Award No. 11585
Docket No. CL-10974

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

(Supplemental)

Martin I. Rose, Referee

PARTIES TO DISPUTE:

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

TENNESSEE CENTRAL RAILWAY COMPANY

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employes that the Carrier violated the Agreement:

(1) When on June 17, 1957, it required Crew-Caller T. L. Harris to appear as a witness for the Company in the investigation afforded Mr. J. G. Roland, for failure to be available for call for service, on the night of June 4, 1957.

(2) That Crew-Caller T. L. Harris be compensated for two hours at the overtime rate for service performed outside of his regular daily assignment, as witness for the Carrier on June 17, 1957.

EMPLOYES' STATEMENT OF FACTS: Crew Caller T. L. Harris was notified by letter of June 10th, 1957, to attend the investigation afforded Mr. J. G. Roland, to be held in the office of the General Superintendent-Chief Engineer of the Tennessee Central Railway Company (Exhibit 1).

Subsequently the meeting was postponed by letter of June 13 (Exhibit No. 2), and the investigation was held on June 17, 1957, an assigned rest day of claimant, Mr. T. L. Harris. Mr. Harris was in no way interested or involved in the investigation, except as a called witness for the Carrier. On June 19, 1957, Mr. Harris made claim to his immediate superior, Mr. Brooks Bearden, Master Mechanic, for a 2 hour call at the overtime rate (Exhibit No. 3). The claim was declined by letter of June 21, 1957, Exhibit No. 4. The claim was further progressed by the General Chairman, with the Master Mechanic, Mr. Brooks Bearden, on August 7, 1957 (Exhibit No. 5). A conference was granted on August 9, 1957 (Exhibit No. 6) and the claim was again declined by Mr. Bearden on August 14, 1957, Exhibit No. 7. Notice of appeal was given, and the claim was appealed by letter of August 19, 1957 (Exhibit No. 8), to Mr. W. E. Manning, General Superintendent-Chief Engineer. The claim was further declined by letter of September 19, 1957 (Exhibit No. 9). This letter was not received by the General Chairman, or was lost or misplaced and could not be located. On November 14, 1957, a

ment, their proposal for an Attending Court — Witnesses Rule, in place of present Rule 11, was in the following language:

"Rule 59 — Attending Court — Witnesses.

(a) Employes taken away from their regular assigned duties at the request of management to attend court or to appear as witnesses for the carrier 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.

(b) Employes attending court or acting as witnesses at home point or headquarters outside of their assigned hours will be paid for the time devoted to such attendance at the rate of time and one half, with a minimum of three hours pay for two hours or less.

(c) Furloughed employes will be allowed a day's pay for each day used as witnesses with a minimum of one day, based on the minimum rate for employes in the class and seniority district from which furloughed, and in addition necessary actual expenses while away from headquarters.

(d) In the event an employe is held away from home station on rest days or holidays, he will be allowed a minimum of one day's pay at pro rata rate for each day so held.

(e) Any fee or mileage accruing will be assigned to the railroad."

Needless to say, Rule No. 11 has undergone no change, and the attempt of Employes to change the rule by the addition of their proposed paragraph (b) in order to meet the identical situation presented in this claim makes it unmistakably clear that they have recognized the absence of such a provision in the agreement and that the subject is one for negotiation. Your Board, of course, is without authority to write a rule for the parties.

Carrier respectfully submits that it has shown that the Notified or Called Rule has no application in the circumstances of this case, and that in the light of special Rule No. 11 having to do with the particular subject of the appearance of an employe in court or at an investigation or hearing as a witness for the Company, the claim in this case must be declined.

All data submitted herein has been presented in substance to the duly authorized representatives of the Employes and is made a part of the particular question in dispute.

The Carrier is making this submission without having been furnished copy of Employes' petition and respectfully requests the privilege of filing a brief answering in detail the ex parte submission on any matters not already answered herein, and to answer any further or other matters advanced by the Petitioner in relation to such issues.

(Exhibits not reproduced.)

OPINION OF BOARD: During his regular assignment on June 5, 1957, Claimant, a Crew-Caller, made a written report to the General Yardmaster

concerning his calls to Switchman Roland on June 4, 1957, for 12:00 Midnight yard job and on June 5, 1957 for 8:00 A. M. Belt job. On June 10, 1957, Carrier notified Claimant to "arrange to attend" at 10:00 A. M. on June 14, 1957, a "formal investigation under the rules in connection with charge" against Switchman Roland "of failure to be available for call for service as helper on midnight train yard job the night of June 4, 1957, and failure to report for duty as helper on 8:00 A. M. belt job June 5, 1957, after having accepted call for same." Pursuant to advance notice, the investigation was postponed to June 17, 1957 and Claimant attended on that date which was one of his assigned rest days. At the investigation, Claimant testified to the correctness of his report of June 5, 1957.

The Employes contend that Claimant was entitled to "be compensated at the overtime rate for service performed outside of his regular daily assignment, as witness for the Carrier on June 17, 1957," and rely on Rule 3½ (e) of the applicable agreement which reads as follows:

"Notified or Called.

> An employe notified or called to perform service not continuous with, or outside of, his regular daily assignment, shall be paid for the time held, at the time and one-half rate, with a minimum of two hours, except that employes who have completed their regular tour of duty and have been released, required to return for further service, may be compensated for the time worked as if on continuous duty."

Carrier asserts that no rule of the agreement requires payment to employes for attending investigations on their assigned rest days, and that its position is substantiated by Rule 11 which states:

"Attending Court.

> "Employes taken away from their regularly assigned duties, at the request of Management, to attend court or to appear as witnesses for the Railway Company will be furnished transportation and will be allowed compensation on the basis of straight time for each working day they are held from their work on this account, and in addition necessary actual expenses while away from headquarters. Any fee or mileage accruing will be assigned to the Railway Company."

The awards of this Board on the subject matter posed by this claim are in conflict. However, the confronting facts in this case make it unnecessary to discuss these awards or choose between the two lines of decisions.

Carrier asserts that the "foundation for the investigation was the written report of" Claimant "and the consequent necessity of his having to testify to the correctness thereof." However, the letter notice of investigation to Switchman Roland and the attendance thereat by Claimant concerned "a formal investigation under the rules in connection with charge" against Roland. No charge had been made against Claimant because of his written report and he was under no obligation to defend it in an investigation. By having Claimant testify to the correctness of his report at its formal investigation under the rules of the charge against Roland, Carrier required Claimant, in effect, to reiterate or render again on his assigned rest day his report of June 5, 1957 to the General Yardmaster. We hold that on these facts Claimant performed service and is entitled to compensation under Rule 3½ (e).

Rule 11 does not support Carrier's position for by its terms and title it is applicable to "Attending Court."

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 Agreement was violated.

AWARD

Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 10th day of July 1963.