Award No. 16091
Docket No. SG-15744

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Nathan Engelstein, Referee

PARTIES TO DISPUTE:

BROTHERHOOD OF RAILROAD SIGNALMEN

SOUTHERN RAILWAY COMPANY

STATEMENT OF CLAIM: Claim of the General Committee of the Brotherhood of Railroad Signalmen on the Southern Railway Company et al, that:

(a) Mr. Thurman Reed, regularly assigned Signal Maintainer — Shelbyville, Ky., be paid at his pro rata rate for one (1) hour on each of the dates of June 17, 18, 23, 29, 30, July 2, 7, and 8, 1964, when he was required to work during his assigned noon meal period.

(b) Mr. Thurman Reed, regularly assigned Signal Maintainer – Shelbyville, Ky., be paid at his overtime rate of pay for eight (8) overtime hours worked on Mr. Reed's assigned territory by Signalman W. B. Gentry, a junior employe in the Signalman-Maintainer class, on each of the dates of June 16, 17, 18, 19, 22, 23, 24, 25, 29, 30, July 1, 2, 6, 7, 8, and 9, 1964.

(c) Mr. W. B. Gentry, Signalman–Supervisor McIntyre's territory, be paid at his pro rata rate of pay as Signalman for eight (8) hours on each of the dates listed in claim (b) when required to lay off his regularly bulletined assigned position of Signalman (8:00 A. M. to 5:00 P. M. with one hour for lunch) and required to work from 5:00 P. M. to 1:00 A. M. on each of such dates.

(d) Mr. W. B. Gentry, Signalman, be paid at his overtime rate of pay as Signalman on each of the dates listed in claim (b), less amount previously paid, when required to work from 5:00 P. M. to 1:00 A. M. on such dates.

[Carrier's File: SG-20555]

EMPLOYES' STATEMENT OF FACTS: Paragraph (a) of the Statement of Claim is no longer at issue. Following the institution of the claim by General Chairman E. C. Melton, Signal Maintainer Thurmon Reed was properly paid for the noon meal periods he was required to work during the period from June 17 to July 8. Paragraphs (b), (c) and (d) are still unresolved.

'(b) Claim of the Brotherhood that Mr. Thurman Reed, regularly assigned Signal Maintainer, Shelbyville, Ky., be paid at his overtime rate of pay for 8 overtime hours worked on the assigned territory of Mr. Reed by Signalman W. B. Gentry, a junior employe in the Signalman-Maintainer class, on each of the dates June 16, 17, 18, 19, 22, 23, 24, 25, 29, 30, July 1, 2, 6, 7, 8, and 9, 1964.

(c) Claim of the Brotherhood that Mr. W. B. Gentry, Signalman, Supervisor McIntyre's territory, be paid at his pro rata rate of pay as Signalman for 8 hours on each of the dates listed in claim (b) when required to lay off his regularly bulletined assigned position of Signalman 8:00 A. M., to 5:00 P. M., with one hour for lunch and required to work from 5:00 P. M. to 1:00 A. M., on each of such dates.

(d) Claim of the Brotherhood that Mr. W. B. Gentry, Signalman, be paid at his overtime rate of pay as Signalman on each of the dates listed in claim (b), less amount previously paid, when required to work from 5:00 P. M. to 1:00 A. M., on such dates.'

The signalmen's agreement has been properly interpreted and applied. We will therefore resist to the utmost your effort to misconstrue the agreement and exact from the company sums of money when no work was performed."

OPINION OF BOARD: Carrier sent a rail relay timer and surface gang to work on the territory assigned to Signal Maintainer Thurman Reed. Mr. Reed was used to perform signal work required in connection with the work done by the timbering and surfacing gang. He worked during his regular hours, the first shift, 8:00 A. M. to 5:00 P. M. W. B. Gentry, as Assistant Signalman, was assigned to perform the necessary signal work in connection with the project on a second shift from 5:00 P. M. to 1:00 A. M.

Brotherhood claims in behalf of Mr. Thurman Reed that Carrier violated the Signalmen's Agreement when it assigned Mr. Gentry to perform the extra service required by Carrier on the territory that was regularly assigned to Mr. Reed. It takes the position that this assignment required Mr. Gentry to suspend work on his regular position and was made to avoid payment of overtime to Signal Maintainer Reed. It also points out that there could be no second shift involved in the assignments which brought about the dispute since Mr. Gentry started at 5:00 P. M. instead of 4:00 P. M. a requirement for the starting time of the second shift under Rule 27.

Brotherhood makes two claims for Mr. Reed, a claim for compensation because he was not able to take his noon meal when he performed the assignment, and a claim for overtime on the grounds that he was entitled to the work in preference to the junior employe, Mr. Gentry. Brotherhood also makes two claims for Mr. Gentry. It contends that he is entitled to compensation at the pro rata rate because he had to lay off his regular assigned position to do the work on the second shift and it claims that he entitled to be paid at the overtime rate for the work he performed during the second shift outside his regular assigned working hours.

