NATIONAL RAILROAD ADJUSTMENT BOARD

Award Number 25508

THIRD DIVISION

Docket Number SG-24755

Robert Silagi, Referee

PARTIES TO DISPUTE: (Brotherhood of Railroad Signalmen
(
(Fort Worth and Denver Railway Company

STATEMENT OF CLAIM: Claim of the General Committee of the Brotherhood of Railroad Signalmen on the Fort Worth and Denver Railway Company:

On behalf of Signal-Communication Inspector C. W. Oatery, Fort Worth, Texas, for sixteen hours at the punitive rate of pay and eight hours at the double time rate of pay, account being required to be on standby when no emergency existed, from 7:30 a.m. on August 16, 1981, until 7:30 a.m. August 17, 1981. [General Chairman file: FWD-81-260]

OPINION OF BOARD: Claimant, a monthly rated employee, had assigned work days Monday through Saturday with weekends designated as "rest" and "subject to call" days. Sunday was his rest day. Claimant regularly alternated with Signal Inspector Douglas on weekends. To cover Douglas' vacation, Signal Maintainer R. L. Wilburn was assigned as Douglas' relief and placed on subject to call status on Sunday, August 16, 1981. Wilburn lacked experience and Carrier was concerned that he might not be able to cope with an emergency, consequently Carrier also placed Claimant on subject to call status as a back-up to help Wilburn should the need arise. No emergency arose and Claimant was not called that day, nor, apparently, was Wilburn.

At the heart of this dispute is Carrier's contention that compensation is paid only for physical labor actually performed as contrasted with the Organization's view that service also merits compensation on the theory that "they also serve who stand and wait".

The Organization asserts that Rules 9, 10 and 42-D control:

"Rule 9 - Overtime - Hourly Rated Employes.

A. Time worked preceding and continuous with a regularly assigned work period will be paid for on the actual minute basis at time and one-half rate, with a minimum of one hour at time and one-half rate and payment of double time rate after sixteen (16) hours of work in any twenty-four (24) hour period. An employe required to work eight (8) or more hours preceding and continuous with his regularly assigned work period will be paid at time and one-half rate for work performed during the regularly assigned work period.

B. Time worked following and continuous with a regularly assigned work period will be paid for on the actual minute basis at time and one-half rate, with payment at double time rate after sixteen (16) hours of work in any twenty-four hour period.

"C. There shall be no overtime on overtime; neither shall overtime hours paid for, other than hours not in excess of eight (8) paid for at overtime rate on holidays or for changing shifts, be utilized in computing the five (5) days per week, nor shall time paid for in the nature of arbitraries or special allowances such as attending court, travel time, etc., be utilized for this purpose, except when such payments apply during assigned working hours in lieu of pay for such hours, or when such time is now included under existing rules in computations leading to overtime.

NOTE: In the application of this rule paragraphs A and B, an employe will not be released from duty for the purpose of breaking the continuity of overtime work."

"Rule 10 - CALLS

A. An employe notified or called to perform work outside of and not continuous with his regular work period will be paid a minimum of two (2) hours and forty (40) minutes at time and one-half rate, and if held on duty in excess of two (2) hours and forty (40) minutes, time and one-half will be allowed on the minute basis, with payment at double time rate for work in excess of sixteen (16) hours of continuous work.

B. The time of an employe who is notified prior to release from duty will begin at the time required to report at designated point at headquarters and end when released at such point. The time of an employe who is called after release from duty will begin at the time called and end at the time he returns to designated point at headquarters.

NOTE: In the application of paragraph A of this rule an employe will not be released from duty for the purpose of breaking the continuity of overtime work."

"Rule 42-D - RATES OF PAY

Monthly-rated employes shall be assigned one regular rest day per calendar week (Sunday, if possible). Overtime rules applicable to other employes who are subject to the terms of the Signalmen's Agreement will apply to service which is performed by monthly-rated employes on such assigned rest day.

The Carrier maintains that Rule 11 controls."

