Award No. 1140
Docket No. 1132

NATIONAL RAILROAD ADJUSTMENT BOARD

FOURTH DIVISION

The Fourth Division consisted of the regular members and in addition Referee Kieran P. O'Gallagher when award was rendered.

PARTIES TO DISPUTE:

RAILROAD YARDMASTERS OF AMERICA

THE BALTIMORE AND OHIO RAILROAD COMPANY

STATEMENT OF CLAIM: Claim and request of the Railroad Yardmasters of America that:

Yardmaster F. F. Maloney be allowed three hours at yardmaster rate for service performed in attending investigation in the office of Train Master W. R. Branson, at 1:00 P. M., November 12, 1955.

EMPLOYES' STATEMENT OF FACTS: Yardmaster F. F. Maloney was on regular assigned yardmaster, 3:00 P. M., to 11:00 P. M., at Mill Creek Yard, Cincinnati, Ohio, on November 5, 1955, on which date BO 8714 was damaged while being switched in that yard.

Following an investigation held on November 12, 1955, at which no responsibility was placed on Yardmaster Maloney, claim was presented for 2 hours pay at overtime rate under Article 3(d) of the effective agreement, for time consumed in attending the investigation.

Claim was denied on the basis that the superintendent felt "that there is no merit to the claim."

POSITION OF EMPLOYES: Claimant appeared at the investigation on November 12, 1955, in response to the following notice:

"Form 1523-E

THE BALTIMORE AND OHIO RAILROAD COMPANY

November 9, 1955 Cincinnati, Ohio 19
(Date) (Place)

To F. Maloney
(Name)
Yardmaster
(Occupation)
Millcreek, Yard
(Address)

You are hereby notified, in accordance with the rules of wage agreement under which you are working, to report at Trainmasters

Office, 2815 Spring Grove Ave. 1:00 P. M. on Saturday Nov. 12, 1955
(Place) (Time) (Date)

or hearing on the following matter: To develop your responsibility for damage to B&O 8714 at Millcreek Yard on November 5, 1955.

W. R. Branson
(Signed)
Trainmaster
(Title)

cc: A. J. Healy"

* * * * *

Following the investigation (transcript of which carrier will undoubtedly reproduce) claim was prescribed under Article 3(d) which was denied by the regional accountant as follows:

"THE BALTIMORE AND OHIO RAILROAD COMPANY

Notice in connection with time claimed

11586

Cincinnati, Ohio, November 25, 1955

Mr. F. F. Maloney, Yard Master
Mill Creek Yard
Cincinnati, Ohio

Dear Sir:

Your time report of November 12, 1955, from 12:00 P. M. to 2:00 P. M. on which you claim 3 hours overtime account attending investigation in Trainmaster's office is declined by the undersigned for the following reasons:

Evidence at hand does not justify payment of your claim.

You have been allowed Nothing.

Cy: C. S. Darling
C. J. Schuler

Yours truly,

J. W. W. Spann
Regional Accountant."

* * * * *

Subsequent handling of the case was as follows:

RAILROAD YARDMASTERS OF AMERICA

"Baltimore & Ohio Local Lodge No. 13

6257 Bridgetown Rd. Cincinnati 11, Ohio

December 7, 1955

Mr. C. S. Darling, Sup't.
Baltimore & Ohio R. R.
Spring Grove & Marshall Aves.
Cincinnati, Ohio

Dear Sir:

On Saturday, November 12, at 1 P. M., F. F. Maloney, yardmaster, was ordered to Trainmaster Branson's office in answer to

notice presented to him, Form 1523-E, dated November 9, 1955, Cincinnati, Ohio, which read as follows:

> 'F. F. Maloney, Yardmaster, Millcreek Yard. You are hereby notified in accordance with rule of wage agreement under which you are working to report at Trainmaster's office, 2815 Spring Grove Ave., 1 P. M. on Nov. 12, 1955 for hearing on the following matter: To develop your responsibility for damage to B & O 8714 at Millcreek Yard on Nov. 5, 1955, signed W. R. Branson, Trainmaster.'

At the conclusion of Mr. Maloney's statement, the question was asked me by Mr. Branson,—'As representative of Mr. Maloney, has this investigation been fair and impartial and conducted in accordance with R. R. Yardmasters of America contract?' To which I replied, 'It has been fair and impartial but not conducted in accordance with R. R. Yardmasters of America contract.'

I refer you to Art. 7, Discipline Rule, pg. 4, second sentence. 'At a reasonable time prior to an investigation such employe shall be apprised in writing of the precise charge against him.' The information you were seeking could have been furnished by 'phone or by note as was developed during hearing that damage was not discovered until 11:50 P. M. Mr. Maloney's work hours are 3 P. M. to 11 P. M.

The Committee contends that Mr. Maloney was sacrificing his time for something that had transpired of which he was entirely ignorant, and we are claiming 3 working hours for attending this investigation.

Further, we refer you to Art. 3, par. (d), pg. 3, current Yardmaster Agreement. 'Yardmasters notified or called to perform work not continuous with, before, or after the regular work period will be allowed a minimum of three (3) hours for two (2) hours work or less.' The Committee considers this incident as work. It was proved at the hearing that Mr. Maloney knew nothing about the affair for which he was called to appear.

