Award No. 6585
Docket No. SG-6632

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Norris C. Bakke, Referee

PARTIES TO DISPUTE:

BROTHERHOOD OF RAILROAD SIGNALMEN OF AMERICA

THE PENNSYLVANIA RAILROAD COMPANY

STATEMENT OF CLAIM: Claim of the General Committee of the Brotherhood of Railroad Signalmen of America on the Pennsylvania Railroad that:

(a) The Carrier violated the Agreement effective June 1, 1943, when on April 27, 1948, it removed the work of rewiring and renewing switches and other signal equipment therein involved at "F" Interlocking Plant at Sunnyside, New York, out from under the operating division, comprising the New York Division seniority district and assigning said work to employes who hold no seniority rights thereunder entitling them to perform said work.

(b) Request that the regular assigned New York Division employes (to be designated) under the supervision of the Supervisor T. & S. who were adversely affected by reason of this violation of the Agreement be compensated for all time made by Long Island employes in connection with signal and switch work at "F" Interlocking, Sunnyside, New York, at that time and one-half rate, that is, the amount of overtime that would have been required of the New York Division employes to perform this work if it had not been removed from their seniority district.

EMPLOYES' STATEMENT OF FACTS: The work involved in this case was the result of a derailment at approximately 9:50 P. M., on April 27, 1948, in the vicinity of "F" Interlocking Station, Sunnyside Yard, N. Y. Pennsylvania Railroad T. & S. Department employes were immediately recruited and assigned to repair the signal facilities. Those employes off duty residing within immediate traveling distance, as well as those on duty and employes going off duty, were dispatched to the scene to repair the facilities. Additional forces were recruited from employes reporting at their starting time on the morning of April 28, 1948.

On April 28, 1948, certain Long Island Rail Road Signal Department employes were assigned to assist in the construction of switches and other signal equipment at "F" Interlocking Station, Sunnyside Yard, New York.

This interlocking plant is located on the New York Division of the Pennsylvania Railroad. The Signal Department employes of the Long Island Rail Road have no seniority on the New York Division of the Pennsylvania Railroad; they are all carried and listed on their respective seniority districts on the Long Island Rail Road.

switches and other signal equipment therein involved at 'F' Interlocking Plant at Sunnyside, New York, out from under the operating division, comprising the New York Division seniority district and assigned said work to employes who held no seniority rights thereunder entitling them to perform said work."

As shown in the Statement of Facts above, the derailment in the vicinity of "F" Interlocking, Sunnyside, N. Y. occurred at approximately 9:50 P. M. on April 27, 1948. As also shown in the Statement of Facts above, the Long Island Rail Road Telegraph and Signal Department employes were used only between 3:00 A. M. and 4:00 P. M. on April 28, 1948. No Long Island Rail Road Telegraph and Signal Department employes were used on the calendar day, April 27, 1948 in the rewiring and renewing switches and other signal equipment at "F" Interlocking Plant, Sunnyside, New York.

The Carrier submits that the claim contained in Paragraph (a) of the Employes' Statement of Claim is erroneous, and your Honorable Board is, therefore, respectfully requested to deny the claim outlined in Paragraph (a) of the Employes' Statement of Claim in its entirety.

III. **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 claims 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 any such action.

CONCLUSION

The Carrier has shown that it has offered to settle the dispute by allowance to the employes of payment at time and one-half rates for the hours they were available but were not assigned to repairing the facilities at "F" Interlocking on April 28, 1948, which is more than fair and in accordance with settlements made in the disposal of previous similar cases.

Therefore, the Carrier respectfully submits that your Honorable Board should decline the claim of the Employes in this matter and direct that the matter be settled on the basis proposed by the Carrier.

(Exhibits not reproduced.)

OPINION OF BOARD: It is a little difficult for this referee to understand why this docket is before him, because it appears that both parties are agreeable to the settlement proposed by the Carrier, which offer is still open.

The organization says in its brief "We think the employes' acceptance of the Carrier's offer in SG-3189 and the two Columbus Division cases and the Third Division's action in connection with Award 3470 all represent a proper disposition of those disputes, and we further believe that application of the same principle to the case before us represents a proper settlement

bearing in mind that in none of the previous cases called to our attention did the Carrier endeavor to reduce the amount due Claimants on the theory that they were engaged in the duties of their own assignments while the violation was taking place." (Emphasis supplied.)

Assuming that the underscored language immediately above represents the present position of the carrier, there is no basis for it because the claimants here were entitled to call at 10:00 P. M. on April 27th, immediately after the wreck when the other signalmen "residing within immediate traveling distance" were called. There was some argument about what was "within immediate traveling distance", but these claimants were not any further away on the night of the 27th than they were at other times in their regular employment.

From unchallenged statements appearing in the record it positively appears that these claimants were available on the evening of April the 27th and they were not engaged in the duties of their own assignment.

With that element eliminated from the case, we revert to the Organization's willingness to accept the Award in 3470 as a basis of settlement.

Carrier says in referring to Award 3470: "The Carrier has not withdrawn its offer of settlement in the present case and submits a similar disposition should be made of it."

