Award No. 826
Docket No. SG-810

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

William H. Spencer, Referee

PARTIES TO DISPUTE:

BROTHERHOOD OF RAILROAD SIGNALMEN OF AMERICA

ATCHISON, TOPEKA & SANTA FE RAILWAY COMPANY

STATEMENT OF CLAIM: "(a) Claim that the agreement is being violated by the railway management requiring the signal maintainers at Thoreau, Laguna, Chambers and Canyon Diablo, Albuquerque Division, to remain within hearing distance of company telephones on Sundays and holidays on which they are scheduled to be 'subject to call.'

(b) Claim for compensation of eight hours at time and one-half rate for the occupants of the signal maintainer's positions at Thoreau, Laguna, Chambers and Canyon Diablo, Albuquerque Division, for each Sunday and Holiday on which they have been required to render service to the company by remaining within hearing distance of company telephones."

EMPLOYES' STATEMENT OF FACTS: "On December 23, 1934, J. G. Brashear, Signal Maintainer, who was then located at Thoreau, New Mexico, made a grievance of being held within hearing distance of his telephone on the days he was scheduled to not work and on which he was held 'subject to call.' He contended being held within hearing distance of his telephone on such days was a violation of Section 11, Article II of their agreement.

"This grievance was handled in the usual manner, first with division officials and finally with the General Manager, and on April 24, 1935, it was settled by the Carrier agreeing that the Maintainer at Thoreau need not remain within hearing distance of his telephone on days he was held 'subject to call,' but that he should call the Dispatcher on the telephone at four hour intervals as per the following:

'THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY
Coast Lines

Los Angeles, Calif.

April 24, 1935

Mr. W. H. Lewis, System Chairman,
B. R. S. of A.,
527 East 4th St.,
Saint John, Kansas.

Dear Sir:

Yours April 20 relative claim of J. G. Brashear, signal maintainer, Albuquerque Division:

I have issued instructions to the Superintendent today to relieve Mr. Brashear of remaining at the telephone on the day he is held subject to call, permitting him to report in at four-hour intervals in

that placed in effect a working arrangement that on one Sunday maintainer would be released from call and on the next Sunday he would remain subject to call, to be paid for only such time as he actually performed service when called and that after fifteen years from date of adoption of the rule and understanding and regardless of conference held with the committee in 1924, when misunderstandings were gone over and straightened out the committee now comes forth and through the medium of a claim attempts to abridge the rule by claiming that the maintainers at Thoreau, Laguna, Chambers, and Canyon Diablo should be paid eight hours at time and one-half when they remained subject to call on alternate Sundays and holidays as it was agreed they would do in 1922 with pay for only such work as they actually performed when called. The Board will please give consideration to the fact that there is only one way that maintainers at the points named can be called on Sundays and Holidays on their off duty on call day and that is by telephone, which requires that they remain within hearing distance of the telephone or be within a radius where they may be called by a member of their family in case of a call.

"We have shown that under the purpose and language of our rules the present claim can not be sustained; that for sixteen years our current practices have been uniformly followed; that over fourteen years ago the same question was raised, exactly as presented in the present submission, and resulted in agreement as to the meaning of the rules. Such agreement is completely sufficient to be either a new agreement or an agreed interpretation, and has been applied ever since it was reached. Notwithstanding the Brotherhood knew the meaning this language had to the carrier and that the carrier was relying upon the employes' own agreement, the employes have never, until the origin of the present dispute, repudiated their own actions or served notice that they had changed their minds. In reliance upon their action and non-action, the carrier re-negotiated the same rules and naturally negotiated only for their well understood and agreed meaning. Every principle that governs the construction of contracts requires the denial of the claim. Furthermore, the signalmen are estopped by their own agreement and by their own conduct, on which the carrier had relied, from now asserting that the words of the schedule which were negotiated on the basis of a well-understood meaning never challenged have a different meaning."

There is in existence an agreement between the parties bearing effective date of Feb. 1, 1929.

