Award No. 2223

Docket No. SG-2176

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Fred L. Fox, Referee

PARTIES TO DISPUTE:

BROTHERHOOD OF RAILROAD SIGNALMEN OF AMERICA

ATCHISON, TOPEKA & SANTA FE RAILWAY SYSTEM

STATEMENT OF CLAIM: Claim of L. A. Harms, signal maintainer, Gallup, New Mexico, for three hours at rate and one-half and ten hours at one-half rate, a total compensation of $9.03, for service performed on December 26 and 27, 1941.

EMPLOYES' STATEMENT OF FACTS: Mr. L. A. Harms, signal maintainer with headquarters at Gallup, New Mexico, was instructed by the signal supervisor, under date of December 25, 1941, to attend an investigation to be held at Winslow, Arizona commencing at 9:00 A. M., December 26, 1941. Mr. Harms was a witness to an accident that occurred at Gallup on December 21, 1941. He was not personally involved in the accident.

In order to comply with instructions, Mr. Harms left Gallup at 5:00 A. M., December 26, traveled to Winslow where he attended the investigation which continued until 9:00 P. M., and then returned to Gallup, arriving at Gallup, his headquarters, at 4:00 A. M. December 27, 1941.

Mr. Harms made claim for one-half rate for time between 5:00 A. M. and 8:00 A. M., December 26; straight time rate from 8:00 A. M. until 5:00 P. M.; rate and one-half from 6:00 P. M. to 9:00 P. M.; one-half rate from 9:00 P. M., the same date, until 4:00 A. M., December 27, 1941.

The carrier declined to compensate Harms for any of this service; however, it did reimburse him for personal expenses and after a period of four months had elapsed, it allowed him eight hours' pay at signal maintainer's rate for the regular hours of his assignment on December 26, 1941, namely, from 8:00 A. M. to 5:00 P. M.

There is an agreement dated June 1, 1939 between the parties to this dispute.

POSITION OF EMPLOYES: The Brotherhood contends that in addition to compensation allowed by the carrier, Harms must be paid for three hours at rate and one-half for service performed attending the investigation between the hours of 6:00 P. M. and 9:00 P. M. on December 26, 1941 and for ten hours at one-half rate for time spent traveling or waiting for trains from 5:00 A. M. to 8:00 A. M., and from 9:00 P. M., the same date, until 4:00 A. M., December 27, 1941. This contention is based on the provisions of the current agreement with particular emphasis on Sections 1, 16, 17 and 24 of Article II, which are quoted here for the convenience of this Division:

POSITION OF CARRIER: The Carrier has shown that of the rules cited in support of the claim, viz., Article II, Sections 7, 16, 17, 24 and 25, that Sections 7, 16, 17 and 24 are inappropriate and, therefore, inapplicable. Thus there remains only Section 25, with the requirements of which the Carrier has complied. Mr. Harms lost eight (8) hours from his regular assignment on December 26, 1941, for which he was admittedly reimbursed.

The claim for other than payment already made is not supported by the rules of the Agreement, and on that account alone must be denied by the Board.

OPINION OF BOARD: On December 21, 1941, a head-end collision occurred between two trains, inside the yard limits of the Carrier, at Gallup, N. M. The petitioner, a signal maintainer, was in charge of the signal system of the yards at the time of the accident. An investigation of the cause of the accident was held at Winslow, Arizona, on December 26, 1941, a regular work day for the petitioner, and he was instructed and required to attend such investigation, which was conducted by officers of the Carrier and attended by two Agents of the Interstate Commerce Commission, and who participated therein. In order for the petitioner to be present at the beginning of the investigation, he left Gallup at 5:00 A. M., on December 26, 1941, three hours before his regular work shift began. Just when he was finally released from attendance at the investigation is not clear. The Carrier says 7:00 P. M., while petitioner says 9:00 P. M. This dispute can only relate, at the most, to two hours overtime. Petitioner was required to await transportation at Winslow until 2:00 A. M. on December 27th, and arrived at Gallup two hours later. His claim is for ten hours time, at one-half pay, from 5:00 A. M. to 8:00 A. M., Dec. 26th, and from 9:00 P. M. of the same day to 4:00 A. M. of the day following; also, for three hours time, at time and one-half, from 6:00 to 9:00 P. M. of December 26th, which he contends was an extension of his regular work day. Some four months after the investigation, and after the original claim was filed, petitioner was paid for his regular day's work, and had been promptly reimbursed for his expenses.

