

Award No. 4909
Docket No. TE-4944

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

Jay S. Parker, Referee

PARTIES TO DISPUTE:

THE ORDER OF RAILROAD TELEGRAPHERS

THE NEW YORK CENTRAL RAILROAD COMPANY (Line West)

STATEMENT OF CLAIM: Claim of the General Committee of The Order of Railroad Telegraphers on the New York Central Railroad Company, Line West of Buffalo,

- (1) That the Carrier violated the terms of the Telegraphers' Agreement when it required H. B. Holmes, Third Trick Train Director at "CT" Tower, Cleveland, Ohio, to attend an investigation at Cleveland, Ohio, commencing 8:30 A.M., on October 14, 1947, as a Carrier witness, and has failed and refused to compensate him in accordance with the rules of the Telegraphers' Agreement; and
- (2) That Train Director H. B. Holmes shall be compensated on a call basis for the time he was away from his home and for services rendered at the investigation outside of his regular assigned hours on October 14, 1947.

EMPLOYEES' STATEMENT OF FACTS: Mr. H. B. Holmes was assigned Third Trick Train Director at "CT" Tower, Cleveland Union Terminal, Ohio, on the morning of October 9, 1947. He was ordered by the Carrier to report at the Assembly Room of the Cleveland Union Terminal 8:30 A.M., October 14, 1947 to attend an investigation in connection with motor 202 running through puzzle switch 473, 5:25 A.M., October 9, 1947. Ordered to the investigation in addition to Holmes were the General Yard Master, the Signal Supervisor, an Engineer, a Helper-Fireman, a Leverman, and a Switch Tender.

Appended is Employees' Exhibit "A" which is a transcript of the investigation and by reference is made a part of this Statement of Facts. The transcript will prove that Holmes' attendance at the investigation was only as a witness for the carrier.

On October 13, 1947, the day prior to the investigation, Holmes worked second trick until 11 P.M., and had to get up at 6:45 A.M. on October 14 to be at investigation in time. Investigation adjourned at 10:45 A.M. and Holmes reached his home at noon and had to return to work at 1:45 P.M. in order to be on duty at 3 P.M. This gave him insufficient rest and interfered otherwise with his off duty hours. Holmes was not at fault in any way, was not charged nor disciplined and filed claim for a call of 3 hours' pay at rate of time and one-half for attending investigation during his off-duty hours. Claim was denied.

POSITION OF EMPLOYEES: There is in effect between the parties an agreement bearing effective date of July 1, 1946, copies of which are on file with the Board, and from which the following rules are cited:

4181. If it had been so intended, there would have been no reason for including Article XVIII in the current Agreement."

CONCLUSION

The carrier has shown that—

1. The Call Rule, Article 5, under which the claim is made, has not at any time been applicable to time attending investigations;
2. Article 19, the "Attending Court or Investigation" rule, the only Agreement rule which pertains to time attending investigations, provides for payment only when employee loses time from his regular assignment;
3. Claimant lost no time from assigned working hours and performed no work;
4. The Telegraphers' request to revise Article 19—included in Mediation which is still pending—so as to extend application of the Call and Overtime rules to time attending investigations is conclusive evidence that existing rules do not support the claim;
5. Awards of the National Railroad Adjustment Board support the carrier's position;
6. The claim is tantamount to a request for a new rule wholly incompatible with accepted practices in effect under the same or comparable rules for over 45 years;
7. The claim is not supported by Agreement rules, is without support on any reasonable premise and should be denied. (Exhibits not reproduced.)

OPINION OF BOARD: Claimant H. B. Holmes, regularly assigned 11 p.m. to 7 a.m. as Tower Director at the Cleveland Union Terminal, was required by the Carrier to attend an investigation in the Trainmaster's office in Cleveland from 8:30 a.m. to 10:30 a.m., Tuesday, October 14, 1947, to determine the facts and fix responsibility in connection with electric motor 202 running through puzzle switch 473 at the Cleveland Union Terminal at a time when he was on duty and in charge of the "CT Interlocking Tower."

Holmes lost no time from his regular assigned work while attending the investigation. His claim is based on the premise that in so doing he was performing work and/or service for the Carrier for which he was entitled to compensation under the rules of the Telegraphers' Agreement.

The particular portion of the current contract relied on as requiring the sustaining of his claim is Rule 5, pertaining to Calls. The Carrier insists that Rule 19, relating to attendance at court or investigation, precludes its allowance.

Article 5 reads:

"Employees notified or called to perform work not continuous with the regular work period will be allowed a minimum of two hours' pay at time and one-half for two hours' work or less and time and one-half thereafter on the minute basis."