Carrier asserts that its failure at the outset to pay Mr. Reed for working during his meal period was due to the fact that this employe did not turn in time for such work. This compensation was paid him after a request was made.

With reference to the claim that Mr. Reed be paid at the overtime rate because as senior he was entitled to any overtime work in his assigned territory in preference to his junior, Mr. Gentry, Carrier maintains that the second shift position was a temporary position, that the Agreement does not prohibit it from establishing such a temporary position, and that the assignment of Mr. Gentry was proper under the controlling Agreement. It relies upon Rule 19 to support its right to fill a temporary vacancy. Carrier also denies that Mr. Gentry was required to suspend work during his regularly assigned working hours, for it asserts he was assigned from an Assistant Signalman position to a temporary position of Signalman, a higher class. This change was not for the purpose of absorbing overtime.

Carrier also states that the starting time for the second shift of 5:00 P. M., one hour later than Rule 27 prescribes, was the logical arrangement since the finishing time of the first shift was 5:00 P. M. and the Agreement stipulates that the second shift follow the quitting time of the first shift. Furthermore, Carrier asserts payment was made to Mr. Gentry at time and one-half for sixteen days for the late starting time, one hour after 4:00 P. M.

Carrier also denies the claim for overtime for Mr. Gentry on the grounds that he was properly paid at the pro-rata rate for filling a temporary vacancy on the second shift.

Since the record shows that Mr. Reed was paid for the meal hour he worked on the dates in question, there is no need to consider part (a) of the Statement of Claim.

With reference to part (b) of the Statement of Claim we find that the Agreement does not give Mr. Reed the right to perform all signal overtime work on his assigned territory.

The record shows that on the property Carrier took the position that a second shift had been created and that it had filled this position in the manner prescribed by the Agreement except that the starting time for the second shift was later than Rule 27 requires. Carrier admitted a technical violation and made payment at the time and one-half rate for the one hour earlier starting time. Since Carrier did not rely upon Rule 19 on the property, its argument based upon this rule is not considered at this time.

Mr. Gentry was removed from his regular assignment to fill a temporary new position. Thus, in violation of the Agreement he was suspended from his regular assignment and therefore is entitled to paid at his overtime rate of pay. Since he was already paid at the pro rata rate he is entitled to be paid an additional amount, the total of which is to equal the overtime rate.

For the foregoing reasons we hold that part (a) of the Statement of Claim is dismissed, part (b) is denied, part (c) is sustained as to violation of the Agreement, but compensation is denied because of payment already made and part (d) is sustained and overtime pay is awarded with deduction made for the pro rata rate already paid to Mr. Gentry.

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 claim is sustained in part and denied in part in accordance with opinion.

AWARD

Claim sustained in part and denied in part in accordance with opinion and findings.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 15th day of February 1968.

CARRIER MEMBERS' DISSENT TO AWARD NO. 16091, DOCKET NO. SG-15744

We dissent to those portions of Award 16091 sustaining part (c) of the claim as to violation of the Agreement and sustaining part (d) to the extent indicated in the Opinion of Board.

The majority is correct in stating:

> "The record shows that on the property Carrier took the position that a second shift had been created and that it had filled this position in the monner prescribed by the Agreement except that the starting time for the second shift was later than Rule 27 requires. * * *"

In the handling on the property the Carrier pointed out that there is no requirement in the Agreement for bulletining new positions or vacancies of thirty days or less; that the new position or vacancy created on the second shift was for less than thirty days, and that Claimant Gentry was assigned to the position in the manner prescribed by the Agreement. Rule 19 of the Agreement, captioned "Temporary Service," prescribes the manner in which temporary positions or temporary vacancies may be filled.

Awards of the Board are legion to the effect that all relevant provisions of all agreements to which the parties are subject may and must be considered by the Board in determining a claim, and that the parties are chargeable with full knowledge of the rules of the Agreement by which they are bound. As succinctly stated in Award 11644:

"It is true that, generally, matters raised for the first time on appeal to this Board may not be considered. This does not apply to Agreements and agreed interpretations of such Agreements. Both parties are charged with full knowledge of applicable rules, agreements and interpretations. These are always proper for Board consideration whether they were or were not specifically presented and discussed on the property. * * * "

As Rule 19 of the Agreement, by its own terms, was clearly applicable to the filling of the temporary position or vacancy on the second shift, the majority committed serious error in refusing to consider the Carrier's arguments as to the applicability of that rule.

Furthermore, it is axiomatic that in submitting a dispute to this Board, the burden of proof is upon the one alleging an agreement violation. In this case that burden rested on the Petitioner. It was not the responsibility of the Carrier to point to some rule permitting its action. The Petitioner did not prove that the Agreement was violated by the Carrier's assignment of Claimant Gentry to the temporary position or vacancy on the second shift. On the other hand, Gentry was assigned to that position in accordance with the provisions of the Agreement, and the claim in his behalf should properly have been denied in its entirety.

W. B. Jones
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R. E. Black
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