"Rule 11 - SUBJECT TO CALL

A. An employe assigned to regular maintenance duties will notify the person designated by the Carrier where he may be called by filing his home address and telephone number with such person. An employe called to perform work outside of assigned working hours will respond promptly when called. The regular assigned employe, if available, will be called for such work on his assigned territory.

B. Monthly rated employes assigned to regular maintenance duties recognize the possibility of emergencies in the operation of the railroad, and will notify the person designated by the Carrier where they may be called. When such employes desire to leave their headquarters or section, they will notify the person designated by the Carrier that they will be absent, about when they will return and when possible where they may be found.

NOTE: An employe will not be subject to call during vacation period which period shall be considered as beginning with the starting time of his assignment on the first day of his assigned vacation period and end at the starting time of his assignment on the first work day following vacation period."

"Work", per se is not defined in the agreement although it is used in a variety of contexts for the clarification of certain rules. The Carrier urges a "hands-on" interpretation of work usually found in the dictionary, as an "activity in which one exerts strength for facilities to do or perform something" or "sustained physical or mental effort to overcome obstacles and achieve an object or result" or "a specific task, duty or function assignment". In the Organization's view such a "hands-on" definition is too narrow in that it would exclude assignments where the function is to be available for a "hands-on" task.

The essential question is whether "time worked" is the equivalent of "service performed". In interpreting the words of any written instrument, except where they are ambiguous, or are words of art or have special technical or trade use, they must be given their ordinary, common usage meaning. Moran v. Prather, 23 L. Ed. 121 (1874) where the Supreme Court said:

"Where the words of any written instrument are free from ambiguity in themselves, and where the external circumstances do not create any doubt or difficulty as to the proper application of the words to the claimants under the instrument, or the subject matter to which the instrument relates, such an instrument, said Tindal, C. J., is always to be construed according to the plain common meaning of the words themselves, and that in such cases dehors the instrument for the purpose of explaining it, according to the surmised or alleged invention of the parties to the instrument, is utterly inadmissible."

To be sure such an interpretation was given more than a century ago, but diligent research fails to reveal a reversal of the Supreme Court on this subject. Contrary to the Carrier's contention it is improper to look to another contract between different parties for help in interpreting the plain, unambiguous words used in the Agreement under consideration.

The alleged distinction between "work" and "service" is not a novel one. This issue has been before this Board on numerous occasions in various contexts and we have found both to be compensable. (Award 21380 Lieberman). The test to be used in the instant case is (a) where on-call time was ordered by the Carrier, (b) whether the time involved herein was outside the regularly scheduled on-call or standby time for Claimant, (c) whether on-call or standby time involve elements which subject the employe to the control and discipline of the employer, and (d) which place a definite restriction on the freedom of movement of an employe.

It is conceded that Carrier placed Claimant on subject to call status. Despite Carrier's claim that employes are required to hold themselves subject to call at all times, it is quite clear that Sunday, August 16, 1981, was not a regularly scheduled on-call day for Claimant. Similarly there can be no dispute that an employe subject to call who fails to respond after being notified by Carrier is subject to discipline. Carrier asserts that the record shows no threat of discipline against Claimant had he failed to hold himself subject to call. It is simply inconceivable that a Railroad employe could flout a legitimate order with impunity. This Board has sustained discipline innumerable times when an employe willfully failed or neglected to obey rules. There is no logical reason to suppose that Carrier would have acted differently in this instance.

Carrier maintains that no restrictions were placed on Claimant's whereabouts. Rule 11, however, does not lend itself to that interpretation. According to said rule, an employe subject to call must advise Carrier of his home address and telephone number and must respond promptly when called. Clearly the rule contemplates that the employe must be reachable on short notice. He may not, therefore engage in recreational or other activities where he cannot receive a message from the Carrier. Moreover, he may not be at such distance from headquarters that upon receiving Carrier's message, he is unable to report to work promptly. The very purpose of placing Claimant on-call was to insure his prompt availability to assist an inexperienced Signal Maintainer should an emergency arise. It would have been of no use to Carrier had Claimant been unreachable or so far away that he could not have reached his work station or the scene of an emergency without delay.

