responsibility for the failure of a named fireman to protect a service for which he had been called. On the same date Deasy was instructed by the Trainmaster to be present at another like investigation, to be held at his office at 11 A. M., on Friday, January 10, 1947. It will be observed that in each instance he was called to appear at a time several hours beyond the end of his assigned hours of duty, and when his time was his own, subject only to the call of his employer. In neither of said investigations was the claimant interested or involved, his attendance being solely in the interest of the carrier. He attended both investigations, and has filed a claim for two hours work, at the overtime rate of pay, for each of the said investigations. The carrier denied payment of the claims as presented, but offered, as a matter of equity, to pay claimant for thirty minutes' time for each of the two investigations at the pro rata rate of pay.

We have this day made Award No. 3968, and a reading of that Award will disclose that the factual situation there involved is identical with that appearing in this case, other than names and varying hours of work. In that Award we sustained the claim there considered on the basis of Award No. 3966. In the latter award, which we now reaffirm, we dealt at some length with our reasons therefor, and it is unnecessary to repeat in this opinion what was there said. We are of the opinion that the present case is governed by the provisions of Rule 46 of the Clerks' Agreement, and that under that rule claimant is entitled to be paid for two hours' attendance on each of the two investigations mentioned in the docket, at the overtime rate.

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 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.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: H. A. Johnson
Secretary

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