Enclosed is duplicate time claim and rejection slip. If you do not concur with Committees' wishes, please return slip and Form 762 A.

Very truly yours,

/s/ A. Healy,
Regional Chairman
Railroad Yardmasters of America

encl.

cc: F. F. Maloney
R. M. Semple"

THE BALTIMORE AND OHIO RAILROAD COMPANY

OFFICE OF SUPERINTENDENT

CINCINNATI 25, OHIO

C. S. Darling, Superintendent

"Claim of Yardmaster F. F. Maloney for 3 hrs. overtime—November 12, 1955.

December 14, 1955
File 89-C cy 88

Mr. Albert Healy, Regional Chairman,
R. R. Yardmasters of America,
6257 Bridgetown Rd.,
Cincinnati 11, Ohio.

Dear Sir:

Referring to your letter of December 7 and returning time slip and Form 762-A-Rev., No. 11586.

As B&O 8714 was handled on Yardmaster Maloney's tour of duty by crew in charge of Yard Foreman Malott by putting car on caboose track and then setting it over on track 5, it was necessary to determine who was responsible for damage to the car. Yardmasters hold instructions that these TOFCEE cars will not be roughly handled or held onto while switching, therefore, it was necessary to conduct an investigation in connection with this incident.

As Yardmaster Maloney was on duty while the crew was handling this car we feel there is no merit to the claim and it is declined.

Yours truly,

/s/ C. S. Darling"

* * * * *

RAILROAD YARDMASTERS OF AMERICA

"Baltimore and Ohio RR Local Lodge No. 13

Niles, Ohio
December 30, 1955

Re—Claim for three hours for Yardmaster F. F. Maloney, Cincinnati, Ohio on November 12, 1955

Mr. R. L. Harvey
Manager Labor Relations
Baltimore and Ohio Railroad Company
Baltimore 1, Md.

Dear Sir:

On November 12, 1955 Yardmaster F. F. Maloney, Cincinnati, Ohio was called in Trainmaster W. R. Branson's office at 1:00 P. M. by formal notice for investigation to develop responsibility for damage to car B&O 8714 at Millcreek Yard on November 5, 1955.

Yardmaster F. F. Maloney is a regular assigned yardmaster 3:00 P. M. to 11:00 P. M. at Millcreek Yard, Cincinnati, Ohio. The car in question B&O 8714 arrived at 1:55 P. M. and was not discovered to be in damaged condition until 11:50 P. M. This was 50 minutes after Yardmaster F. F. Maloney was relieved from duty.

The Yardmasters Committee contends that as Yardmaster F. F. Maloney had no responsibility in the damage of this car and the information he gave could have been received by telephone

or letter that he be paid three hours at yardmasters pay under Article 3, paragraph (d) Quote—'Yardmasters notified or called to perform work not continuous with, before, or after the regular work period will be allowed a minimum of three (3) hours for two (2) hours work or less.'

Fraternally yours,

/s/ Robert M. Semple
General Chairman"

* * * * *

THE BALTIMORE AND OHIO RAILROAD COMPANY

OFFICE OF VICE PRESIDENT

PERSONNEL

BALTIMORE 1, MD.

R. L. Harvey
Manager Labor Relations

"January 23, 1956

Mr. Robert M. Semple, General Chairman
Railroad Yardmasters of America
426 Brown Street,
Niles, Ohio

Dear Sir:

Referring to our conference on January 17, 1956 when we discussed the claim of Yardmaster F. F. Maloney, Cincinnati, Ohio, for three hours pay, November 12, 1955.

On November 12, 1955 Yardmaster F. F. Maloney regularly assigned 3:00 P. M. to 11:00 P. M. Mill Creek Yard, Cincinnati, Ohio, attended hearing in the Trainmaster's office at 1:00 P. M. to develop his responsibility for damage to car B&O-8714.

As pointed out to you in our conference the switching of car 8714 after being yarded in track 17 up to and including the time when it was placed in track 5, where it was found to be in damaged condition, all occurred within the tour of duty of Yardmaster Maloney. As the purpose of this hearing was to determine Yardmaster Maloney's responsibility for the damage to car 8714, in the light of the findings in Award 988 of the Fourth Division, National Railroad Adjustment Board, there is no merit to the claim and it is declined.

Very truly yours,

/s/ R. L. Harvey"

The principle contended for in this case, that attendance at meetings, hearings, investigations, etc., is work within the meaning of agreement rules, specifically, overtime and rest day rules, has been generally recognized by carriers as a whole since Fourth Division Awards 417, 537, 567, 837 and 987. This particular carrier, however, is loathe to recognize this principle, even in spite of these awards and the particular rule in its agreement under which the claim has been presented.