A rational view of the evidence convinces us that all parts of the test mentioned above are answered in the affirmative.

There is no doubt that the assurance of a contingency back-up man had substantial value to the Carrier. That no emergency occurred and that Claimant was therefore not called to perform "hands on" work in no way justifies Carrier's claim that Claimant performed no work. Service can also consist of useful labor even though it does not produce a tangible commodity. (See Webster's Seventh New Collegiate Dictionary.) Applying the ordinary and common usage meaning to "work" and "service" we believe that they are synonyms as used in this Agreement. We therefore hold that Claimant did perform work or service within the context of the rules.

Nothing in the Agreement compels an employe to perform services gratuitously. The question before this Board is how shall Claimant be compensated. The Carrier argues that because the Signal Maintainer received no extra compensation for being on call, neither should Claimant. The record is devoid of any mention of payment of extra compensation for the Signal Maintainer. Assuming, however, that he received no extra compensation for being on-call and that he made no claim for extra compensation, such a non-claim is not an issue before this Board, nor may this Board base its decision upon a doctrine of parity of remedy when one essential part of the equation is missing.

The Organization maintains that since Claimant was subject to call for 24 hours, he should receive 16 hours at the punitive rate of pay and 8 hours at double time. While not abandoning its argument in chief that Claimant is not entitled to any pay at all, Carrier insists that it is unthinkable that Claimant be paid at "punitive rate in the comfort of and with all the amenities of home, during part of that time [he] was sleeping at the double time rate." In this connection the Carrier adverts to Rule 18 - Subject to Call, of an Agreement between Louisville and Nashville Railroad and Brotherhood of Railroad Signalmen (Award No. 720). In said Agreement the parties provided for a minimum of eight hours at straight time pay for standby service when the employe is subject to call on more than alternate Sundays and Holidays... "but if called and they respond, they will be paid in accordance with Rules 16 and 17." Undoubtedly it would have been better had the parties to the instant dispute negotiated a similar rule in their own Agreement. The presence of such a rule in another Agreement does not permit this Board to incorporate its substance into the Agreement under consideration no matter how desirable such a rule would be. That is for the parties to negotiate and agree upon. It has been held countless times that this Board may not improvise rules but must interpret them as they are.

Finally Carrier argues that even if on-call pay is to be awarded, federal law makes it unlawful to permit Claimant to continue at work in excess of 12 consecutive hours therefore compensation for more than 12 hours is impermissible. Indeed the Hours of Service Act, 45 USCS §§61 et seq., makes it unlawful for a common carrier to require or permit an individual who is "engaged in installing, repairing or maintaining signal systems, in case such individuals shall have been continuously on duty for twelve hours to continue on duty or to go on duty until he has had at least ten consecutive hours off duty." The interdiction contained in §63 (a)(1) pertains to one "who is engaged in installing, repairing or maintaining signal systems." Carrier was at great pains to point out that Claimant was doing anything but that. According to Carrier, part of the time Claimant was sleeping in the comfort of and with all the amenities of home! The short answer to Carrier's argument is that §64 (a)(1) prescribes the penalty for violation of §63 as a fine of $500 against the common carrier to be recovered in an action brought by the United States attorney for such violation. Nothing in the Hours of Service Act prevents payment to an individual for services rendered at the direction of a carrier even though such services violate the Act.

Under these circumstances this Board finds that Claimant must be paid for the 24 hours of his service in accordance with the rules applicable at the time the dispute arose. This claim is sustained.

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.

A W A R D

Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Attest: Nancy J. Dever - Executive Secretary

Dated at Chicago, Illinois, this 13th day of June 1985.

CARRIER MEMBERS' DISSENT
TO
AWARD 25508 (DOCKET SG-24755)
Referee Silagi

The essential facts of this case are clearly detailed in the last two sentences of the first paragraph of the Opinion. While Wilburn was "on-call" neither Wilburn nor Claimant were called to perform any service on this date.

