Award No. 12227
Docket No. SG-11616

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

(Supplemental)

Nathan Engelstein, Referee

PARTIES TO DISPUTE:

BROTHERHOOD OF RAILROAD SIGNALMEN

THE VIRGINIAN RAILWAY COMPANY

STATEMENT OF CLAIM: Claim of the General Committee of the Brotherhood of Railroad Signalmen on the Virginian Railway Company that:

(a) The Carrier violated the current Signalmen's Agreement, as amended, particularly Rules 204 and 312, when it required Signal Maintainer E. H. McKay to suspend work on his regularly assigned maintenance position and perform construction work on various dates from October 2 to November 3, 1958, inclusive.

(b) The Carrier should now be required to compensate Mr. E. H. McKay at the Signal Maintainer's rate of pay, as follows, in addition to whatever compensation he may have already received for those dates:

October 2, 1958—eight hours pro rata, one and one-half hours time and one-half.

October 6, 1958—eight hours pro rata, one and one-half hours time and one-half.

October 16, 1958—eight hours pro rata, one hour time and one-half.

October 17, 1958—eight hours pro rata.

October 20, 1958—eight hours pro rata, two hours time and one-half.

October 25, 1958—nine and one-half hours time and one-half.

October 27, 1958—eight hours pro rata, two hours time and one-half.

October 30, 1958—three hours pro rata, one hour time and one-half.

October 31, 1958—eight hours pro rata, two hours time and one-half.

November 1, 1958—five hours time and one-half.

November 3, 1958—eight hours pro rata, eight hours time and one-half, one hour double time.

[Carrier's File: M-1100-Misc.]

There is no rule in the agreement which provides that an employe under one classification of signal employe cannot be required to perform the work of another classification of signal employe. On the contrary, there are rules which specifically contemplate that employes may perform a class of work other than their assigned class. In addition to Rule 702, which states how an employe shall be paid if he is used on another position, Rule 607(c) provides how an employe will be paid in event he is kept off his assigned position longer than a stated period. Under Rule 607(c) a signalman who has been assigned as maintainer (or vice versa) may continue to be employed on work of signalmen classification, provided he does not lose any pay thereby.

The claims in this case are, therefore, not supported by the agreement rules on which they have been presented and are directly contrary to provisions of other rules of the agreement. They, therefore, have no merit and should be denied.

OPINION OF BOARD: The question in dispute is whether Carrier should be required to pay additional compensation to regularly assigned Signalman E. H. McKay for signal construction work he performed in connection with the installation of a Centralized Traffic Control system located outside of his assigned maintainer territory. Claimant McKay asserts that Carrier violated the Signalmen's Agreement, specifically, Rules No. 204 and 312, when it required him to suspend his work to perform work of another class.

Carrier argues that there is no rule in the Agreement which provides that an employe under one classification of signal employe cannot be required to perform the work of another classification. It maintains that there are rules which indicate the employe may perform work other than that of his assigned class. To sustain this position, Carrier cites two rules: Rule No. 702, which states how an employe should be paid if he is used in another position, and Rule No. 607(c), which explains how an employe will be paid if he is kept from his assigned position longer than a stated period. Carrier also submits that Claimant was paid at the overtime rate for the time worked outside of his regular hours. Moreover, the compensation was at the higher signalman's rate rather than that of the lower rate of signal helper. Carrier furthermore urges that Claimant did not absorb overtime, but was paid overtime for the work performed in excess of eight hours.

The record is clear that Mr. McKay was regularly assigned to the position of signal maintainer. According to Rule No. 204, his work "includes the inspecting, testing, and light general repairs of all facilities of the signal department in his assigned territory." To require Mr. McKay to perform signalman construction work on the dates enumerated in the claim is to disregard Rule No. 204, which defines the duties of a signal maintainer and is explicit that the work be performed in his designated territory.

We find that Claimant did suspend work on his regular assignment when he took the work outside his territory. Because no one replaced him on his regular duty is not adequate evidence that there was no suspension of work. Since the installation had not progressed to the point where a signal maintainer was needed, the work on the new location, which he was requested to do, was not regular maintainer work.

We are not persuaded that there would be no point to Rule No. 702, as Carrier argues, unless it is interpreted to mean that an employe may be used on a job in another classification. Carrier considers this Rule without its relation to Rule No. 204. To ignore Rule No. 204 when applying Rule 702 is to

violate the intent and purpose of the seniority rule which is designed to protect the employe's right to the position he has secured. Under certain circumstances, as in the case of an emergency or of the filling of a vacancy, Rule No. 702 may be pertinent, but we do not find it so in the instant case. Nor is Rule No. 607(e) applicable to this dispute, for it concerns employes who are to be transferred to new assignments.