This carrier has elected, notwithstanding these awards, particularly No. 987 which involves this same carrier and agreement rules, to base its

defense on Fourth Division Award No. 988. In analyzing Award No. 988, it is to be noted that carrier based its defense in that dispute on an argument that the claimant then "lost no pay" and that "Award No. 597 establishes a precedent." Award 988 ruled, notwithstanding the precedents established by Awards 417, 537, 567 and 837, as well as that recognized in Award No. 987 which was currently being formulated, as follows:

> "The governing agreement does not contain a rule on attending investigations. In the absence of any such rule, we are constrained to follow the standards of 'what purpose' and 'whose benefit', and hold that in this instance the 'hearing' developed as a benefit to the claimant and that the purpose was his personal responsibility."

It is of course, obvious, that the majority in Awards 987 and 988, actually recognized the precedents established by Awards 417, 537, 567 and 837, and that a "middle of the road policy" was adopted by allowing the claim in Award 987 and denying the claim in 988. The trend of justice should not be plunged into such an incongruous situation as set up by the two Awards 987 and 988 by one and the same majority. The "what purpose" and "whose benefit" question written into the dispute by the majority was just as much in evidence in favor of the claimant in Award 988 as in Award 987. On this basis the employes were entitled to just as convincing an award in 988 as in 987, but they have been forced to again raise the issue for a more conclusive determination of the issue.

Even on the basis of the "what purpose" and "whose benefit" theory propounded by Award No. 988, the claimant in this case was, as clearly established by the record performing service for carrier's sole purpose and benefit. Certainly, no purpose or benefit accrued to the claimant and no responsibility or blame was attached to him. On the contrary, his free time was consumed for the sole purpose and benefit of the carrier just as much as though he had been performing service on his regular assignment.

All data used in support of this claim has been presented to the carrier and made a part of the particular question in dispute. The claim should be allowed.

CARRIER'S STATEMENT OF FACTS: On November 5, 1955 Yardmaster F. F. Maloney held a regular assignment 3:00 P. M. to 11:00 P. M. in Mill Creek Yard, Cincinnati, Ohio.

At or about 11:50 P. M. on November 5, 1955, Car B&O 8714 TOFCEE was found damaged in Track No. 5 at Mill Creek Yard by B&O patrolman.

Car B&O 8714 was handled during Yardmaster Maloney's tour of duty. It was handled by crew in charge of Yard Foreman J. W. Malott. Yardmaster Maloney was on duty while this crew was handling this car, acting in his capacity as Yardmaster. Mr. Maloney was in charge of operations at Mill Creek Yard at that time.

In order to ascertain the full facts surrounding the damage to this car all those employes who were involved in matters pertaining to the accident were given formal notification to appear for an investigation. Under date of November 9, 1955, Mr. Maloney was given the following notification:

> "You are hereby notified in accordance with the rules of the wage agreement under which you are working to report to the Trainmasters Office at 1:00 P. M. November 12, 1955, for hearing on the following matter: to develop your responsibility for damage to B&O 8714 at Mill Creek Yard on November 5, 1955."

This investigation was held as scheduled. The Carrier now introduces as its Exhibit "A" that portion of the testimony submitted by Yardmaster

Maloney, yardmaster in charge of the yard where the accident happened, and under whose jurisdiction Yard Foreman Malott had been working.

Investigation developed that the car had arrived at Mill Creek Yard at 1:55 P. M. on Train St. Louis 97. The train was yarded in Track No. 17. Yard Foreman Malott in charge of the 4:00 P. M. East Lead of Mill Creek crew testified that when he came on duty at 4:00 P. M. Car B&O 8714 was the east car in Track No. 17. There was another TOFCEE car six feet in this track. He testified that he pulled six cars out of the track, shoved the one TOFCEE car into the cab track, and shoved four cars back to Track 17. He then shoved Car B&O 8714 into the cab track. At 10:00 P. M. he was instructed by the Yardmaster to secure the TOFCEE cars from the cab track and put them in Track 2. After doing this he cleared Track 5, then got the two TOFCEE cars from Track 2 and shoved them in on Track 5. The record indicated that the Yard Foreman's crew was the only crew that handled the damaged car on this date.

It will be observed from Carrier's Exhibit "A", Yardmaster Maloney's testimony, that the question related directly to ascertaining the factual record and to determining the responsibility, if any, for the accident. It could not be disputed that Yardmaster Maloney was directly and immediately concerned in this matter for the yard at Mill Creek was under his supervision and jurisdiction.

The investigation was held on November 12, 1955. The record establishes that the claimant yardmaster lost no time at all as a result of attending this investigation. Subsequently, the Yardmasters' Committee handled the claim of Yardmaster Maloney for 3 hours at the Yardmasters' rate "* * * for service performed in attending the investigation in the office of Train Master W. R. Branson, at 1:00 P. M., November 12, 1955."

CARRIER'S ARGUMENT WHAT THIS CASE CONCERNS: The issues in this case are comparatively simple. The Yardmasters' Committee says that when the claimant was required to attend this investigation he qualified for compensation based on the payment of 3 hours at Yardmasters' rate. The Committee asserts that this was "work" within the meaning of the rules. The Committee does not say that the Yardmaster's attendance at the investigation was a part of his regular assignment. The record alone establishes that the claimant lost no time whatever from his regular turn.