The rules quoted at Pages 1 and 2 of the Award have no basis in the present case as there was NO "time worked" either prior to or subsequent to and continuous with a regular assigned work period; nor was there any Call "to perform work outside and not continuous with his regular work period." By their very language Rules 9 and 10 cannot apply. Rule 42(d) requires that "service" be performed.

Under Rule 11, Claimant was advised of the possibility of a call. Such did not impose any restriction on the Claimant nor did it entitle him to any benefit. It simply was compliance with Rule 11(b). The Majority's assertion that such subjected the Claimant to control and/or discipline (P.4) is both unwarranted and bereft of any supporting evidence in the handling of the matter on the property. Further, at Pages 4-5 the Majority concludes that Claimant was in some manner restricted in his freedom of movement. Beyond the Majority's hypothesis of assumptions, there is no evidence of any such impairment. In fact, such a contention was first raised in the Organization's Rebuttal Submission and should have been ignored by the Majority.

While such contentions seem to have an aura of rationality, this Board must confine itself to the FACTS OF RECORD that has been submitted to it. If Claimant considered that he could not engage in "recreational or other

activities" (P-4) that argument and supporting evidence should have been joined on the property. It is not the province of this Board to create loopholes for the parties; it is the duty of this Board to consider all of the evidence of the on-property handling that is in the record.

The Majority's position that the language of the contract provisions is unambiguous and plain is correct. However, in this case, that clear language has been culled to allow 'what if' bootstrapping to take the place of evidence.

The conclusion reached that service or work was in fact performed must fall when the four criteria enunciated by the Majority is examined.

Third Division Award 20036 (Hays):

> "In our judgment the rule does not contemplate payment of double time unless and until an employee has actually 'worked' sixteen (16) hours -- at regular pay for eight (8) hours and then eight (8) hours at time and one-half rate.
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> "In Award 5156 (Carter) the Board held: "....double time accrues in any 24 hour period in which more than 16 consecutive hours are worked...." (Underlining ours). The same language is used in Award 5262 (Robertson).
>
> "It is the opinion of this Board that the Rule means actual work. In Award 10854 (McGrath) the same finding was made, and the Board said: '....it is our decision that the double time rates apply only after sixteen hours of actual work have been performed.'"

Having erroneously concluded that work was performed, the Majority compounds its error by concluding that even while sleeping at home in his own bed (P.5), Claimant is nevertheless performing work that is compensable at the double time rate. One might wonder what restriction Carrier had imposed on Claimant's activities to warrant such a conclusion! The answer cannot be found in the Award nor in the record submitted to this Board. Obviously, the

dictum of Third Division Award 826, "They also serve who only stand and wait", takes on greater meaning as a result of this Award.

In some instances the call to standby, without more, was deemed by the parties to be a service performed. In the disposition of Award 720 such was stated. However, the Majority at Page 5 misinterpreted the basis for Carrier's citation. It was not made in an attempt to have such a result read into the present agreement; it was simply to show that such a call DID NOT EQUATE with any performance of compensable service under the present Agreement. Even Third Division Award 21380, on which the Employes rely, concluded:

> "It is evident that Carrier construed the requisite standby time as service to be compensated in view of its straight time pay decision."

Clearly, in the face of continued opposition, the Employees, as the moving party, should have been required to substantiate to this Board evidence of their contention that actual service was performed.

Second Division Award 10172 (LaRocco) (1/9/85):

> "Before this Board can pass on whether or not the Carrier is correctly applying Rules 3(m) and 3(n), the Organization which bears the burden of proof, must demonstrate that the Claimants are actually being held on constant, around-the-clock call under the threat of possible disciplinary action. Aside from the Organization's mere assertions, there is no evidence in the record to prove that the Carrier has been treating the Claimants any differently than it had in the past."

Finally, the Majority has concluded that Carrier violated the Hours of Service Law when Claimant performed compensable service for the Carrier at home in bed. Claimant's "vigilance" in this regard is its own answer.

We vigorously Dissent.

P. V. Varga

W. F. Euker

M. W. Fingerhut

J. E. Yost