OPINION OF BOARD: At the outset it is important to note precisely the factual basis upon which the petitioner rests its claim in this dispute. Paragraph (a) of the claim states that "the agreement is being violated by the railway management requiring the signal maintainer" at named stations "to remain within hearing distance of company telephones on Sundays and Holidays on which they are scheduled to be 'subject to call'." In Paragraph (b) claim for compensation is made on behalf of employes for each Sunday and holiday "on which they have been required to render service to the company by remaining within hearing distance of company telephones."

The record discloses but a single instance in which the carrier purports to challenge the factual basis upon which this claim rests. In its original submission, the carrier states:

> The Board will please give consideration to the fact that there is only one way that maintainers at the points named can be called on Sundays and Holidays on their off duty on call day and that is by telephone, which requires that they remain within hearing distance of the telephone or be within a radius where they may be called by a member of their family in case of a call.

In 1935 precisely the same controversy as the one here under consideration arose. The carrier in its submission states with respect to that controversy:

> Dispatcher's telephone was maintained in living quarters of the maintainer so that in case of signal trouble the dispatcher could call the maintainer and clear up the trouble. There was no other means of communication between the dispatcher and maintainer on such days. The maintainer was therefore required to remain within hearing distance of the telephone to protect any emergency service that might arise.

This controversy was settled by the adoption of a plan under which the signal maintainer was freed from the necessity of remaining in hearing distance of company telephones but required to call the dispatcher's office at four-hour intervals. On May 28, 1936, a representative of the carrier notified a representative of the petitioner that "there has been a change in conditions making it necessary that this concession be withdrawn and instructions have been issued to the Superintendent to this effect." The obvious inference from this communication is that thereafter the claimants in this dispute were again required to remain within hearing distance of company telephones on Sundays and holidays when subject to call. In its Supplemental Statement the petitioner states that "prior to May 1, 1934, the signal maintainers located on the Albuquerque Division or any other division did not have their movements restricted on day off but subject to call, to within the limits of the sound of the telephone." The carrier nowhere denies the accuracy of this statement.

At the rehearing before the Referee, counsel for the carrier denied that the carrier had restricted the employes involved as rigorously as claimed. He asserted that the use of the phrase "of remaining in hearing distance of the telephone" was merely a shorthand expression to describe a broader interpretation and application of the rule involved in this dispute. The petitioner in its Supplemental Statement said:

> Because of the speed of most of the trains being increased and the number of closed stations growing the Carrier concluded it would have to devise some plan to secure assurance of the greatest efficiency in the operation of its signal system. With that thought in mind and without regard of the provisions of the current agreement, under date of April 30, 1934, ... Assistant to General Manager, Coast Lines, Mr. C. E. Hill, issued instructions **that signal maintainers who are subject to call on Sundays and Holidays must remain in hearing distance of phone when there is no other communication.**

Counsel for the carrier took the representative of the petitioner to task for not having produced a copy of the communication containing these alleged instructions. He offered the Division a copy of the communication referred to in the petitioner's statement for the purpose of showing that the carrier had not issued instructions of the type alleged by the petitioner to have been issued. In this communication—written by Mr. Hill to General Chairman Lewis—this statement appears:

> There is only one medium of communication at Thoreau on the day that Brashear is held subject to call and that is by telephone. Anything is liable to happen on the road and there is only one way that Brashear can make himself available and that is by remaining within hearing of the phone.

While this communication relates to a specific station, it is equally applicable to any station at which the only "medium of communication" is the company telephone.

On the evidence of record the Division finds that the carrier during the period involved in this dispute has required the claimants to remain in hearing distance of company telephones on Sundays and holidays when off duty but subject to call.

It is next appropriate to inquire whether the carrier, under Section 11 of Article II of the Agreement between the parties, was justified in imposing this requirement on the claimants. This section provides:

> Employes assigned to, or filling vacancies, on a section or plant will be subject to call. Such employes will notify the designated officer where they may be called and will respond promptly when called. When such employes desire to leave their home station or section they will secure authority from the designated officer who will grant permission if the requirements of the service will permit.

