



Award Number 17260

Docket Number SG-17881

NATIONAL RAILROAD ADJUSTMENT BOARD

**THIRD DIVISION
(Supplemental)**

James Robert Jones, Referee

PARTIES TO DISPUTE:

BROTHERHOOD OF RAILROAD SIGNALMEN

UNION PACIFIC RAILROAD COMPANY

STATEMENT OF CLAIM: Claim of the General Committee of the Brotherhood of Railroad Signalmen on the Union Pacific Railroad Company:

- (a) Carrier violated the current Signalmen's Agreement, as amended, particularly Rule 55(a), when beginning March 13, 1967, Mr. J. W. Burleski, Jr., Signalman on the Wyoming Division, was assigned to work with another Signalman at Rawlins, Wyoming.
- (b) Carrier be required now to pay Mr. Burleski the Foreman rate of pay for as long as this situation existed.

EMPLOYEES' STATEMENT OF FACTS: During the period of time involved in this dispute, Signalmen J. W. Burleski (Claimant) and E. J. Jacobsen and Assistant Signalman J. D. Adams were regularly assigned to positions in Union Pacific (Carrier) Signal Gang No. 3210, which gang was headquartered in outfit cars located at Denver, Colorado. Starting March 13, 1967, the Carrier caused the three above named employees to perform signal work at Rawlins, Wyoming. These employees' regular Foreman in Signal Gang No. 3210 neither exercised supervision over their work nor carried their time on the Gang pay roll during the time here in dispute; supervision was given by the General Foreman and/or Assistant Signal Supervisor (both Carrier officials) at Rawlins.

While at Rawlins the three employees were reimbursed for their expenses and, in the cases of Burleski and Jacobsen, paid the Signalmen's rate of pay, Adams receiving the Assistant Signalmen's rate.

On the property this dispute was handled in the usual and proper manner by the Brotherhood, up to and including the highest officer of the Carrier designated to handle such dispute, without receiving a satisfactory settlement.

There is an agreement in effect between the parties to this dispute, bearing an effective date of April 1, 1962, as amended, which is by reference made a part of the record in this dispute.

(Exhibits not reproduced)

CARRIER'S STATEMENT OF FACTS: At the time the violation is alleged to have occurred, the claimant in this dispute, Signalman J. W.

cated that he assumed that would be the case. For some reason, however, while the Mattison claim was dropped and allowed to expire under the time limit provisions of the Agreement, the Organization did progress this present claim involving the identical circumstances.

(Exhibits not reproduced)

OPINION OF BOARD: Claimant, a Signalman, and another signalman and an assistant signalman, were regularly assigned to Carrier's signal gang No. 3210 headquartered at Denver, Colorado. These three were required to perform certain work at Rawlins, Wyoming, from March 13, 1967, through March 31, 1967.

Claimant contends that he should be paid at the foreman rate of pay during this period of time. Claimant relies mainly on Rules 2(b) and 55(a) to support his claim. These rules are reproduced for the record:

"Rule 2(b) Signal Foreman: An employe who is assigned to the duties of supervising the work of other employes, and who is not required to regularly perform the work over which he has supervision."

"Rule 55(a) Allocation of Work. It is understood that one signal maintainer or signalman with one or two assistant signalmen may perform work not under the direction of a signal foreman, and that one signal maintainer may assist another maintainer in making temporary necessary repairs."

Claimant contends that by excepting from situations in which working under the direction of a Signal Foreman is required (exceptions are outlined in Rule 55 quoted above), Rule 55(a) demands that in all other cases in which a group of two or more employes are worked, one of the employes shall be a Signal Foreman.

Carrier contends that in the absence of some clearly defined legislative restraint or contractual limitation, an employer is free to manage his business according to his own best judgments. Carrier states that neither Rule 2 nor Rule 55 so limits in this case.

Carrier states that Rule 55 does not require a foreman for one or more signalmen working temporarily away from the remainder of the gang under the general supervision of their regularly assigned gang foreman. Carrier further states that Rule 55 does not require nor imply that a foreman must be physically present to oversee the operation of all of the members of his gang.

Carrier contends that when Claimant and the other signalmen were dispatched to Rawlins, they were first instructed by the foreman as to the exact nature of the work to be performed, and were furnished with diagrams, materials, tools and equipment which would be required. Carrier states that no further direct supervision was needed.

Carrier also contends that claim should be denied because Organization neither alleged nor proved that Claimant was assigned nor performed any supervisory duties.

It is axiomatic that the burden of proving a prima facie case is on the Claimant. In this case, Claimant must prove that the work performed was

"not under the direction of a signal foreman". We feel that Claimant has fallen short in proving this prima facie case; Claimant has not satisfactorily refuted Carrier's contention that full and complete instructions and equipment were provided by the Signal Foreman at Denver before Claimant began work at Rawlins.

Rule 55(a) would require direction of a Foreman in the instant case. However, Carrier contends, and Claimant has not adequately proven otherwise, that the necessary direction was provided by the Signal Foreman.

It is true that one could conceive that the combination of distance and time away from direct supervision would result in lack of necessary supervision at the site where the work is performed. However, this Board should not reach such suppositions unless supported by substantial evidence in the record. Such preponderance of evidence is not to be found in this Record.

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 Employees involved in this dispute are respectively Carrier and Employees 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 not violated.

A W A R D

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 30th day of June 1969.

DISSENT TO AWARD NO. 17260

DOCKET NO. SG-17881

Award No. 17260 is in error.

The Majority bases its denial award on its finding that the Claimant did not disprove that "the necessary direction was provided by the Signal Foreman". It is difficult for the undersigned to comprehend their reasoning. The record before the Board absolutely established that the employees involved were separated, and received no instructions, from any Foreman for a period of nineteen (19) calendar days. (We hold the distance to be im-

material in view of the protracted period and language of the controlling Agreement.) In Award No. 12 of Public Law Board No. 15, Referee Don Hamilton said:

"We are aware of the doctrine of physical proximity referred to by the Carrier. However, we are of the opinion that this doctrine cannot be stretched to cover the situation in this case. If the position of Foreman is to be meaningful in the supervision of the work involved, we fail to see how such supervision can be properly executed for a period of four days at a distance of 400 miles. This is not to say that if the Foremen were to be gone a relatively long distance for a relatively short period of time, that the same rule would apply. However, when a distance of 400 miles is coupled with a time lapse of four days, we are of the opinion that the Foreman's effectiveness is diminished, if not obliterated." (Emphasis ours)

Public Law Boards function under the same Railway Labor Act as does this Board. That Act proclaims one of its purposes to be:

"* * * to provide for the prompt and orderly settlement of all disputes growing out of grievances or out of the interpretation or application of agreements * * *". (Emphasis ours)

The Award of Public Law Board No. 15 cannot be said to be palpably wrong and should have been precedent in this dispute.

Award No. 17260 being error, I dissent.

/s/ W. W. ALTUS, JR.
W. W. Altus, Jr.

For Labor Members

July 25, 1969