It must of course be recognized that the Yardmaster was given formal notification to appear for the investigation and also that he was directly concerned in the matters being investigated.

But by and large, this entire subject (as it occurs and arises on the property of the Baltimore and Ohio Railroad) has already been before this labor tribunal. The same arguments made by the Committee here have already been pleaded before this Board. The contentions of the parties as a general issue have already been submitted to this Board. Actually, this entire matter (and the principles at issue) have already been presented before this Board. Quite frankly, the Carrier is at a loss to understand the presentation of this kind of claim.

ON THIS RAILROAD THERE ARE ALREADY PRINCIPAL RULINGS ON THIS ISSUE: Initially the Carrier refers to this Division's Award No. 597. It involved the same parties herein present in the instant dispute; i. e., the Railroad Yardmasters of America and the Baltimore and Ohio Railroad Company.

The "STATEMENT OF CLAIM" in Award No. 597 reads:

"Claim of the Railroad Yardmasters of America that:

"1. Yardmaster W. J. Foley be allowed a minimum day of eight (8) hours at overtime rate account required to attend meet-

ing in the office of Terminal Train Master on his regular assigned rest day, March 26, 1948.

"2. Yardmaster J. W. Lewis and A. M. French each be allowed two (2) hours at overtime rate account required to attend meeting in the office of Terminal Train Master on March 26, 1948.

"3. Yardmasters S. S. Morningstar and J. J. Milan each be allowed eight (8) hours at overtime rate account required to attend meeting in office of Terminal Trainmaster on March 26, 1948.

"4. Yardmaster R. T. Joyce and E. L. Klaus each be allowed two (2) hours and fifteen (15) minutes at overtime rate account required to attend meeting in the office of Terminal Train Master on March 26, 1948."

The "EMPLOYES' STATEMENT OF FACTS" in Award No. 597 reads:

"Claimants in this case were required by the Carrier to attend a meeting outside their regular assigned hours, in the office of the Terminal Train Master, on March 26, 1948.

"Claims for the Yardmasters involved were made in accordance with the provisions of Rules 3 and 4 of the effective Agreement.

"Following denial by Superintendent the claims were progressed to the highest Officer designated by the Carrier to handle such matters."

It will be observed that in the matters at issue in Award No. 597 the claims came from Yardmasters who were on their rest days and from Yardmasters required to attend the meeting on days which were not rest days.

In Award No. 597 the argument advanced by the Yardmasters' Committee took the following direction:

"Rule 3 reads in part as follows:

"'3a—Eight (8) consecutive hours or less shall constitute a day's work, except as provided in paragraph (d) of this Article.'

"'3b—All time in excess of eight (8) hours shall be paid for at the rate of time and one-half.'

"'3d—Yardmasters notified or called to perform work not continuous with, before, or after the regular work period will be allowed a minimum of three (3) hours for two (2) hours work or less, and if held on duty in excess of two (2) hours time and one-half will be allowed on the minute basis, provided that yardmasters who have completed their work period for the day and been released from duty, required to return for further service, may, if conditions justify, be paid as if on continuous duty.'

"Rule 4 reads in part:

"'a—Regularly assigned Yardmasters will be assigned one (1) regular relief day in seven (7), without

deduction for such relief day from their established monthly rate, provided they have performed service as Yardmaster or General Yardmaster on not less than three (3) days in the six (6) day period next preceding the regularly assigned relief day, and if required to work on such regularly assigned relief day will be paid therefor at the rate of time and one-half, based on their daily rate.'

"The excuse on which these Yardmasters were called to the office of the Terminal Train Master was a general one and for the purpose of discussing operating conditions and situations in general. No specific charges of failure were cited and no definite responsibility was established. This being so, then the purpose of the meeting was definitely for the benefit of the Carrier and not for the employes."

In its position the Committee argued:

"The question at issue here then is whether or not the service performed was 'work' within the meaning of the applicable rules. Award 417 above referred to definitely establishes that on the basis of the purpose to be served, it was 'work' within the meaning of the rules."

(a) **The Carrier advances its contention in Award No. 597:**

The Carrier desires to refer briefly to the argument it advanced in the claim decided in Award No. 597. There the Carrier argued:

"The definitive nature of the wage claims presented herein is manifest. First of all, claims have been submitted on behalf of three trick yardmasters, Claimants W. J. Foley, S. S. Morningstar and J. J. Milan, that they are properly entitled to additional compensation amounting to eight (8) hours at the **overtime** rate of pay. Secondly, claims have been submitted by two trick yardmasters, Claimants R. R. Joyce and E. L. Klaus, for two (2) hours and fifteen (15) minutes at **overtime** rate and by two yardmasters, Claimants J. W. Lewis and A. M. French, for two (2) hours at **overtime** rate of pay. It is not disputed in this case that all of the claimants found herein were required to appear for this meeting at sometime other than that represented by their regularly assigned tours of duty.

