

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

Award No. 39937
Docket No. MW-39223
09-3-NRAB-00003-050617
(05-3-617)

The Third Division consisted of the regular members and in addition Referee Jacalyn J. Zimmerman when award was rendered.

**(Brotherhood of Maintenance of Way Employees Division –
(IBT Rail Conference
PARTIES TO DISPUTE: (
(Union Pacific Railroad Company [former Southern
(Pacific Transportation Company (Western Lines))**

STATEMENT OF CLAIM:

“Claim of the System Committee of the Brotherhood that:

- (1) The Agreement was violated when the Carrier failed and refused to compensate Mr. M. T. Graham in accordance with the provisions of Rule 42 and in connection with his appearance at a deposition, as instructed by the Carrier, on September 30, 2004 (Carrier’s File 1412589 SPW).**
- (2) As a consequence of the violation referred to in Part (1) above, Claimant M. T. Graham shall now be compensated for four (4) hours at his straight time rate of pay.”**

FINDINGS:

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

The carrier or carriers and the employee or employees involved in this dispute are respectively carrier and employee within the meaning of the Railway Labor Act, as approved June 21, 1934.

This Division of the Adjustment Board has jurisdiction over the dispute involved herein.

Parties to said dispute were given due notice of hearing thereon.

Claimant M. T. Graham established and holds seniority in various classes of the Track Sub-Department on the Sacramento Division, Western Seniority District. At the time of the instant dispute, the Claimant was regularly assigned as a Truck Driver on Gang 7220, headquartered at Colfax, California. His workweek consisted of eight hours per day, Monday through Friday, with Saturday and Sunday as designated rest days.

The Carrier does not dispute that on or about August 23, 2004, it informed the Claimant that he was required to appear, pursuant to subpoena, on September 30, 2004 for depositions in a lawsuit in which the Carrier was the defendant. The Claimant worked his regularly assigned duties until lunchtime that day, then went home, cleaned up, and traveled to the Carrier's Law Department Office in Roseville, California, pursuant to the Carrier's instructions. At some point after arriving, the Claimant was informed that he was not needed at that time, but would probably be called at a later date. It is not disputed that the Carrier paid the the Claimant for only four hours, at his straight time rate, for that day. The Claimant now seeks an additional four hours for the time spent in connection with his attendance at these proceedings.

During the on-property handling, the Carrier asserted, and the Organization did not dispute, that the Claimant's role in the lawsuit was as a witness for the plaintiff. The Organization asserts, however, that because the Carrier required him to appear for the deposition, Rule 42 of the parties' Agreement required that he be compensated for the time spent in attendance. Rule 42 - Attending Court, provides:

“(a) Employees instructed by the Company to attend court investigation, coroner's inquest and/or boards of inquiry as witnesses for the Company shall be compensated at straight time rate for actual time and attendance and/or held for attendance, the maximum allowance on any date to be eight (8) hours at straight time rate for each day so held.”

Rule 42 sets forth three criteria that must be satisfied before the Carrier is required to compensate an employee for attendance at court-related proceedings like the one at issue. First, the employee must have been instructed by the Carrier to attend; second, the attendance must be in connection with certain specified

proceedings; and, third, the employee's attendance must be as a witness for the Carrier. The Carrier does not dispute that the first two criteria are met herein. With respect to the third criteria, the Organization essentially argues that because the Carrier subpoenaed the Claimant and mandated his attendance at the deposition, he became a witness for the Carrier, notwithstanding the uncontradicted assertion that his role in the lawsuit was as a witness for the plaintiff, not the Carrier.

To accept the Organization's position would be to essentially write the third criterion out of the contractual language. In other words, if any time the Carrier mandated attendance the employee became its witness, there would be no reason for the additional language; it would be superfluous. Indeed, under the Organization's interpretation, the Carrier would even be required to compensate an employee who was suing the Carrier, should the Carrier choose to depose him. Clearly this is not the intent of the Rule. Therefore, in order to give meaning to the contractual language, we find that all requirements of Rule 42 must be satisfied before the Carrier is required to pay an employee. Because the Organization failed to demonstrate that the Claimant was the Carrier's witness, beyond relying upon the Carrier's instructions that he attend, the claim must be denied.

AWARD

Claim denied.

ORDER

This Board, after consideration of the dispute identified above, hereby orders that an Award favorable to the Claimant(s) not be made.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Dated at Chicago, Illinois, this 31st day of August 2009.