Article 19 provides:

"Employees taken away from their regular assigned duties, at the request of the Management, to attend court or to appear as witnesses for the carrier, or where an agent is subpoenaed by the court to produce railroad records in a case where the carrier is involved, will be furnished transportation and will be allowed compensation equal to what would have been earned had such interrup-

tion not taken place, and, in addition, necessary actual expenses while away from their headquarters. Any fee or mileage accruing will be assigned to the carrier."

We frankly concede that prior to November 1946 our decisions respecting the right of an employe to recover compensation under contractual provisions similar to those here involved for attending investigations outside the hours of his regular assignment or on his rest days when required by the Carrier were so conflicting they could not be harmonized. However, it can now be said without fear of contradiction that that is no longer the situation. That this is true has already been established by antedating decisions.

In Award No. 4569, we said:

"In the past there has been some conflict in our awards upon claims for pay for attendance at investigations as witnesses upon request of the Carrier outside the regularly assigned hours of work of the claimant. However the last award denying such a claim under rules similar to those herein was Award No. 3343 in November 1946. Since that award we have consistently held otherwise in Awards Nos. 3462, 3478, 3722, 3911, 3912, 3966 and 3968."

It can also be stated that since September 29, 1949, the effective date of the foregoing Award, our decisions have been equally consistent. See Awards Nos. 4570 and 4573.

See, also, Award No. 4790, where, even though the facts are dissimilar and the claim therein involved was sustained for other reasons, we recognized the force and effect of our more recent Awards when we said:

"This Board has had occasion to consider many claims (some interpreting specific rules on the subject and others applying general rules to the given state of facts) in connection with attendance of employes at investigations and rules examination outside the hours of their regular assignments or on rest days. The holdings of such Awards, as has been previously pointed out in other Opinions of this Board, are not in harmony. The later Awards have sustained claims of such nature in cases where the Claimant had no 'mutuality of interest.'"

Careful analysis of the heretofore mentioned decisions clearly reveals that this Division of the Board is now definitely committed to the proposition that collective agreements containing rules such as are here involved are to be construed as authorizing and requiring payment of compensation under the Call Rule to employes who are required by the Carrier to attend investigations outside the hours of their regular assignment or on their rest days so long as there is no mutuality of interest between the Carrier and the employe called in the result of the investigation. This on the theory that in such a situation the employe is engaged in the performance of work in the Carrier's behalf. The test whether mutuality of interest exists, as we understand and construe such decisions, depends on whether the employe whose attendance is required has a direct personal concern in the matter being investigated or is called merely as a witness in furtherance of the Carrier's interests.

No useful purpose would be served by laboring the contentions advanced by the Carrier in support of its position that Rule 19 precludes allowance of compensation for attendance at investigations outside assigned work hours or on rest days regardless of mutuality of interest. They have all been answered in the above Awards. For the same reason we do not propose to again repeat the reasons for the Board's present position on the point in question or our own conclusion with respect thereto in the instant case. It suffices to say that for the reasons therein set forth and because we are convinced that whenever possible it is the Board's duty to insure uniformity of interpretation of the rules governing relationship between Carriers and

Organizations of employes and to their respective interests that we do so, we adhere to such Awards and the rule therein announced. It follows the Carrier's position as to the force and effect to be given Rule 19 of the instant Agreement cannot be upheld.

From what has been stated, it is apparent the conclusion just announced does not mean that all Carrier required attendance at investigations outside employes' regular tours of duty or on their rest days is compensable under the provisions of Rule 5. Whether there is "mutuality of interest" as that phrase is used in our Awards must be determined from the facts disclosed by the record of the particular case involved. We therefore turn to that question.

In the confronting case there can be no question but what the Carrier's motor ran through a puzzle switch, under the control of the "CT" Tower manned by a Tower Director and Leverman, under conditions indicating someone was guilty of some dereliction at a time when claimant was on duty in his assigned capacity of Tower Director. The claimant occupied a position where the question whether he had properly performed his duties was at least open to question and the Carrier had a right to inquire as to whether his dereliction or that of some other of the few employes involved was the proximate or concurring cause of the incident. The record discloses nothing indicating that prior to holding the investigation the Carrier had any advance information as to the outcome or could have ascertained it by any other action. Under such conditions and circumstances we do not believe it can be said the Carrier's action in requiring claimant to attend the investigation was arbitrary or held that when he did attend he was not mutually interested therein. This conclusion requires a denial of the claim.

FINDINGS: The Third Division of the Adjustment Board, upon the whole record and all the evidence, finds and holds:

That both parties to this dispute waived oral hearing thereon;

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 under the existing facts and circumstances the claimant was mutually interested in the investigation he was required to attend outside his regular tour of duty and, therefore, is not entitled to an affirmative Award under the Call Rule of the current Agreement.

AWARD

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: A. I. Tummon
Acting Secretary

Dated at Chicago, Illinois, this 20th day of July 1950