Award No. 4616
Docket No. SG-4444

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

John M. Carmody, Referee

PARTIES TO DISPUTE:

BROTHERHOOD OF RAILROAD SIGNALMEN OF AMERICA

THE PENNSYLVANIA RAILROAD COMPANY

STATEMENT OF CLAIM: Claim that W. H. Johnson, Signalman, be compensated at the straight time rate of $1.24½ per hour for eight hours on the following dates: July 2, 3, 5, 6, 8, 1946, account of Mr. Johnson being taken from his regular position to work in Philadelphia Message Office to fill a vacancy where the man was on vacation. Furthermore, we request that Mr. Johnson be paid the difference between the straight time rate and the time and one-half rate on the following dates: July 2, 3, 5, 6, 8, 1946, account of Mr. Johnson being forced to work other than his regular assigned hours, and causing his position to be blanked.

EMPLOYES' STATEMENT OF FACTS: An agreement, dated June 1, 1943, is in effect between the Pennsylvania Railroad Company and the Brotherhood of Railroad Signalmen of America which governs the rates of pay, hours of service, and working conditions of the claimant, who is engaged in work generally recognized as work accruing to employes covered by the Telegraph and Signal Agreement. We understand this agreement is on file with this Board and request is respectfully made that it be considered as part of the record in this dispute.

This claim was handled in the usual manner on the property as provided in the Railway Labor Act, as amended June 21, 1934, without securing a satisfactory settlement.

It was also handled before the National Vacation Committee in keeping with the terms of an agreement negotiated in Chicago, Illinois, on February 2, 1947.

Under date of May 20, 1948, Mr. Fred N. Aten, Chairman of the Fourteen Cooperating Railway Labor Organizations, addressed the following letter to Mr. L. W. Horning, Chairman of the Carrier Members, Article 14 Committee:

"FOURTEEN COOPERATING RAILWAY LABOR ORGANIZATIONS
Room 1309 — 608 South Dearborn Street
Chicago 5, Illinois
May 20, 1948

Files: 14B-258-21-Art. 14
14B-37-21-Art. 14

Mr. L. W. Horning, Chairman
Carrier Members Article 14 Committee
466 Lexington Avenue
New York 17, New York

Subject: Case of W. H. Johnson, Signalman, Pennsylvania Railroad, Philadelphia, Pennsylvania.

Dear Mr. Horning:

Please be referred to President Clark's letter of May 13th addressed jointly to you and the undersigned in connection with the case

"The Interpretations placed upon the Agreement by that Board is binding upon this Board. And this is true notwithstanding the fact that a new agreement has been negotiated by the parties since that decision, in that there is nothing carried forward in the new Agreement that would indicate that the interpretation of the System Board was intended to be completely eliminated."

IV. Under the Railway Labor Act, the National Railroad Adjustment Board, Third Division, is Required to Give Effect to the Said Agreement and to Decide the Present Dispute in Accordance Therewith.

It is respectfully submitted that the National Railroad Adjustment Board, Third Division, is required by the Railway Labor Act to give effect to the said Agreement, which constitutes the applicable Agreement between the parties, and to decide the present dispute in accordance therewith.

The Railway Labor Act, in Section 3, First, Subsection (i) confers upon the National Railroad Adjustment Board the power to hear and determine disputes growing out of "grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions." The National Railroad Adjustment Board is empowered only to decide the said dispute in accordance with the Agreement between the parties to it. To grant the claim of the employes in this case would require the Board to disregard the Agreement between the parties hereto and impose upon the Carrier conditions of employment and obligations with reference thereto not agreed upon by the parties to this dispute. The Board has no jurisdiction or authority to take such action.

CONCLUSION

The Carrier has established that under the applicable Agreement, as interpreted by the parties thereto, the Claimant is not entitled to the additional compensation claimed on July 2, 3, 5, 6, and 8, 1948.

Therefore, the Carrier respectfully submits that your Honorable Board should dismiss the claim of the Employes in this matter.

(Exhibits not reproduced.)

OPINION OF BOARD: The essential facts are not in dispute; the dispute arises out of the interpretation and application of rules. The Carriers maintain one rule, Article 2, Section 17, and two interpretations of that rule by System Boards apply; the Organization cites other rules, Article 2, Section 5, and Article 2, Section 9 (a) and (b).

