# Award No. 6679

# Docket No. TD-6658

## NATIONAL RAILROAD ADJUSTMENT BOARD

## THIRD DIVISION

**Norris C. Bakke, Referee**

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## PARTIES TO DISPUTE:

## AMERICAN TRAIN DISPATCHERS ASSOCIATION

## THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY (Eastern Lines)

**STATEMENT OF CLAIM:** Claim of the American Train Dispatchers Association that:

(a) The Atchison, Topeka and Santa Fe Railway Company, hereinafter referred to as "the Carrier," violated the current Agreement between the parties to this dispute, particularly Article III, Section 2 and Section 5, when it failed and refused and continues to fail and refuse to compensate Train Dispatcher J. C. Collins of its Clovis, New Mexico train dispatching office at the rate of time and one-half for overtime service performed by him at the orders and for the benefit of the Carrier on June 27, 1952.

(b) The Carrier shall now pay to Train Dispatcher J. C. Collins at the overtime rate, trick train dispatcher rate, for service performed by him between 12:30 A. M. and 7:45 A. M. which was before his regular assigned hours of 7:45 A. M. to 3:45 P. M., and for service from 3:45 P. M. to 4:15 P. M., which was after those regular assigned hours on June 27, 1952, as required by Article III, Sections 2 and 5 of the Agreement.

**EMPLOYES' STATEMENT OF FACTS:** There is an Agreement between the parties, bearing the effective date September 1, 1949. A copy thereof is on file with your Honorable Board, and by this reference is made a part of this submission the same as though fully set out herein.

For ready reference and convenience of the Board, Article III, Section 1, Basic Day, Section 2, Overtime and Section 5, Transfer Time, are quoted in their entirety:

**"ARTICLE III—HOURS OF SERVICE, OVERTIME AND CALLS**

"BASIC DAY—Section 1. Eight (8) consecutive hours shall constitute a day's work.

Collins was allowed a minimum day of 8 hours at his regular dispatcher's rate for the time he lost from his regular assignment, in pursuance of the terms of Article VII, Section 10 of the Dispatchers' Agreement; and, (2) the overtime rules could not possibly be involved in the instant dispute, for the reason that the Employes **are only contending that Mr. Collins is entitled** to the payment of the 7 hours and 45 minutes he spent in traveling to and from Belen, New Mexico at **pro rata rates, not overtime rates.**

Moreover, the matter of compensating Mr. Collins for attending the investigation at Belen as a witness for and at the request of the Company on June 27, 1952 is subject to Article VII, Section 10 of the Dispatchers' Agreement, which is, as stated before, **a special rule dealing with the attendance of dispatchers at investigations.** The Third Division has consistently recognized and held that special rules, such as Article VII, Section 10, take precedence and prevail over general rules, such as basic day and overtime rules, leaving the latter to operate in a field not covered by the former. See Third Division Awards 4496, 5636 and others.

The burden of proof of an agreement violation in the instant dispute is upon the employes and their representatives, who must show that Article VII, Section 10, requires the payment of the 7 hours and 45 minutes time the claimant, Mr. Collins, spent in traveling to and from Belen, New Mexico on June 27, 1952. The Employes cannot make such a showing and a sustaining award in the instant dispute would have the effect of amending or revising the Agreement rules, by writing a travel time rule into the Agreement, which the Employes had requested but were unable to obtain in the negotiations leading up to the adoption of the Dispatchers' Agreement, effective September 1, 1949.

In conclusion, the Carrier respectfully asserts that the instant claim is entirely without support under the Agreement rules and should, for the reasons expressed herein, be denied in its entirety.

All that is contained herein is either known or available to the Employes and their representatives.

(Exhibits not reproduced.)

**OPINION OF BOARD:** This claim must be sustained. There is nothing that needs to be added to what we said in Award 4569.

During the presentation the Carrier laid stress on the fact that the employe was not used on his rest day, and argued that this case should be distinguished and denied for that reason. However, that issue was raised and answered in Award 2223 wherein we said "We think the time has come when we should say that where the employe is not himself involved in a matter being investigated, and he is called by the Carrier, in its own interest, to attend an investigation, he should be paid, whether we call what he does 'work' or 'services,' and whether **he is called on his rest day or otherwise** is **not** controlling. * * * (Emphasis supplied.)

**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 its Agreement in denying the claim.

AWARD

Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: (Sgd.) A. Ivan Tummon
Secretary

Dated at Chicago, Illinois, this 18th day of June, 1954.

## DISSENT TO AWARD 6679, DOCKET NO. TD-6658

We have two lines of awards, one holding correctly that where there is no rule specifically providing for the allowance of any form of compensation for attending investigations, this Board is without authority to order the payment of any compensation; the other holding erroneously that even though there is no such rule, the use of an employe's time places a "duty" upon the employer to pay for that time in serving "the justice of the Employes' position."

Of the two, the second or one-eyed justice theory seems to have found favor with those who wish to disregard the fact that this Board is confined to the function of rule interpretation.

The referee here relies primarily upon Award 2223. That award leads into the second theory. But it commented upon an earlier one holding in line with the first theory, saying that there "the holding was that the Agreement did not provide for pay for special service such as this, and that the matter was one for negotiation." That was, of course, proper, sound, and functionally appropriate for this Board. But the referee in Award 2223, with whom the one in the instant case clearly agrees, went on to say "It will be noted that there was no holding that he was not entitled to pay for services performed." This is where philosophy deranges interpretation for if this Board should be of the opinion that an employe is "entitled to pay" for attending an investigation, it still cannot effectively order any payment unless it is provided for by rule.

This award reiterates the naked proposition in 2223 that "We think the time has come when we should say that where the employe . . . is called by the Carrier in its own interest to attend an investigation, he should be paid . . ." On the contrary, though, we think the time has certainly come when this Board should cease rambling around in the realm of negotiation, creating "duty" without the parenthood of contract. We have no right to formulate a rule. Whether an employe "should be paid" is peculiar to the field of negotiation.

In the instant case there is a rule clearly providing that "Train dispatchers acting as witnesses in investigations for and at the request of the Company will suffer no deduction in pay for actual time lost from regular assignments by reason thereof." The claimant dispatcher was absent from his regular assignment for one day. He was paid one day's pay by the Carrier in fulfillment of its indemnity to him under the rule and no referee or Board can lawfully order the payment of one cent more. If there is an equitable basis for compensation for travel time in connection with attendance at investigations, that should be permitted to ripen into a rule between the parties before it can be entertained by this tribunal.

Finally, it is a matter of record in this case that the Employes sought to negotiate just such a rule so that travel time would be paid in these circum-

stances. Referees Leverett Edwards and Robert O. Boyd in their respective First Division Awards 11878 and 13076 both held as have many others that the attempt to negotiate a rule not only evidences the absence of such a provision but recognizes the negotiable character of the subject and is persuasive of the conclusion that the petitioner is seeking to secure in the wrong forum here what he did not get in dealing across the conference table.

Like the within Opinion, that in Award 4569 mentioned here was more of an expedient than a decision.

We dissent.

/s/ E. T. Horsley

/s/ R. M. Butler

/s/ W. H. Castle

/s/ C. P. Dugan

/s/ J. E. Kemp