The carrier asserts that the employes in the present claim are in effect asking to be excused from the operation of the "subject to call" requirement. There is, of course, no basis for this assertion. The employes do not deny that on the days in dispute they are subject to call. In the presentation of this claim they are merely asking whether under a fair interpretation of the language of the rule it is permissible for the carrier to require them to remain in hearing distance of the company telephone on Sundays and holidays when off duty but subject to call. The petitioner urges that "no provision exists in the current agreement which requires an employe to remain at any particular place or location, at any time, in anticipation of a call for the purpose of correcting a signal failure or for any other cause, so long as the employe does not absent himself from his home station or section."

The first sentence of Section 11, read in connection with the second paragraph of the section, renders the employes described subject to call on each alternate Sunday and holiday although off duty. This means that on such days the carrier, if the occasion requires, has the privilege of calling them into active service. The section contains two specific requirements—and only two—designed to render the employes available when called. The third sentence of the paragraph provides that the employes may not leave their home station or section without permission from a designated officer of the carrier. The second sentence states that employes subject to call "will notify the designated officer where they may be called and will respond promptly when called." This provision clearly implies that the employes have freedom of movement provided they do not leave their home station or section. It just as clearly negatives the contention of the carrier that it has the privilege of designating the precise spot at which they may be called.

The carrier insists that even though the Division should decide that the first part of the claim must be allowed, Section 7 of Article II must preclude the allowance of the second part of the claim. This states that "except as otherwise provided in these rules no compensation will be allowed for work not performed." This provision, in the opinion of the Division, has no application to the situation. When the carrier, in violation of Section 11 of Article II, required these employes to remain in hearing distance of the company telephones, it required service of them within the meaning of Section 8 of the same article. Certainly the carrier would not have imposed this requirement upon the claimants if it had not felt that their standing-by would be of value to it. "They also serve who only stand and wait."

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 claimants, in violation of Section 11 of Article II of the Agreement between the parties, have been required by the carrier to remain in

hearing distance of company telephones on Sundays and holidays when they are off duty but subject to call; and that they are entitled to be compensated for such service under Section 8 of Article II.

AWARD

(a) The claim is sustained.

(b) The claim is sustained from September 19, 1937.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: H. A. Johnson
Secretary

Dated at Chicago, lllinois, this 16th day of March, 1939.

DISSENT ON AWARD 826—DOCKET SG-810

The majority opinion compels express dissent. Its first seven paragraphs are devoted to establishing the proposition that the carrier, by instruction or letter or otherwise, required the signal maintainers at Laguna, Thoreau, Canyon Diablo, and Chambers to remain within hearing distance of the telephone. The remaining paragraphs are devoted to the proposition that the carrier was not justified under the agreement in such requirement, and to the justification of a damage award. In its process of reasoning, the majority distort and confuse the vital issues; complete violence is done to the record, and a result is reached not justified by the facts.

The basic issue is not fairly disputable. The carrier has contended that the employes were required by the rules to remain where they could be reached over the telephones in their living quarters at the points named. This requirement would be satisfied by their remaining in hearing distance of the phone, or having someone for them be within hearing distance of the phone and be themselves where they would be promptly reached. The employes in their brief filed at the hearing described the instructions against which they complain, which alleged instructions have never been produced, as instructions "that signal maintainers who are subject to call on Sundays and holidays must remain in hearing distance of phone when there is no other communication." The sole issue of the proceeding, therefore, is properly phrased as follows: Can the carrier properly require the signalmen to remain where they can be reached? The issue has not been, and cannot be, resolved against the carrier under the rules.

