Award No. 13663
Docket No. SG-13250

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Daniel Kornblum, Referee

PARTIES TO DISPUTE:

BROTHERHOOD OF RAILROAD SIGNALMEN

ST. LOUIS-SAN FRANCISCO RAILWAY COMPANY

STATEMENT OF CLAIM: Claim of the General Committee of the Brotherhood of Railroad Signalmen on the St. Louis-San Francisco Railway Company that:

(a) The Carrier violated the Signalmen's Agreement, especially the Scope Rule, the Classification Rules and Rules 2, 19 and 61, when it failed to call Signal Maintainer W. H. McCully to correct a signal failure at Cherokee Yards on January 28, 1961, and, instead, called Test Foreman C. J. Land to clear the trouble.

(b) The Carrier now be required to compensate Test Foreman C. J. Land for 2.7 hours at the Signal Maintainers' overtime rate of pay.

(c) The Carrier now be required to compensate Signal Maintainer W. H. McCully for 2.7 hours at the overtime rate of pay.
[Carrier's File: D-3655]

EMPLOYES' STATEMENT OF FACTS: On January 28, 1961, Carrier experienced trouble with its Cherokee Retarder Yard at Tulsa, Oklahoma. The Carrier telephoned Signal Maintainers Bradshaw and Stow, neither of whom answered the telephone. Carrier then telephoned Test Foreman C. J. Land, who proceeded to the yard and cleared the trouble. Other Signal Maintainers were available and standing by to be called for emergency service, and among those available were Claimants W. H. McCully and W. V. Endecott. Mr. McCully is assigned to the retarder yard, and Mr. Endecott is assigned to a signal section and resides in Tulsa.

The Carrier claims it did not call Claimant McCully because he did not have a telephone. But the record in this dispute reveals that Claimant made arrangements to be called and the Carrier's Signal Supervisor notified him that those arrangements were not satisfactory. The Carrier was obligated under the agreement to try to contact Mr. McCully, but Carrier made absolutely no effort to call Claimant or Mr. Endecott.

Test Foreman Land is a monthly-rated employe, and the bulletin under which he was awarded his position lists his duties as follows:

On the other hand, Claimant McCully did not have a telephone, and did not advise the Carrier how he might be called and the claim in his behalf has neither merit nor Agreement support and should be denied.

The agreement rules as they apply to the particular factual situation involved do not warrant a sustaining award and this Division is requested to so find.

(Exhibits not reproduced.)

OPINION OF BOARD: Before we can reach the merits of this dispute a threshold issue must first be resolved. In its submission to this Board the Carrier asserts that "No conference was held on the property on the instant claim and it is, therefore, prematurely before the Board."

In the first place, the record does not support this unexceptional and categorical assertion of the Carrier. On the contrary, it shows without challenge that no less than two such conferences were held on the property: the first, on March 17, 1961, was between the Organization's General Chairman and the Carrier's Signal Engineer at the latter's office on the property; the second, on May 16, 1961, between the General Chairman and the Carrier's Superintendent of Communications and Signals, also at the latter's office on the property.

The only personal conference that was omitted in the progression of this dispute on the property to which the Carrier now takes exception was one with the Carrier's Director of Labor Relations, presumably, its Chief Officer designated to handle such disputes. But the record spells out, and we here find, that to all intents and purposes there was a **mutual** waiver by the parties of such a conference. This is indicated, in effect, in the exchange of letters between the Organization's General Chairman and the Carrier's Director of Labor Relations on June 6 and July 10, 1961, respectively. The former's letter, June 6, 1961, was the appeal to the Director of Labor Relations from the rejection of the claim by the Carrier's representatives with whom, as indicated, personal conferences had already been held. Its concluding sentence stated that if a conference was desired "to discuss and dispose of this matter kindly advise time, place and date." Instead of scheduling such a conference the response of the Carrier's Director of Labor Relations, July 10, 1961, consisted rather of a definitive denial on the "merits" of both facets of the claim and stating the reasons therefor. Its only reference to a conference was a concluding one that if the addressee, the General Chairman, should "**nevertheless** desire to **further** handle these matters in conference", one would be arranged. (Emphasis ours.) Apparently, from this exchange of correspondence, taken in conjunction with the conduct of the parties, it is fair to conclude that **both** sides then felt that, in the circumstances, still another conference on the matter would be an act of supererogation.

From its repeated pronouncements on the subject this Board is well aware that the usual joint conferences on the property "up to and including the chief officer of the carrier, etc.", is normally a procedural and statutory prerequisite to its jurisdiction. E.g., Award 12499 (Wolf); see also Award 11737 (Stark). And while it may well be that it is not within the power of the Petitioner unilaterally to waive any such conferences (but Cf., Awards 2786, 3269, 10030, 10139, 10567, 10675, 10769), it has been held that the parties **jointly** can "elect to waive the oral discussion, as was done in this instance" (Award 7403, Larkin), and also indicated that "There may be

cases where the parties mutually agree to forego the conference" (Award 11737, supra). By implicit agreement of the parties and by their conduct there was such a joint waiver in this case and, in all the circumstances disclosed, including also the fact that no less than two "sit down" conferences were actually held on the property on this claim, we hold that the Carrier's argument as to lack of jurisdiction is not well taken.