As we understand the position of the Carrier, it denies any obligation to make the further payment on three grounds in particular: One, that the investigation conducted at Winslow was one in which the petitioner and the Carrier had a mutual interest; two, that the services performed by the petitioner in attending the investigation, traveling and waiting for transportation, was not "work" within the meaning of any rule of the Agreement, requiring payment for work done at points other than the employe's regular station; and three, that appearing at an investigation, at the request of the employer, is analogous to appearing before a court or at an inquest, provided for under Sec. 25 of Article II of the Agreement, and that payment in accordance with said section has been made. All these contentions, except that of the payment last mentioned, are vigorously denied by the petitioner.

We cannot agree with the first contention. The record shows that the yard signal system at Gallup was thoroughly tested on December 20th, by petitioner and his immediate superior, Assistant Signal Supervisor Jones, the day before the accident, and found functioning properly. Immediately after clearing up the wreck, and on December 21st, the system was again tested by Signal Supervisor Disney and his assistant, Jones, petitioner being present, and it was again found to be functioning properly. Nothing being shown as to any repair of the system after the accident, we may reasonably assume that the system was working at the time of the collision, and this, beyond reasonable doubt, served to relieve petitioner of any charge of being at fault in the matter. The Carrier must have known, from its own investigation, that the petitioner was blameless; yet someone was at fault and on the Carrier rested the burden of locating the fault. The Interstate Commerce Commission was interested and, of course, the Carrier was especially interested, not only for itself, but for the public as well. Hence the investigation. The Carrier could have shown the condition of the signal system by Assistant Signal Supervisor Jones, who made tests before and after the accident, and by Disney, his su-

perior, who assisted in the test after the accident. Petitioner was only needed to corroborate these officials, and presumably that is the reason he was called. The investigation developed no fault on his part. We think he appeared at the investigation at the direction of the Carrier, and solely in its interest.

The second contention of the Carrier gives us more trouble, and this arises from the conflicting Awards made on the subject by this Board. It is undoubtedly true that this and other Boards have often held that special services, such as attending investigations, was not "work" within the meaning of Agreements similar to the one being here considered. Award No. 55, Second Division, was based on a case where an employe was claiming pay for attending an investigation, and 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. It will be noted that there was no holding that he was not entitled to pay for services performed. In Award 409 by this Board it was held in a similar case that "Attending an investigation at the request of or under instructions of the railway company is comparable in the present instance to 'attending court under instructions from the railway company.'" In Awards Nos. 487 and 773 pay was denied where employes were required to spend time in the examination of rules, it being contended that familiarity with rules was of equal importance to the employer and employe. In Award 1032, pay was denied, but the claimant himself was being investigated. Award 1427 was a case of a medical examination. Award 1816 was a case of court attendance, and the relevant rule was applied, which gave him pay for regular time but no overtime. Award No. 2132, decided in April, 1943, was an investigation case. The claim was denied and in the Opinion of Board it is stated:

> "The awards are not in harmony on this particular problem. It seems to us, however, that it is not advisable, even to reach a result which might appear equitable, to attempt to read into a rule something which is not there. The weight of authority, as well as sound reason, supports this principle. The attendance of an employe at an investigation or at court constitutes the exceptional case and is work performed outside his regular duties. What the employe did in this instance was not 'work' as that word is used in Rule 6. Awards 134, 409, 605, 773, 1816."

It will be noted that it is held that "The attendance of an employe at an investigation or at court constitutes the exceptional case and is work performed outside his regular duties," but that "What the employe did in this instance" (attending an investigation) "was not 'work' as that word is used in Rule 6," which rule concerned Sunday and holiday work.

But as early as 1936, this Board began to have it doubts about the matter. In Award 134, in denying a claim for attending an investigation, it said:

> "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."

and then goes on to say, in effect, that inasmuch as the term "work" had usually been construed to mean work of the type to which an employe is regularly assigned, this principle should be adhered to. To the same effect is Award No. 605, decided in 1938.

Petitioner relies on Awards Nos. 588, 1545 and 2032. In Award No. 588 the claimant was required on Sunday, his day off, to attend an investigation of an accident in which he was not personally involved. He asked for pay "for eight hours at rate of time and one-half time for travel and waiting time a total of fifteen and one-half hours." His claim was allowed to the extent of 14½ hours. This allowance was based, in part, on the fact that employe was called on a Sunday, which was his time off, and on other considerations not necessary to state. The important part of the Award was what the Board then said on one of the vital questions presented in the dispute before us, and that statement is:

"There is a sharp conflict in decisions concerning payment of employes for time consumed in attending investigations, the majority holding in substance that it is not 'work' in the sense used in the rules so as to bring into play the Call rule or other rules governing work. There may be some warrant for this view in cases such as where an employe is required to attend an investigation involving fault of his own or where he may be called upon for rules or physical examination, in which matter he has a mutual interest with the carrier. In the instant case, however, the employe was in no way involved and was merely a witness."