The majority, in phrasing the issue as it has, has drawn a red herring across the trail. In stating that the carrier required these men to remain within hearing distance of the telephone, the petitioner claims and the majority lend color to the claim as involving harsh and arbitrary action. In truth, the obligation to be available for call is imposed by the agreement. The country around the headquarters of the four signalmen involved is western desert country, and with only one exception there are no settlements at the points in issue. There is no way to reach maintainers at any of the four points except over the telephones in their living quarters. The situation at these places is well known to all the employes, and accepted by them when they bid upon such jobs in response to bulletins. The snow and sleet storms of winter, and the lightning and cloudbursts of summer, do not await the moment when an employe may choose to comply with his obligation to be on call to repair the damage to signals and remove hazards to life and property and delays to trains which are created without warning; hence the agreement, which means that employes must so conduct themselves that they can be reached.

Preliminary to discussing the reasoning of the majorty, I desire briefly to register protest against a principle which inheres in the award. Penalty is sought because the contract allegedly does not expressly permit the carrier to issue certain alleged instructions. Sustaining this claim, the majority can only be proceeding on the theory that the carrier may do only what it asks and obtains from its employes contractual permission to do. This theory is a complete reversal of the legal one to which we are bound. The employer is restricted in its action only to the extent that it may not violate any positive law, or any provision of its contract. The test is not the question—Is this thing complained of permitted?—but rather the question—Is it prohibited? The majority erroneously apply the former test. Application of the lawful test requires denial of the claim.

As above stated, the first seven paragraphs of the opinion are devoted to the proposition that the carrier required the maintainers to remain in hearing distance of the telephones. In establishing the point, the majority state the same controversy arose in 1935 and was settled. From a partial, and, as we will show, a misleading quotation from a letter written for the carrier May 18, 1936, the "obvious inference" is drawn that "the claimants . . . were again required to remain within hearing distance of company telephones." The obvious implication from this course of reasoning is the holding that the carrier issued instructions, as petitioner contends, imposing a requirement not imposed by the schedule. Neither **obvious** conclusion bears examination upon this record in the very dimmest light of reason. The opinion then states respondent's counsel denied the carrier imposed as harsh a restriction as petitioner claims. This denial is dismissed apparently as ex parte and without weight; but an equally ex parte claim of the petitioner as to alleged instructions, a copy of which they have not furnished the Board, is accepted as conclusive. The counsel for the carrier is recited as having taken the representative of the petitioner "to task" for not having produced copies of such instructions; and the opinion refers to a letter introduced by the carrier itself, which is taken as sufficient evidence to show that the carrier required all maintainers to remain in hearing distance of the telephone, though the letter refers to Thoreau alone. From the reasoning summarized in this paragraph, the opinion concludes that claimants were required by the carrier to remain in hearing distance of the telephones. I will briefly summarize what the record shows.

Since the rules were written, signal employes have been required all over the Santa Fe to remain where they could be reached on their on-call Sundays and holidays. The rules themselves and their history, hereafter analyzed, establish this proposition. Bulletin 127 was in effect from January 23, 1932, to December 22, 1938. It governed the entire matter, and provided:

> "It will be necessary for all signal employes who are subject to call when leaving home and going to places where they cannot be reached, that they must have permission from the Signal Supervisor. It will not be necessary to have permission when leaving home to go to some point within calling distance. In cases of this kind it will only be necessary to advise proper parties where you can be located."

On April 17, 1934, the General Chairman of the Signalmen wrote the carrier's representative in part:

> "The outstanding instructions on this Division regarding the proper protection when a maintainer is on duty and on call, is for him to remain within hearing distance of the phone."

It will be noted this is interpretative of the outstanding instructions effective since 1932. This does not square with the employes' contention, indiscriminately adopted by the majority, as not denied of record, that no such requirement was ever made prior to May 1, 1934. The General Chairman himself carries this requirement back to 1932; and it will be noted that he

is telling the carrier, and the carrier is not telling him, what the "outstanding instructions" required. These instructions go no whit farther than Section 11 of Article 2 of the contract. These circumstances definitely show that the employes understood, as perforce in reason they must have in the slightest exercise of their faculties, that the rules and strictly parallel instructions required them to remain so that they could be reached over their telephone. In the carrier's letter of April 30, 1934, it agreed with Mr. Lewis' interpretation of the requirements, as applied to Thoreau. This letter of April 30, 1934, was referred to by the employes as being the general instructions on which they relied. They produced neither it nor the letter to which it replied, nor the outstanding instructions on the division.