When this case was discussed in conference the employes advanced the primary allegation that the claimants were properly entitled to overtime rate of pay on the basis set forth hereinabove under the proper application of paragraphs (a), (b) and (d) of Article 3, in the Yardmasters' Working Agreement. It being apparent that paragraphs (a) and (b) of Article 3 are concerned solely with defining the basic day and basic overtime, the only dispute arising here relates to the proper application of paragraph (d) of that rule, the so-termed 'Call Rule'.

"Paragraph (d) of Article 3 reads as follows:

"'(d) Yardmasters notified or called to perform work not continuous with, before, or after the regular work period will be allowed a minimum of three (3) hours for two (2) hours work or less, and if held on duty in excess of two (2) hours time and one-half will be allowed on the minute basis, provided that yardmasters who have completed their work period for the day and been released from duty, required to return for further

service, may, if conditions justify, be paid as if on continuous duty.'

"The definitive nature of the claims found here demonstrates that what the claimants seek in effect is a measure of payment at an **overtime** rate of pay. There being no dispute then as to this basic proposition, the Carrier submits the only portion of paragraph (d) of Article 3 upon which this dispute may properly rest is that portion reading as follows:

"'(d) Yardmasters notified or called to perform work not continuous with, before, or after the regular work period will be allowed a minimum of three (3) hours for two (2) hours work or less, and if held on duty in excess of two (2) hours time and one-half will be allowed on the minute basis, * * *.'

"The Carrier recognizes that there is but one pertinent question emergent in this dispute. That question simply relates to the proper meaning and intent of the word '* * * work * * *' to be found in that portion of Article 3 (d) quoted hereinabove.

"Proper answer to this question must necessarily reside in a determination of the actual factual record in this dispute. It goes without dispute that the claimant yardmasters in this case were specifically not required to pursue any manner of '* * * work * * *' such as that properly required of them during the course of their regular tours of duty. All they did was to attend a meeting in the Terminal Trainmaster's Office at which time discussion was had relating to their failure to comply with the regulations of the 'SX' Operating Manual No. 1. Similarly, it cannot be subjected to substantial question but that the only instruction the claimant yardmasters received at that time was directly related to the correction of their deficiencies and to the proper performances of those tasks which were then, and are now, required of all employes working as yardmasters on this property. Under the circumstances, it is apparent that the claimant yardmasters were specifically not required to perform any '* * * work * * *' within the meaning or application of any provision to be found in Article 3 of the Yardmasters' Agreement."

When this case was discussed on the property the Yardmasters' Committee offered no argument and made no argumentation substantially different from that already made in Award No. 597.

Actually, that argument and those arguments were not upheld before this labor tribunal. There this Board ruled:

"The claimants in this dispute are asking for overtime for attending a meeting called at the Terminal Trainmaster's office for March 26, 1948. The purpose of the meeting, according to the joint statement of facts submitted to this Board, was as follows:

"'On March 26, 1948, all Trick Yard Masters of Glenwood were ordered to attend a meeting in Terminal Train Master's Office relative to failure of carrying out instructions of SX cars.

"'Trick Yardmasters claimed overtime for time held on duty after regular relieving time and starting in advance of regular time, which was declined.'

"The Employes contend that the reason for the meeting was a general one and for the purpose of discussing operating condi-

tions and situations in general; that no specific charges of failure were cited and no definite responsibility was established; and that the purpose of the meeting was definitely for the benefit of the Carrier and not the employes.

"The Carrier contends that the meeting was held to discuss with the claimants their failure of carrying out instructions of SX cars.

"The awards relied upon by the Employes refer to meetings called by the Carrier regarding safety measures or matters that are for the sole benefit of the Carrier.

"The Employes argue that because they did not receive any discipline from the Carrier growing out of this meeting concerning their failure to follow the handling of the 'Sentinel Service' according to procedure outlined in the 'SX' Operating Manual, and due to the fact that the meeting was for the benefit of the Carrier, they should be compensated for the time spent at the meeting, under the rules applicable.

"From the record as a whole, the Board finds that the purpose of the meeting was for the claimants' benefit; that even though the claimants were not disciplined it cannot be taken that the meeting was for the Carrier's benefit or its own interest. Moreover, the rules cited by the Employes are not applicable under the circumstances of this claim since the present Agreement is silent as to the payment for time spent by the claimants at a meeting for their own benefit. Therefore, said claims should be denied." (The complete citation of "OPINION OF BOARD").

AWARD 988 OF THIS DIVISION IS DIRECTLY INVOLVED: The Carrier submits that the same issues presented in the instant case were presented before this tribunal in its Award 988, Docket 984.

The "STATEMENT OF CLAIM" in Award 988 read:

"Claim and request of the Railroad Yardmasters of America that:

Yardmaster M. Graban be allowed pay for six (6) hours at overtime rate, for service performed on June 15, 1953, outside of and not continuous with his regular assigned hours, in attending meeting in the office of the Road Foreman of Engines at Glenwood, Pa., 8:00 A. M. to 2:00 P. M."

Referee Emmett Ferguson participated with the majority in the "Findings" in Award No. 988. The claim there was denied.