The Claimant is a Signalman regularly assigned as a member of the Signalman's gang on the Philadelphia Terminal Division with headquarters at 30th Street, Philadelphia, Pa., tour of duty 7 A. M. to 3:30 P. M. with a thirty-minute meal period.

During the period July 1st to 8th, 1946, inclusive, he was required to fill the position of Maintainer, Telegraph and Signals, in the Philadelphia message office, 30th Street, while the reglar incumbent was absent on vacation. On July 1st he worked his regular position, 7 A. M. to 3:30 P. M. for which he was paid on his regular basis. From 11 P. M. that day and until 7 A. M. he worked the position of Maintainer, Telegraph and Signals, for which he was paid 8 hours at Maintainer's overtime rate. On July 2, 3, 5, 6 and 8 he was paid at Maintainer's rate on a straight time basis. On July 10 he returned to his regular assignment as Signalman in the gang, for which tour of duty he was paid at the overtime rate.

Carrier finds authority for this transaction and these payments in Article 2, Section 17, which it has applied here. This rule says, in part, "Employes changed from one shift to another shall be paid overtime rates for the first shift of each change." In support of the application of this rule, Carrier cites Decision No. 72 of "The Pennsylvania Railroad Telegraph and Signal Department

Reviewing Committee" and Decision No. 214 of "The Pennsylvania Railroad—Long Island Rail Road Telegraph and Signal Department System Board of Adjustment."

The Organization maintains that these decisions have no validity here because it withdrew from the Memorandum of Agreement from which that System Adjustment Board derived its powers. That action, however, is not material here. This Board has ruled, in Award 3628 and others, that interpretations placed upon this Agreement by that Board are binding upon this Board. We assume this to mean when the facts are identical.

Let us consider the decisions in those cases. In Decision No. 72 Claimant did not leave his gang, nor was his work changed in any way. The hours were shifted merely to meet special traffic conditions as they affected his regular work in a congested area. In Decision No. 214 Claimant was shifted from one trick to another trick on work that was organized on a three-trick basis. In neither of these cases was a seniority right involved nor was either position blanked; their work went on. Neither was there any question of absorbing overtime as is raised here by the Organization.

What we are dealing with in the instant case is a change in position. Apparently the position to which the Claimant was transferred required special qualifications not possessed by every man in his gang. He was selected "because of special qualifications," Carrier's Counsel argued orally, to fill a vacancy in a position different from his regular one carrying a different rate of pay.

Can this be interpreted to be a "change from one shift to another"? (Article 2, Section 17.) We doubt it. We think the rule means what it says. It appears to have been properly applied in the System Board decisions cited by the Carrier. We are dealing here with a different set of facts. We do not think the rule means one employe may be assigned to another employe's position away from the job on which he holds seniority at a different rate of pay to do different work under the guise of a shift change.

We conclude this application of Section 17, Article 2, to the Claimant here, is a violation of the Agreement.

We come now to the matter of adjusted compensation. Claimant was deprived of the opportunity to earn on his regular assignment by action of the Carrier. "The right to perform work is not the equivalent of work performed in so far as the overtime rule is concerned. Whether the overtime rate be construed as a penalty against the employer or as the rate to be paid an employe who works in excess of eight hours on any day, the fact is that the condition which brings either into operation is that work must have been actually performed in excess of eight hours. One who claims compensation for having been deprived of work that he was entitled to perform, has not done the thing that makes the higher rate applicable. . . ." (Award 4244) See also Award 2346 on penalties.

We conclude Claimant will be protected in his rights and adequately compensated and the Carrier adequately penalized for its default if Carrier is required to pay Claimant the equivalent of straight time at his Signalman's rate for time he was held away from and did not work his regular position and pro rata or straight time at Maintainer's rate for all of the time he was required to work the Maintainer's position.

We have made no reference to the Vacation Agreement of December 17, 1941, nor to the interpretations by Referee Morse, which the Carrier refers to as having a bearing on this case. We have read that Agreement and the Referee's interpretations with care as well as the arguments in briefs submitted in this and in other cases and the vigorous dissenting opinions covering the matter. We conclude that such application as the Carrier asserts should be considered here as pertinent has been disposed of in Awards 2340, 2480, 3733 and 3795.

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 Carrier applied the Agreement improperly.

AWARD

Claim sustained to extent indicated in Opinion.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: A. I. Tummon
Acting Secretary

Dated at Chicago, Illinois, this 26th day of October, 1949.