In 1935, responding to a request that the Thoreau maintainer be relieved of his obligation on his on-call Sundays and holidays to remain where he could be reached over his telephone, phrased by the employes as the obligation to remain in hearing distance, the carrier, obviously acting under the rule which provides that such permission would be granted "if the requirements of the service will permit," (Art. 2, Sec. 11), granted the relief sought. The carrier's letter granting the permission read:

> "I have issued instructions to the Superintendent today to relieve Mr. Brashear of remaining at the telephone on the day he is held subject to call, permitting him to report at four-hour intervals in order that he may be in touch with the dispatcher to take care of any situation that may arise."

On May 28, 1936, Mr. Hill for the carrier withdrew the concession in a letter partially quoted by the referee, which read:

> "Since arrangements were made to permit signal maintainer at Thoreau to absent himself from headquarters on Sundays and holidays on which held subject to call with the understanding that he would call in to the dispatcher at four-hour intervals there has been a change in conditions making it necessary that this concession be withdrawn and instructions have been issued to the Superintendent to this effect.
>
> "Additional trains have been put on, the speed of all trains stepped up, a high speed train having been placed in operation, all of which makes it very necessary that all concerned in the protection of service be available."

Not only the inference, but the plain meaning, of this letter, indeed, of the exchange of letters and their entire background, is that a permission to absent himself from headquarters had been sought, granted, and withdrawn, and, further, that both parties to the agreement had fallen into the habit of speaking of the rule's obligation as the obligation to remain "at the telephone" or "in hearing distance." The only "obvious inference" from the letter last quoted is that the employe was required to remain where he could be reached as required by the rules. The inference "obvious" to the referee is possible only by partial quotation and disregard of the balance of the letter and the remaining record.

The alleged taking of petitioner's representative "to task" by respondent's counsel was in brief as follows: Counsel pointed out that alleged instructions were relied upon but had not been produced; that the burden of proof was upon the petitioner and was not met by ex parte allegations as to the existence of alleged instructions not produced; that the carrier offered the letters referred to and their background if the Division wanted them, but did not request their acceptance as the carrier was safe enough in reliance upon the failure of the employes to prove their case. The offer was accepted and completely disproved the ex parte allegations of the employes as to instructions. Perforce, to sustain the contentions as to instructions, the majority would be forced to rely, and improperly, upon ex parte, unproved charges of petitioner. This they have done.

From the foregoing, it is perfectly clear that no proof was made that the carrier by specific instruction required the maintainers to remain within hearing distance of the telephone; yet, the employes have themselves made the issue of whether such instructions were given the foundation of their claim. As a matter of fact, these tactics are but a subterfuge to obtain relief from the requirement of the rules, which relief this body has not attempted to give and which it cannot give. The carrier can simply notify its employes that all alleged instructions about remaining within hearing of the telephone, if ever issued, are withdrawn; and the rule will still require these maintainers to be where they can be reached. From this inescapable conclusion, it is evident that the majority decision has done a grievous wrong. To show the meaning of the rules, I will analyze them.

The first paragraph of Section 11 of Article 2 has been quoted in part by the referee, but for convenience I repeat:

> "Section 11. Employes assigned to, or filling vacancies, on a section or plant will be subject to call. Such employes will notify the designated officer where they may be called and will respond promptly when called. When such employes desire to leave their home station or section they will secure authority from the designated officer who will grant permission if the requirements of the service will permit."

The rule imposes upon an employe the obligation to be subject to and available for call. The first sentence reads, "Employes . . . will be subject to call." The referee states that the rule means the carrier "has the privilege of calling them into active service," which is true. It also, and primarily, imposes a correlative. To assert that this rule gives a privilege to the carrier and imposes no obligation on the employes is an absurd refinement.