The "Opinion of the Board" in Award No. 988 read as follows:

"In this docket pay is claimed for Yardmaster Graban under Rule 3(d) (Call Rule) because he was required to be present from 8:00 A. M. to 2:00 P. M. at a hearing outside of his regular working hours. The Carrier has denied the claim on the ground that the claimant lost no pay and argues that Award No. 597 establishes a precedent for its decision and for our guidance in reaching our present decision.

The same Award has already been considered in our Docket No. 983 Award No. 987. We consistently hold that the criteria of Award No. 597 may again properly be applied to the instant facts. The question thereupon arises: For what purpose and for whose benefit was the meeting or 'hearing' held?

"The primary purpose of the meeting was investigative. It was described in the notice as a 'hearing . . . in connection with the personal injury.' The claimant was himself on trial in a manner of speaking because it is noted in the transcript, Carrier's Exhibit A, that at the outset the claimant was offered counsel, which he accepted, and at the conclusion he was asked the usual question, whether or not he had been given a fair and impartial hearing.

Although the notice calling the meeting does not expressly inform Mr. Graban that his conduct in the matter was in question, and that the part he played in the affair was to be investigated, it is certain that he came to the hearing prepared to defend himself.

While it is undoubtedly true that the Carrier received a benefit from the hearing in learning the facts of the accident, we are of the opinion that so far as Graban was concerned the principal purpose of the hearing was his personal responsibility. His participation resulted in giving him the benefit of clearing himself of any possible charge of neglect of duty in his supervision of the yards.

The governing Agreement does not contain a rule on attending investigations. In the absence of any such rule, we are constrained to follow the standards of 'what purpose' and 'whose benefit', and hold that in this instance the 'hearing' developed as a benefit to the claimant and that the purpose was his personal responsibility."

The Carrier submits that the same issues in the instant case were offered in Award 988. There the Referee held in part that: "While it is undoubtedly true that the Carrier received a benefit from the hearing in learning the facts of the accident, we are of the opinion that so far as Graban was concerned the principal purpose of the hearing was his personal responsibility. His participation resulted in giving him the benefit of clearing himself of any possible charge of neglect of duty in his supervision of the yard."
The Carrier asserts the immediate applicability of this particular findings to the case at hand.

AWARD 1030 OF THIS DIVISION IS DIRECTLY INVOLVED: The Carrier submits that the concluding award in this series containing the issues presented in the instant case is Award No. 1030, Docket No. 1018.

The "STATEMENT OF CLAIM" in Award 1030 read as follows:

"Claim and request of the Railroad Yardmasters of America that:

Yardmaster M. Graban be allowed one day's pay at time and one-half rate for attending investigation in the office of the Terminal Train Master at Pittsburgh, Pa., on his rest day, Tuesday, August 11, 1953."

Referee G. Allan Dash, Jr., participated with the majority in the findings in Award 1030. The claim there was denied.

The "OPINION OF BOARD" in Award 1030 read as follows:

"The claim by Yardmaster M. Graban in this case is to the effect that he is entitled to payment for a full eight-hour day at overtime rates because he was required to attend an investigation on a rest day, Tuesday, August 11, 1953. His claim is based on parts of two provisions of the existing Agreement, namely Article 6(a) and Article 4(a). The specific parts of these two provisions referred to are as follows:

Article 6

Miscellaneous

'(a) When a regularly assigned Yardmaster is required to perform service other than his regular duties, the rate of pay will be not less than his regular rate of pay for days so used; * * *'

Article 4

Relief Days

'(a) Regularly assigned Yardmasters will be assigned one (1) regular relief day, in seven (7), * * * and if required to work on such regularly assigned relief day will be paid therefor at the rate of time and one-half, based on their daily rate. * * *'

The investigation which Yardmaster Graban attended on August 11, 1953, was, in the words of the Carrier's letter notifying him to report thereto, a 'hearing on the following matter—relative personal injury Yard Helper Gilbert T. Cowen, Jr., 10:15 P. M., August 7, 1953.' In the letter of notification he was not apprised of any charge against him, was not notified of his right to have counsel or witnesses present, and was not given any cause to expect that discipline was being contemplated against him. (Article 7 (a) of Agreement) The letter of the Carrier under date of March 5, 1954, shows that the Carrier was not aware if anyone was responsible for the injury sustained by Yard Helper Cowen, and that it had called Yardmaster Graban to the hearing because he was in charge of the Yard at the time of the accident, might possess pertinent information, and would be in a position to hear any testimony that might adversely affect him with the concurrent possibility of refuting it and thus avoid a further hearing in connection with possible discipline against him. The hearing was held as scheduled, with no responsibility of Yardmaster Graban being charged or developed therein.

After the hearing of August 11, 1953, Yardmaster Graban filed a claim for payment for a full eight hour day on the ground that he was required to attend the hearing on his rest day. During the handling of this claim on the Carrier's property, between the authorized representatives of the Carrier and the Yardmasters, the parties were in full agreement that Yardmaster Graban had been required to attend the hearing on his rest day. A number of items of evidence are present in the record on this case that support this conclusion.