When regular Signal Maintainer McKay was required to perform work other than that accruing to a signal maintainer, Carrier eliminated the need to employ another construction worker to execute this work. This action had the effect of depriving another employe of the opportunity of doing work he might normally perform on an overtime basis. Thus, we find a violation of Rule No. 312, which states "Employes will not be required to suspend work during regular work hours to absorb overtime."

As to the contention of Carrier that additional compensation to Claimant would be unjust enrichment since that party already benefitted by overtime salary, we hold that this payment is a means of maintaining the integrity of the Agreement which, we find, was violated.

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 20th day of February 1964.

CARRIER MEMBERS' DISSENT TO AWARD 12227, DOCKET SG-11616

The Referee is fully aware of the error committed in this award. We handed him a copy of Award 11472, a decision from the same Carrier dealing with a very similar problem. The claim in that case was denied. The Referee was pointedly asked why he ignored that decision. As yet we have received no answer. The Referee, whether he knows it or not, has a responsibility to deal with those matters which the parties discussed. He is shirking that responsibility when he ignores the Carrier's primary authority for denying the claim, and he compounds this dereliction when he adamantly refuses to give

the Carrier the courtesy of discussing the rules which are relied upon. For example, in this case the Referee was advised that Rule 207 — dealt with Signal Helpers and contained the following prohibition:

> "* * * Signal Helpers will not be permitted to do work recognized as that of other classes as named in these rules."

The Referee was asked on what basis he could justify his decision implying a restriction in the use of Signal Maintainers to perform construction work when there was no prohibition, such as is found in the Signal Helpers rule, contained in Rule 204. Again, the Referee arbitrarily refused to answer this question. The Referee was completely aware the parties knew how to insert a prohibition in the use of other classes of employes in the rule when that was their intent. They placed that restriction in Rule 207. They did not place it in Rule 204. In view of these facts, there was only one answer the Referee could honestly give. Therefore, he chose to give none.

Obviously, we cannot force the Referee to give an answer to a specific question. Our powers are limited. However, we have a responsibility in this matter also. Where the Referee refused to reply to a specific question, the inescapable conclusion is, such answer if honestly given, would destroy the decision. The Referee's silence, when he had an obligation to speak, impeaches the award.

In addition to the many other errors in this award, which we will not detail because of their obvious nature, the one that must stun any reader even vaguely familiar with contract interpretations and basic legal principles applicable thereto, is the statement appearing in the final paragraph of the "Opinion", which acknowledges the plea of unjust enrichment and then dismisses it as though it were some nuisance defense not worth considering. Indeed, this attitude reflects the Referee's entire treatment of this case from the Carrier's standpoint. The Referee's decision on the question of damages is flatly contrary and repugnant to all authority on contract law — and this authority was specifically cited in detail for his benefit. The citation was treated with an air of indifference, if not intolerance. The Referee is advised that the Courts have judiciously and zealously applied the law of damages to our awards, and no reason was advanced for making an exception in this case. The Referee's decision places the Claimant in a better position than he would have been in had the contract not been broken. This is contrary to contract law and unenforceable for that reason.

We dissent to this decision because it has settled nothing — instead, it created controversy where before there was at least, a semblance of understanding.

W. F. Euker
R. E. Black
R. A. DeRossett
G. L. Naylor
W. M. Roberts

LABOR MEMBER'S ANSWER TO DISSENT TO AWARD NO. 12227, DOCKET NO. SG-11616

Contrary to the implication of the majority's dissent, there is no error in the conclusions reached in Award No. 12227. The subject award is, hope-

fully, an indication of a trend toward a return to common sense and a discontinuance of the practice of granting to Carriers through the guise of interpretation relief from their obligations and commitments to their employes.

Rule 204 of the parties' agreement is free of ambiguity; Award 12227 correctly interprets and applies this rule and the balance of the agreement.

The dissenters cite and rely upon Award No. 11479; we fail to find any similarity between that case and this dispute. It must be recognized that the referee in Award No. 11479 held that the claim should be denied only because of his opinion that there was a lack of proof of the complained-of act; no such deficiency existed here.

Award No. 12227 is correct in every respect.

W. W. Altus