We come then to the merits of this dispute. On Saturday, January 28, 1961, a radar transmitter failed in the master retarder at the Carrier's Cherokee Yard in Tulsa, Oklahoma. This tied up the hump yard operations and created an emergency. There were then at least four hourly rated Signal Maintainers assigned to work the Cherokee Yard, including Claimant McCully, who lived in Tulsa. The Carrier tried vainly to call two of these Signal Maintainers, but neither answered his telephone. The third one was not subject to call, having reported off duty in accordance with the rules. Admittedly the Carrier never attempted to call the fourth, Claimant McCully. As the Carrier put it, "Claimant McCully had given his supervisor his street address in Tulsa, but on the date of the claim he did not have a telephone."

In view of the emergency the Carrier then called Claimant Land, a Signal Test Foreman and thus a monthly rated employe under the Agreement. This Claimant reported to the Yard and corrected the failure. He was given no added compensation for this work because, according to the Carrier, as a monthly rated employe he "has been compensated for all services performed during the calendar month in which the claim occurred." But claim is made on behalf of both McCully and Land that each be compensated at the Signal Maintainer's overtime rate for the time spent in correcting the failure.

The claim of McCully is predicated primarily on Rule 19 of the Agreement. In effect, under this Rule all employes are on standby duty in the event of "emergencies" and are obligated to "notify the person designated by the Management where they may be called." The Rule also provides that "Unless registered absent, regular assignee will be called." As indicated, Claimant McCully, a "regular assignee" for purposes of the work in question, was not called to perform it.

Carrier's basic excuse is that because Claimant had no telephone, it did not know where or how to contact him. But the record shows that for purposes of Rule 19 Claimant had previously filed with Management's designee his residence address in Tulsa, the city which was also the situs of the emergency work in question. Moreover, it shows that before the event which gave rise to this claim he had made arrangements with the call boy (crew caller) as to how he could be reached at his residence when on standby duty. While it is true that Management had apprised the Claimant that his arrangement with the call boy was "unsatisfactory", it did not tell him why or advise him how to rectify it. The implication in the record is plain that for Management's part anything short of ready access to the Claimant by telephone would have been equally unsatisfactory.

There is no requirement in the Agreement that an employe maintain a telephone for emergencies or any other purpose. Certainly there is nothing in th Agreement or the working arrangements which makes it a condition of hire or of continued employment that an employe have or be accessible by telephone. Rule 19 simply provides that the employes notify Management "where they may be called." In turn, the Rule provides that "Unless registered absent, regular assignee will be called" by Management. This Rule has been construed by this Board to require, among other things, that the

Carrier at least make "a reasonable effort to call the Claimant for service", as follows (Award 11333, Coburn):

> "The foregoing rule is mandatory in two pertinent respects: First, it requires the employe to notify someone designated by management where he may be called; second, it requires the Carrier to call the 'regular assignee' for emergency service unless he has registered absent. As was so aptly said in our Award 3292, 'Under the rule the duty to make the call rests on the Carrier, the duty to respond rests on the employe.'
>
> The primary issue presented here is whether the Carrier made a reasonable effort to call the Claimant for the service. (Awards 9747, 10376, 10771)."

See also Award 11225 (Sheridan).

And it had been earlier held by this Board that the fact that the employe had no telephone or was not available by telephone does not excuse the Carrier from making the effort to call him (Award 3292, Simmons):

> "Under the rule the duty to make the call rests on the Carrier, the duty to respond rests on the employe. Carrier pleads an impossibility of making the call. Such a situation as existed does not fall in the category of an impossibility that excused performance. The making of the call was possible, but not practical. It was not the duty of the employe to furnish a practical means to the Carrier. That duty rested on the Carrier. It having contracted to make the call, and not having done so, must respond in the payment which the rules require."

In the instant case it is not denied that at the time of the trouble Claimant McCully (1) had not "registered absent"; (2) had notified Management where he could be called; (3) was regularly assigned at the point of the trouble; (4) was available if called. The inexorable fact is that Carrier made no effort to call him. We hold, therefore, that Carrier must respond by the payment to him of the amount claimed on his behalf.

From the point of view only of damages the claim on behalf of employe Land is inevitably tied to the disposition of the McCully claim. In consequence, therefore, of our directing payment to Claimant McCully, we hold that the claim of employe Land must be denied. Manifestly, were we to direct the Carrier also to pay Claimant Land for the same services we would be compounding the damages and, in effect, imposing a penalty on the Carrier. Of course, in so denying the Land claim we do not otherwise pass upon its merits per se.

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

That the parties waived oral hearing;

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 to the extent found in the above Opinion.

AWARD

Claim on behalf of employe McCully is allowed. Claim on behalf of employe Land is denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 17th day of June 1965.

LABOR MEMBER'S DISSENT TO AWARD 13663,
DOCKET SG-13250

The Majority, consisting of the Referee and the Carrier Members, correctly disposed of the lack of conference issue injected by Carrier.

The Majority likewise correctly interpreted and applied Rule 19.

The Majority errs, however, in its treatment of the claim in behalf of Claimant Land because upon compliance with this award, Carrier will have paid exactly what it would have paid Claimant McCully if he had been called, yet it was Claimant Land who was required to perform the service, in no way related to his regular assignment, as a result of Carrier's failure to comply with the plain terms of the agreement.

To hold that under such circumstances the allowance of claim in behalf of Land would be imposing a penalty on the Carrier is far fetched, to say the least.

G. Orndorff
Labor Member