Award No. 1545 is a case where an employe, Houser, was called on Sunday, his day off, to attend an investigation of a derailment in which he was not personally involved. Another person, Dunn, who attended the same investigation, was paid for reasons satisfactory to the Carrier. The Board in allowing the claim said:

"So here, the employe was ordered to attend on his day off Call duty—his Sunday—and concerning a matter with which he had no connection. The reason assigned for paying Dunn and declining to pay Houser is not convincing."

We now come to Award No. 2032, decided in October, 1942, most strongly relied on by the Petitioner. In that case the claimant asked for pay at time and one-half rate, for two hours service performed after his regular assigned working hours, in attending an investigation of a derailment in which he was not involved. The relevant rule was:

"Employes released from duty and notified or called to perform service outside of and not continuous with regular working hours, will be paid a minimum of three straight time hours for two hours work or less."

The claim was sustained. From the Opinion of Board it appears that many of the arguments advanced by the Carrier in that case are being re-presented in the present dispute. For example, it is stated:

"On oral argument of this matter before the Referee and the full Board an effort was made to distinguish between 'service' and 'work'; that it has been the practice of this Carrier not to pay for time spent attending investigations unless such attendance required absence from a regularly assigned tour of duty, in which case the employe would be made whole. They point to the fact that in this case the employe had received his full day's work and full day's pay; that he lost nothing by attending the investigation and that he should not be paid for this time."

The Board disposed of these contentions and the case in the language following:

"The effort to distinguish 'work' and 'service' are entirely vain. The fact is that the Carrier took two hours of Mr. Hughes' time for its own use and benefit and in the furtherance of its own business. Whether he worked or only stood and waited he is entitled to be paid for this time. Neither refinements of reasoning or quibbling by words can alter the plain facts of the case nor impair the justice of the Employes' position. The time consumed with his time, subject to directions from his employer to use it otherwise, and upon receiving such directions it was his duty to attend to his employer's business. It then became the duty of the employer to pay for that time at the agreed rate. This conclusion is sustained by Awards Nos. 588 and 1545 and the question should no longer be subject to dispute or argument."

The question of whether special service, such as attending an investigation, at the request or direction of the Carrier, is "work" within the meaning of the rules of the Agreement, or whether that term means work of the nature of that done in the employe's regular assignment, is unsettled, the weight of the authority, in terms of number of Awards, being in favor of the proposi-

tion that such special service is not "work," although Award No. 2032 is to the contrary, and other awards show the reluctance of the Board to maintain what may be termed the majority rule. But in cases where an employe is not personally involved in the matter being investigated, and especially in cases where he is called on his day of rest, we think the more recent awards require payment to be made.

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. Whatever it is, the employe's time is taken, at the request or under the direction of the Carrier, and in its interest. In the instant case, the employe was on continuous duty from 5:00 A. M. of one day until 4:00 A. M. of the day following, twenty-three hours, and deprived of an opportunity to get the rest which the Agreement must contemplate he was entitled to. We do no think the Agreement should be interpreted to mean that such services should be rendered without pay. We choose to follow Award No. 2032, and say that what he did was "work" within the true intent and meaning of the Agreement, rather than the Awards which hold to the contrary. If the Board was wrong in its earlier or even recent Awards, it should set itself right.

It follows that if we call the services performed by the petitioner "work," then he worked his regular shift and, we think, three hours overtime in attending the investigation; and spent ten hours in travel and waiting, the latter to be paid for on half pay basis. He has been paid for his regular eight hours, and the amount to which he is entitled is a mere matter of calculation.

We do not think Section 25, Article II, of the Agreement applies to the character of services performed by the petitioner. In the first place the rule covers cases where public authority is involved; second, the rule applies to specific cases; and third, as is well known, public affairs are, in general, conducted during regular working hours, and attendance in court and inquests would not ordinarily encroach on the rest period of an employe. These considerations, no doubt, prompted the rule, and we see no reason why it should be expanded to cover cases where, in many instances, such as the instant case, its application would do an injustice to an employe. We think it wiser to let the rule stand as written. As written it is plain and unambiguous and, we assume, speaks the full intent of the parties who made it.

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 Employe involved in this dispute are respectively Carrier and Employe 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 petitioner be allowed pay for three hours, at time and one-half pay, for attending investigation at Winslow, Arizona, December 26, 1941, and for ten hours time in traveling and waiting for transportation, in connection with the same investigation, at one-half pay, a total of $9.03.

AWARD

Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: H. A. Johnson
Secretary

Dated at Chicago, Illinois, this 29th day of June, 1943.