The obligation on the employes is to be subject to and available for call, which cannot be met unless the employes so conduct themselves that they can be reached by the means of communication available at their home stations. It is true that this general obligation is implemented by two specific requirements, first, the duty to notify where the employe can be called, secondly, the obligation to leave neither home station nor section without permission; but they truly implement and do not destroy the obligation to remain available. The employe must notify his superior where he may be called, and respond promptly when called. The majority do not and cannot deny that the employes may not leave their home station without permission and are under duty to respond promptly when called.

Somewhere in the second requirement the majority find an implication that the employes are to have perfect freedom of action so long as they do not leave their home station or section without permission. The source of this implication is certainly not in the rules. It would have been interesting to have had an expression of the source of this implication and the method by which it is evolved. As we read the second requirement, the only implication arising is that the employe must be at all times where he can be reached and so conduct himself that he can and will respond promptly when called. As I understand the word **implication**, it signifies meaning drawn or implied from language. As the referee uses the term it can only signify "meaning to destroy language."

My conclusions, inescapable from the language of the rules, are confirmed by their history and application upon respondent's property, elements ignored by the majority, which sustain the claim on an irrelevant issue. The particular rule in question originated during Federal Control[1]. On July 20, 1920, the

[1]Section 14 of Article II, National Agreement effective February 1, 1920, read:

> "Employes who are subject to call because of the requirements of the service will notify (*) where they may be called and will respond promptly when called. When such employes desire to leave their home station or section they will secure authority from (*) who will grant permission if the requirements of the service will permit.
>
> "(*) As named by the management."

Railroad Labor Board, established by the Transportation Act of 1920, issued its Decision No. 2, increasing rates of pay retroactive to May 1, 1920, and in so doing continued in effect the rules of the National Agreement until changed by negotiation of the parties or subsequent order of the Board. On April 14, 1921, the Labor Board, by its Decision No. 119, decided that it could not find the rules of the National Agreement constituted "just and reasonable rules for all carriers," abrogated them as of July 1, 1921, and directed the negotiation of new rules. It reserved jurisdiction to promulgate new rules covering such points as the negotiating parties should be unable to agree upon.

Principle 10 of the guides furnished by the Labor Board to the parties to govern their negotiations (Exhibit B to the decision) provided:

> "Regularity of hours or days during which the employe is to **serve or hold himself in readiness to serve** is desirable."
>
> (Emphasis supplied.)

In this principle there was clear recognition of the distinction between **service** and **readiness to serve,** a distinction preserved in the negotiations and clearly preserved in the presently effective schedule, but a distinction which the majority perforce ignore.

The Santa Fe and its employes agreed on all rules except the rule covering payment for work performed after the eighth hour and on Sundays and holidays. The rule covering these items was prescribed by the Labor Board. Section 11 of Article 2 was agreed upon, and in giving to signalmen freedom from obligation to be subject to call on alternate Sundays and holidays this carrier granted a concession not given by the National Agreement and not given by many other railroads in negotiation.

The Labor Board, by its Decision 707, February 13, 1922, prescribed certain rules, among them a rule reading the same as the Santa Fe rule here in issue and above quoted[2]. Section 4 of the General Instructions, a part of that decision, stated that where rules prescribed were similar to rules of the National Agreement the rules were nevertheless prescribed as new rules and the interpretations of the rules of the National Agreement by the Railroad Administration, Adjustment Boards, or similar agencies, were not carried forward.

Under the rule prescribed by it, the Labor Board held, in Decision 1890, that signal maintainers were properly refused permission to leave their home stations. The same holding was made in Decision 2388, repeated in Decision 2769. The last decision is eloquent condemnation, by a tribunal presiding at the birth of the rule here in issue, of the opinion of the majority. The Labor Board said:

> "The characteristics of the service in the signal department make it imperative that men be available for call at all times. This established principle is recognized in connection with the daily assignment, the employes being assigned to eight hours' actual service and subject to call during the 16-hour period while not actually on duty, and if the employes' request was granted it would be equally consistent to allow payment for 16 hours each week day in addition to the hours of the regular assignment. This practice has grown up through years of experience in the signal department, and has always been considered a working condition which was recognized in wage and rules negotiations."