The 'Memorandum of Conference held in the office of Superintendent at Pittsburgh, Pa., September 23, 1953' (a copy of which was attached to the Employes' Ex Parte Submission in this case), under the hearing of 'Joint Statement of Agreed Upon Facts,' contained the statement:

'Yardmaster M. Graban was notified by Form 1523-E, signed by Terminal Train Master T. J. Joyce, to report for a hearing in connection with personal injuries to Yard Helper Gilbert T. Cowen. This being Yardmaster M. Graban's regular relief day, he is claiming one day at time and one-half.'

On page 3 of the Carrier's Ex Parte Submission in this case, the Carrier makes the following statement:

'The investigation was held on August 11, 1953. The investigation was held on the claimant's rest day.'

At the hearing before the Fourth Division and the Referee, held on November 17, 1954, the representatives of both parties made references to their mutual conclusion that the time during which Yardmaster Graban was required to attend the August 11, 1953 hearing fell upon his rest day. However, during the Board's consideration of the case the Carrier representatives on the Board noted that if support of this claim should sustain the conclusion that the time spent by Yardmaster Graban at the investigation was on his rest day, the Board would not be consistent with its own definition of a rest day as advanced in Awards Nos. 737, 924, 1010 and 1011.

The principles of the Board's past Awards setting forth the definition of a rest day, first enunciated in Award No. 737, when applied to the facts in the instant case, require the conclusion that Yardmaster Graban's attendance at the investigation was not on his rest day. His regular hours were from 3:00 P. M. to 11:00 P. M. with Tuesday as his assigned rest day. Thus, in accordance with the rest day principle of Award No. 737, his rest day extended from 3:00 P. M. Tuesday, August 11, to 3:00 P. M. Wednesday, August 12, 1953. Since he attended the investigation for an hour or two beginning at 8:00 A. M. on Tuesday, August 11, 1953, he did not attend on his rest day. Therefore, it cannot be concluded that he was in any way covered by the Rest Day Rule in Article 4(a) of the Agreement.

Inasmuch as the Board finds that Yardmaster Graban's attendance at the August 11, 1953 investigation was not on his rest day, it is convinced that the factual situation involved in his attendance at that investigation must be viewed in approximately the same light as was the situation on which it has already ruled in Award No. 988. Though Yardmaster Graban was not apprised of charges against him, was not notified of his right to have counsel and witnesses present, and was not given a cause to contemplate possible discipline against himself, the fact that this incident occurred other than on his rest day and in the absence of a rule concerning attendance at investigations, rightly requires the application of the principle of Award No. 988, namely, for 'what purpose' and for 'whose benefit' was the investigation held?

While there are some variations between the facts surrounding the August 11, 1953 investigation and the investigation involved in Award No. 988, the variations are not sufficient to warrant a different conclusion than that expressed by the Board in Award No. 988. Thus it must be concluded as respects the August 11, 1953 investigation, in the words of Award No. 988, that 'so far as Graban was concerned the principal purpose of the hearing was his personal responsibility' and that, 'His participation resulted in giving him the benefit of clearing himself of any possible charge of neglect of duty in his supervision of the yards'. Therefore, the claim in the instant case must be denied for the same reasons advanced by the Board in Award No. 988."

The Carrier asserts the immediate applicability of the particular findings of these awards to the case at hand.

SUMMARY OF CARRIER: The Committee is left with a considerable burden in this case. That burden is to demonstrate that the principles initiated by this Division in its Findings in Awards 597, 988 and 1030 are not applicable to this case.

But the factual record here describes an instant comparability between what the Committee argued in Awards 597, 988 and 1030 and the arguments that have been advanced by the Committee in handling of the instant dispute.

In all these cases the Committee has argued that what was required of the claimant constituted "work" within the meaning of the rules appearing in the Yardmasters' contract.

All of these arguments this Division has specifically refused to accept. That proposition is testified to in the holdings in Award 988.

The record in the instant case describes that the claimant was directly involved and immediately concerned in the matters under investigation. It shows that he was given proper formal notification to appear for the hearing. The reasons for holding this hearing seem obvious.

Under such circumstances, the Carrier asserts the absence of any rule appearing in the applicable working contract which would operate to support the claim as made.

On the basis of all that is contained herein, the Carrier respectfully petitions this Division to hold this claim as being without merit and to deny it accordingly.

The Carrier asserts that all data submitted in support of its position in this case has been presented to or is known by the other party to this dispute and has been made a part of this particular dispute.

Oral hearing is requested.

(Exhibits are not reproduced.)

OPINION OF BOARD: The facts in this case are not in dispute. The issue is the payment of the Yardmaster for having appeared at an investigation outside of his assigned hours.

A proper determination of this claim may be had by a close examination of the Agreement between the parties.

Article 7 of the Agreement provides that before a Yardmaster may be disciplined he shall have had a hearing before a proper officer and that: "At a reasonable time prior to the investigation such employe shall be apprised in writing of the precise charge against him * * * and shall have the right to be represented by the duly authorized representative."

In the instant claim, the Yardmaster was given notice "in accordance with the rules of the wage agreement * * * to develop your responsibility for damage to B&O 8714 at Mill Creek Yard on November 5, 1955." A copy of the notice was addressed to A. J. Healy, and an examination of the transcript of the hearing develops that A. J. Healy was the Local Chairman of the Railroad Yardmasters of America representing Mr. Maloney, the Yardmaster, and that Mr. Healy was present at the hearing.

