Form 1

NATIONAL RAILROAD ADJUSTMENT BOARD
FOURTH DIVISION

Award Number 4084
Referee Irwin M. Lieberman Docket Number 4019

PARTIES TO DISPUTE: Railroad Yardmasters of America

Southern Railway Company

STATEMENT OF CLAIM: Claim and request of Railroad Yardmaster of America that:

Yardmaster D. H. Kitchens be paid four (4) hours pay at the yardmaster rate of pay on date of May 13, 1981 account Mr. Kitchens appeared as witness in investigation at Asheville, N.C. on this date.

OPINION OF BOARD: Claimant herein, a Yardmaster, was called to attend an investigation on May 13, 1981 dealing with a sideswipe at Asheville, North Carolina. Claimant was called by a defendant at the hearing but none of the principals or their representatives requested Carrier to call him. The record indicates that Claimant was not on duty at the time of the accident and had no direct knowledge of the matter under investigation. It is asserted by the Organization, without rebuttal, that Claimant did testify at the hearing as a mitigation witness for the Claimant in that case. The Yardmaster, Claimant herein, requested payment for the time spent at the investigation in accordance with the provisions of Rule 10 (a) and (b) of the agreement; he was refused payment triggering the dispute herein.

Rules 10 (a) and (b) provide as follows:

> "(A) Employees taken away from their regular assigned duties, at the request of the Management, to attend court or to appear as witnesses for the Company, will be furnished transportation and will be allowed compensation equal to the amount that would have been earned had such interruption not taken place and, in addition, the necessary actual expenses while away from home. Any fee or mileage accruing will be assigned to the Company.
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> (B) Yardmasters attending, as witnesses, investigations in which they are not concerned, will be paid in same manner as though attending court as witnesses for this Company. If no time is lost, they will be allowed pay for the actual time attending such investigation on a minute basis with a minimum of four (4) hours."

The record indicates that the Organization had filed a Section 6 notice in April of 1979 which, among other items, requested a change in Rule 10. The change requested is as follows:

> "Carrier will agree to compensate Yardmasters four (4) hours pay at the yardmaster pro rata rate when they are cited by any party to investigations as witnesses and in instances where they have been charged and subsequently cleared of any wrong-doing."

Following an over-all settlement, and as part of it, Rule 10 was amended by adding what is now the last sentence of Rule 10 (b), supra.

Petitioner argues that the Claimant did attend an investigation as a witness in a matter in which he was not charged or directly concerned. Under the clear and unambiguous language of Rule 10, he should have been paid, according to Petitioner. It is immaterial as to whether or not he was called as a Carrier witness, the Organization maintains. It is pointed out that under well established doctrine Carrier has the responsibility to call all witnesses who may possess information vital to a determination of the matter under investigation (Award 2881). Petitioner notes further that Carrier's argument that there must be proof that Claimant was a material witness is incorrect. Petitioner maintains that there is nothing in the Agreement specifying "material" witness. Furthermore, the Organization claims that the Yardmaster in this situation was an important witness in its behalf.

Carrier maintains that the Organization has failed to meet its burden of proof that the agreement was violated in this dispute. Carrier argues that the Organization has failed to prove that "...Carrier had an obligation to call Mr. Kitchens as a witness--that he was a material witness". Carrier insists that prior to the rule changes of January 31, 1981, non-material witnesses were not entitled to any payment and the addition to the rule did not affect that situation.

Carrier indicates that it fully recognizes its obligation to cite all material witnesses to an investigation. In this instance Carrier did not find Claimant to be a material witness and Petitioner has offered no evidence to establish that fact. Since there was no proof submitted by the Organization that he was a "material witness" and merely the assertion that he was a "mitigation witness", Carrier had no obligation to call him to the investigation. Carrier argues further that before the rule change unless involved Yardmasters attended an investigation at the request of management and as witnesses for the Company (i.e. as material witnesses), they were not entitled to pay for such attendance. That this as recognized by the Organization is evident by the Section 6 proposal (supra). Further Carrier notes that no past practice was cited by Petitioner in support of its position. Finally, Carrier maintains that to allow the Organization's position would permit any number of non-material witnesses to attend an investigation at the request of the Organization and force Carrier to pay for their time.

The Board notes that Carrier unequivocally states that: "The term 'witnesses for the Carrier' must be synonymous with 'material witness'". In addition Carrier also asserts that none of the principals to the investigation or their representatives requested Carrier to call claimant as a witness; yet the record indicates that he was called by a defendant, contrary to Carrier's assertion. From the Carrier's position, it is clear we must deal with the question of what is a material witness and whether or not that concept is incorporated, by interpretation, as part of Rule 10.

The question of materiality of testimony has been dealt with by the courts on many occasions. The Federal courts have said that generally speaking any evidence is relevant and material which tends to prove or disprove any ultimate issue made by the pleadings, or to make the proposition at issue more or less probable, or which can throw any light on the transaction involved (155 S.W. 2d 624,625). Obviously the question of what is material evidence is the subject of interpretation and must be judged on a case by case basis. It is also beyond dispute that in investigations, which are not prosecutions or adversary proceedings, much greater latitude must be permitted and the individual being charged should not be unduly restricted in the calling of witnesses. Furthermore, the language of Rule 10 does not include the term "material" in describing witnesses. It is well established that Boards such as this have no power to add to contracts and are limited to merely interpreting them in a reasonable manner.

The initial response to the Claim in this dispute is perhaps the key to an understanding of Carrier's position. Superintendent Wetsel in denying the claim said: "Mr. Kitchens did not appear as a witness for the company nor was he cited to the investigation". In this Board's view (and we are sure Carrier will concur) Carrier does not have the unilateral right to determine who may appear at an investigation on behalf of the charged employee. If a yardmaster is called as a witness under this contract, must he be paid for his time as provided in Rule 10? On a prima facie basis, yes, regardless of whether he is called by Carrier or the Employee. The only condition, as this Board views it, is that if the Yardmaster called presents frivolous testimony or totally irrelevant material, Carrier may refuse to pay for his time, as an exception to the rule. However, the burden falls on Carrier, not the individual, to establish the basis for the exception.

Applying this principle to the case at bar, the Board notes that Claimant's testimony was characterized as "mitigating" in content. Carrier also characterizes it as "not material". No transcript having been provided, the Board can make no independent judgment with respect to Claimant's role at the investigation. It is significant to note, however, that mitigation is frequently an important element in ultimate decisions as to penalty for rule infractions. Based on the record before us, the absence of evidence that the testimony was either frivolous or irrelevant, and the clear language of the rule, the claim must be sustained.

FINDINGS:

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

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.

The parties to said dispute waived right of appearance at hearing thereon.

A W A R D

Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Fourth Division

Attest:

Nancy J. Dever
Executive Secretary

Dated at Chicago, Illinois, this 15th day of March, 1984