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[2]Labor Board Decision 707, Article II, Section 14.

The Labor representatives on this Division, in seeking to obtain an award in Docket SG-600, Award 588, eloquently sustained the proposition that signalmen must remain available for call, and respond promptly when called. The written brief filed in that docket in behalf of the Labor members of the Division, a part of the official records of this Division, reads in part:

" . . . He was, as the rule requires, 'subject-to call.' This subject-to-call and service requirement contemplates that Maintainer Appleby would be available for service for any and all emergency requirements of the carrier during the sixteen hours of each assigned work day outside of the regular eight hours of assigned time in a twenty-four hour period. For that time which he is thus held subject-to-call, he receives no compensation unless actually called for service.

"As the rule provides, he 'will respond promptly when called'; he is required to secure permission 'from the designated officer'—who is usually the signal supervisor of that district or the train dispatcher—before he is privileged to leave his home station, Kiowa, Kansas, or his signal section and the permission is granted only 'if the requirements of the service will permit.'

"Thus, it will be noted that for sixteen hours of each day, the signal maintainers, including Maintainer Appleby, under the requirements of the agreement in effect, are held subject to service without compensation unless called and actually performed service.

"For each alternate Sunday, this requirement also applies for the maintainers on the Signal Supervisor's district, as Section 11 provides that these employes who are subject-to-call 'will be released from that obligation and from duty on each alternate Sunday and holiday.' "

The Award in that case said, with respect to the rule here in question:

"Considering all the circumstances particularly the peculiar rules concerning days off in the Signal Agreement, Article 2, Section 11, under which the employes are required to keep themselves available for call at all times except if and when they may be released from this obligation on alternate Sundays, and even then when released to furnish information as to where they may be found; . . . "

There are other decisions likewise contrary to the majority holding. The Labor Board's Decision 2769 held:

"The characteristics of the service in the signal department make it imperative that men be available for call at all times."

This Division, in Award 603, held with respect to the very agreement here involved:

"Signalmen under their agreement are required to hold themselves available at all times (except when excused) to be called in case of trouble."

In the face of the rule's plain meaning, fortified by its history and the decisions of this and other tribunals construing it, and the interpretation heretofore made by the Labor members of this Board endorsing the conclusion I here advance, the majority have simply been led away on the trail of the false issue of alleged instructions to remain in hearing distance of the telephone. Further, the obligation indisputably imposed by the rule is an obligation which the carrier does not pay for except in the measure of the hourly rates fixed for time actually worked. From the inception of the rules, the distinction between readiness for service and service actually performed has been clearly maintained, the former not paid for as such, the latter paid for at hourly rates fixed at a level which took into due account and compensated for the duty to remain during periods of no work ready to respond to call but without pay for such readiness. This distinction has already been adverted

to in discussion of Labor Board Decision 119, Exhibit B, Principle 10. These considerations bring me to consideration of the error of the majority in assessing a penalty.

Upon the issue of damages, the carrier contended that the rules leave no doubt but that the only payments required of the carrier are for work actually performed for it, with certain minutely prescribed exceptions, among which exceptions provision for payment for readiness for work is not present. In this connection an agreed interpretation of the exact rule in issue was made in 1924, which provided in substance that no payment would be due for readiness to serve. The first part of this agreement recited:

> "(1) On Sundays when subject to call (that is on the alternate Sundays and holidays) **only actual time worked** will be paid for at time and one-half with a minimum for a call."
>
> (Emphasis supplied.)