It would appear that all of the requirements to constitute a good notice of the hearing were strictly complied with by the Carrier, but the right to call Mr. Maloney as a principal was questioned on the ground there was no **precise** charge against him as required by Article 7.

The hearing developed that the Yardmaster had no knowledge of the damage to the car involved. However, the evidence shows that the car was handled by a switch crew under Yard Foreman Malott; that Mr. Maloney had instructed Yard Foreman Malott as to the switching of the car in question; that Mr. Malott was working under Mr. Maloney's direction at the time

and that all of these movements of the car were performed during Mr. Maloney's tour of duty. Therefore, Mr. Maloney, being the executive under whose jurisdiction the car was switched, was properly called to attend a hearing to develop his responsibility for the damage to the car in question, and the notice to appear at the hearing was sufficiently **precise** to apprise him as provided in Article 7 of the Agreement.

The Agreement is silent with regard to compensation for attendance at hearings, and the Claimant seeks to invoke the provisions of Article 3(d) of the Agreement. However, this Board, having determined that the primary purpose of the hearing of November 12, 1955, was to determine the responsibility for damage to the car in question; and that the Claimant was present at the hearing in response to proper notice as a principal and not as a witness, the provisions of Article 3(d) do not apply.

For the reasons above cited the claim, accordingly, must be denied.

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

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

The parties to said dispute were given due notice of hearing thereon.

AWARD

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of FOURTH DIVISION

ATTEST: R. B. Parkhurst
Secretary

Dated at Chicago, Illinois, this 19th day of November, 1956.

DISSENT OF LABOR MEMBERS TO AWARD NO. 1140, DOCKET NO. 1132.

The incongruity of this award is plainly apparent from even a casual study of its contents. The majority condones the action of carrier in preferring charges against the claimant under Article 7 without any previously established information or evidence that he was in any way responsible and without including others, who, as far as carrier knew, might have had direct and sole responsibility, and in spite of the fact that claimant was completely free from responsibility.

By this award, carrier's action in singling out the claimant on the theory that he alone was responsible unless he could prove himself innocent, is condoned.

After recognizing that "the hearing developed that the yardmaster had no knowledge of the damage to the car involved", the award asserts that all of the movements of the car were effected during claimant's tour of duty and that because of this he was "properly called to attend a hearing to develop his responsibility." All of this is asserted, notwithstanding the employes' charge and argument that the notice to appear for investigation to develop "his responsibility" did not constitute a "precise charge" under the clearly expressed provisions of Article 7(a).

The award then proceeds to emasculate the agreement by asserting that:

> "Having determined that the primary purpose of the hearing . . . was to determine **the** responsibility for damage to the car in question; and that the claimant was present at the hearing in response to proper notice as a principal and not as a witness, the provisions of Article 3(d) **do not apply.**"

The record in the case is completely barren of any evidence to establish how or when the car was damaged, or that it was damaged during its handling by Yard Foreman Malott who was working under claimant's supervision. Carrier's representative admitted at the oral hearing they did not know whether or not any guilt actually attached to the foreman who handled the car. Yet the majority has the audacity to say that because claimant instructed the foreman—because the foreman handled the car—because the carrier says the car was found to be damaged some fifty minutes after claimant had gone off duty—because he was given a notice to appear for investigation, "all the requirements to constitute a good notice of the hearing were strictly complied with. . . ." It is further brazenly asserted that "Mr. Maloney, being the executive under whose jurisdiction the car was switched, was properly called to attend a hearing . . ."—and that "having determined that the primary purpose of the hearing . . . was to determine the responsibility for damage to the car in question, and that the claimant was present . . . as a principal and not as a witness, the provisions of Article 3(d) do not apply."

All of this is asserted in the award, notwithstanding previous awards dealing with the question of "for whose benefit"—notwithstanding claimant's complete freedom from responsibility and without evidence developed by the carrier to determine when or how car was actually damaged—and notwithstanding the weight of awards cited to establish that attendance at investigation is "work" within the meaning of "call", "overtime" and "rest day" rules.

It is utterly untenable that the award should write into the agreement a stipulation that Article 3(d) does not apply because there was "purpose of the hearing" and because the claimant was present "as a principal and not as a witness."

It is further evident that besides writing into the agreement a stipulation not intended by the parties, the award disregards completely the intent of the parties as spelled out in Article 7(e) that:

> "If the final decision decrees that the charge or charges against the employe are not sustained, the record shall be cleared of same and the employe reinstated and compensated for the difference between the amount he would have earned in service and any amount he earned from outside employment during the period he was out of service."

The award in this dispute is so far at variance with the rules in evidence and precedents cited that any inclination to discount either a lack of experience or an over-zealous intent to further the interests of the carrier is completely nullified by a recognition of the extent to which the majority strays from its recognized functions and responsibilities.

We therefore dissent.

LABOR MEMBERS:

V. W. Smith
J. P. Tahney
W. J. Ryan