Our conclusion, therefore, is that the case be remanded to the parties with disposition in accordance with the Award in 3470.

FINDINGS: The Third Division of the Adjustment Board, upon the whole record and all the evidence, finds and holds:

That both parties to this dispute waived hearing thereon;

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 dispute be remanded to the parties for disposition in accordance with Opinion.

AWARD

Claim to be disposed of in accordance with above Opinion.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: (Signed) A. Ivan Tummon
Secretary

Dated at Chicago, Illinois, this 27th day of April, 1954.

SPECIAL CONCURRING OPINION TO AWARD 6585, DOCKET SG-6632

We concur that Award 3470 should control the disposition of this claim, in accordance with the Carrier's offer, but regret that we are forced to qualify our concurrence because of the language of the "Opinion" preceding the Award.

It appears from the first paragraph of the Opinion that the majority was under the impression that the settlement as proposed by the Carrier was agreeable to both parties, and as the source of that impression cites a statement from the brief submitted to the Referee by the Employes' Board Member.

It does not appear, from the record that the Employes were agreeable to accepting the Carrier's offer, but stood on their position that the Claimants should be paid at the time and one-half rate for a **number of hours equivalent to the hours worked by the Long Island employes.** The Carrier's offer of payment at the time and one-half rate was strictly and specifically limited to the hours during which the named claimants **were not employed on their regular assignments, and were, therefore, available for emergency work.**

The Employes' Board Member in his brief, as quoted in the Award, stated that the Carrier's offer was acceptable to the Employes, but added the following important, and to the Carrier unacceptable qualification, **"bearing in mind that in none of the previous cases called to our attention did the Carrier endeavor to reduce the amount due Claimants on the theory that they were engaged in duties of their own assignments while the violation was taking place."**

Award 3470 and the preceding settlement in the Broad Street Station case, referred to in Award 3470, were both made on the time and one-half basis **only** because the terms of the settlement specifically recognized that the hours to be paid for were to be determined by the Claimants' **actual availability.** Thus the Opinion in Award 3470 allowed **"compensation to the employes who were deprived of the work . . . on the 'time lost' basis, that is, by allowing earnings which the Claimants were deprived of by such failure."** Stated another way (in reference to the Broad Street Terminal settlement) the settlement was based on **" 'the difference between what they earned and what they would have earned each day they worked had they been permitted to work twelve hours on each such day for the period' in question."** Both these prior settlements were, therefore, on the basis of time and one-half but only for the hours during which the Claimants were available, i.e., not engaged in work upon their regular assignments, and otherwise immediately able to perform work if required. Thus the amounts due Claimants in both prior settlements were in fact reduced on the theory that they were engaged in the duties of their own assignments while the violation was taking place. If availability is to be ignored there is then no basis for payment at time and one-half because the awards of this Board generally allow only pro rata rates for work not performed. The consideration of availability is the specific justification for the payment of time and one-half according to the special limited basis of settlement which has been used on this Carrier.

The Majority states that "unchallenged statements" in the record showed that those Claimants were available on the evening of April 27 and not engaged in the duties of their own assignments. This finding is without any support in the record. The Carrier's statement of facts shows the regular assignments of the Claimants, and the extent to which they overlapped the time worked by the Long Island employes. It shows the complete unavailability of certain claimants. The finding that none of the Claimants were engaged in their regular assignments and that all were available is in direct conflict with the facts of the record.

The Award further errs in stating that the Claimants were entitled to call at 10:00 P. M. on April 27. The facts show that prior to 3:00 A. M. on April 28 no Long Island employes were used. One was used starting at 3:00, one at 3:30, two at 7:30 and five at 8:00 A. M. To assume that a violation of the Scope Rule of the Agreement occurred between 10:00 P. M. on April 27 and 3:30 A. M. on the 28th, during which time the Carrier was using only its own employes is manifestly incorrect. It is impossible that in this case a violation of the Scope Rule could occur before the Carrier used any Long Island employes.

The simple issue involved in this case was a dispute as to whether time and one-half should be paid to the Claimants based on the total number of hours actually worked by one or more Long Island employes during a period of time in which the Claimants were in fact available. The Carrier proposed time and one-half on the latter basis. The hours contemplated by the Carrier's proposal were, of course, only the hours during which the Long Island employes were actually working; even the Employes' claim did not comprehend any hours other than those. A second issue was whether a furloughed employe (Helper Babulya) could be considered available for emergency work under the circumstances shown in the record.

Award 3470 relied on took into consideration the Claimants' actual availability during the hours when work was performed by employes without seniority on the division involved. On that limited basis alone the Board accepted the payment of time and one-half for work not performed in view of the offer of settlement which was still open. The present award "That the case be remanded for disposition in accordance with the Award in 3470" is therefore proper, but the opinion uses language which if accepted would nullify the fundamental concepts upon which Award 3470 was based.

/s/ R. M. Butler

/s/ W. H. Castle

/s/ E. T. Horsley

/s/ C. P. Dugan

/s/ J. E. Kemp