Concerning this agreement, and notwithstanding the identical rule which it had interpreted had been re-negotiated into a new schedule effective in 1929 without any notice from the Signalmen to the carrier that the old words in the new schedule were to be regarded as having a meaning different from their agreed interpretation, the General Chairman had the following to say:

> "I cannot see where the matter of Committees in 1924 agreeing to interpretation of Section 11 of Article II, nor of cases handled under provisions of a prior agreement, can have any bearing on this case, which is being handled under provision of Signalmen's Agreement, effective February 1, 1929."

I note in passing that at the hearing before the referee the Signalmen's representatives found it necessary and expedient to assert that the 1929 revision was merely a revision of rates and not a revision of schedule. Whatever may be the case, and the written statement above quoted is legally correct in stating a new schedule was negotiated in 1929, the conclusion is not affected: there is an agreed interpretation to which the majority do violence.

The agreement of 1924 that only **time worked** would be paid for is borne out by the schedule itself. The carrier has analyzed the schedule in this respect, and I adopt its analysis as my own, as follows:

> "Article 2 of the schedule controls. It deals with a miscellany, including what shall be paid for and what not, and also the obligation of employes to be on call. There is no duty imposed upon the carrier to pay for the employe holding himself on call; and, indeed, the existence of any such duty to pay is completely negatived.
>
> "Section 7 is the general rule relating to basis of pay. It provides that '**Except as otherwise provided** in these rules, **no compensation will be allowed for work not performed.**' Thus work performed is the only thing paid for, with named exceptions; and to this the employes have agreed. Unless there is some exception under which their claim may fall, they are asking an award of that which they have agreed will not be paid. Let us examine the exceptions. 'Employes released from duty —**notified to perform work**—will be paid as if on continuous duty, provided such employes are required to report not later than forty (40) minutes after the ending of regular working hours,' otherwise they are paid at time and one-half rates 'from the time called until they return to designated point at home station' with a minimum of 'two (2) hours for one (1) hour and twenty (20) minutes **service** or less.' (Sec. 10.) Here are examples of payment for time during which work is not performed. There are others, as the provision for payment of traveling time and various classes of employes under various enumerated conditions (See Secs. 13, 14, 16, 17, 18), the provision for payment when required to report **for work** at **usual starting place** and not used (Sec.

22), and provision for payment for time lost attending court or coroner's inquest at company request (Sec. 25). There is no exception to the general rule, providing for payment to men for fulfilling their duty to be on call at all times on week days, twenty-four hours a day, and on alternate Sundays and holidays; hence, the rule that 'no compensation will be allowed for work not performed' is controlling. There is and can be no contention that the employes performed any **work** generally regarded as signal work for the company. They merely held themselves in readiness to perform such work. Such work as they performed they were compensated for. Hence, regardless of whether the subject-to-call rule means the employes are required to be where they can be reached, there is no basis for payment to them, because they performed no **work.**"

And on this question, what do the majority say? They waive aside the language and precedents to say that the carrier unlawfully required the employes to remain in hearing distance of the telephones. Upon this finding the majority erect the conclusion that **service** was required and must be paid for under Article 8, Section 2. Does it so provide? Its essential provisions are:

"**Work performed** on Sundays and . . . holidays . . . shall be paid . . . "

(Emphasis supplied.)

The agreed interpretation read:

" . . . Only actual time worked will be paid for . . . "

Every possible approach to the schedule shows its true intent is that except as otherwise provided only work performed shall be paid for, and payment for those who "stand and wait," whether they serve or not, as well as for those who merely "stand" or those who merely "wait" is not only not provided for their standing and/or waiting, but actually prohibited by Section 7, which reads, "Except as otherwise provided in these rules no compensation will be allowed for work not performed." **Work performed** is the only thing paid for by the schedule, with the exception of minutely prescribed payments heretofore referred to.

In the teeth of the prohibitions of the schedule and its agreed interpretation, without basis in the schedule and in violation of its plain meaning, the majority sustain the claim.

In doing so, they have legislated a right which is specifically denied the Board by the very law under which it was established.

/s/ J. G. Torian.