Award No. 10009
Docket No. SG-9542

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Donald F. McMahon, Referee

PARTIES TO DISPUTE:

BROTHERHOOD OF RAILROAD SIGNALMEN OF AMERICA

CLINCHFIELD RAILROAD COMPANY

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

(a) The Carrier violated the current Signalmen's Agreement when it called a junior SC & E man in preference to a senior available SC & E man of Gang #10 to perform emergency service at a wreck at Caney, Virginia, on February 25, and 26, 1956.

(b) The Carrier now pay P. E. Booher, Jr., senior SC & E Man fifteen (15) hours and thirty (30) minutes at time and one-half rate for services performed from 5:50 P. M., February 25, 1956, to 9:20 A. M., February 26, 1956, account of junior SC & E employe being called when P. E. Booher, Jr., a senior SC & E employe was available.

EMPLOYE'S STATEMENT OF FACTS: The claimant, P. E. Booher, Jr., is regularly assigned as SC&E Man in this Carrier's SC&E Gang No. 10, with a seniority date of August 8, 1950, in this Carrier's SC&E Department.

On date of Saturday, February 25, 1956, a derailment occurred on this Carrier's Fremont Section at Caney, Va., which is near Fremont, Va. The regularly assigned SC&E Maintainer assigned to the Fremont Section was registered as off duty on this date. Therefore, since the services were needed of a SC&E Man, the Carrier was obligated under the rules to call a senior available employe of the class to perform the services.

Instead of calling the senior available SC&E Man, the Carrier called Junior SC&E Man J. L. Sifferd to perform the services at the derailment. SC&E Man Sifferd has a seniority date as of November 21, 1950, whereas the claimant has a seniority date as of August 8, 1950. Both the claimant and Sifferd are regularly assigned as SC&E Men in SC&E Gang No. 10, and Saturday, February 25, 1956, was a rest day of their assignment.

The record discloses that Claimant Booher was at his place of residence on February 25, 1956, which was at Kingsport, Tenn., that he was available

The Employes know that the rule was so written and mutually agreed upon to permit exactly what was done in this case.

We, therefore, submit that the agreement was not violated — that this claim is wholly without merit — and we respectfully request this Board to so find.

Carrier has included in this submission all relevant, argumentative facts and evidence with respect to this claim, all of which have heretofore been presented to the Employes.

OPINION OF BOARD: Claimant named herein held a regular assignment on Carrier's SC & E Gang No. 10. Claim is made against Carrier for 15½ hours compensation at the time and one-half rate for service performed by another employe when Claimant was available for emergency service, but was not called for service by Carrier, as contended by the Organization.

On Saturday, February 25, 1956, a derailment occurred on the Fremont Section at Caney, Virginia. The facts show on the day in question Claimant, who held a seniority date over J. L. Sifferd, were both off duty on account of both employes being on their regular rest day, February 25, 1956. The regular Signal Maintainer, in whose territory the derailment occurred, was not available for service in the existing emergency having been marked out of town until 9:00 P. M., February 26, 1956.

In view of the existing derailment and the regular assigned Maintainer not being available for emergency service, Carrier, requiring immediate service to be performed at the point of derailment, called its Supervisor, SC & E employe Sifferd and an SC & E Helper to proceed from Erwin, Tennessee, Carrier's headquarters to the point of derailment. Necessary signal repairs were made and the employe J. L. Sifferd performed the service of Maintainer for a period of 15½ hours.

It is for the service performed by Sifferd, who held seniority junior to Claimant, that the Organization is processing this claim on the contention that Claimant should have been called by Carrier in preference to Sifferd. The Organization relies on the provision of Rule 16 of the effective Agreement based upon the premise that Carrier did call a part of a group of employes who customarily work together on Gang No. 10, that such employes shall, if having seniority and being available, have a preference for overtime work if they so desire. The record does show that Claimant does have a seniority date senior to Sifferd.

Carrier takes the position that the provisions of Rule 17 of the effective Agreement specifically apply to the facts and circumstances here, and as stated in this rule, the Maintainer on whose territory the work is required will be called first. In the claim before us the regular Maintainer was not available, Carrier called J. L. Sifferd to perform the service required. We find no provision in either of the rules relied on by the parties that Carrier is required to call the senior member of a Signal gang to perform emergency service on a Signal Maintainer's territory, when the regular assigned Signal Maintainer is not available for such emergency service. There was no requirement that Carrier was obligated to call the employe it used, but when it did call an employe, a member of Signal Gang No. 10, it became obligated under the provision of Rule 16 (d) to use the senior available employe of the group of employes who customarily work together. Claimant held seniority

of the employe used by Carrier. There is no showing in the record that Claimant was not available for service had he been called.

Carrier did not consider the seniority rights of the Claimant when it used another employe, and **by using part of a group of employes customarily working together** it brought itself directly under the provisions of Rules 16 and 16 (d) as follows:

Rule 16

"The hourly rates named in this agreement are for an eight-hour day. All service performed outside of the regularly established working period shall be overtime and paid as follows:"

Rule 16 (d)

"When overtime service is required of a part of a group of employes who customarily work together, the senior available employes of the class involved shall have a preference of the overtime if they so desire."

See Award 2341, paragraph 2 of Opinion.

A review of the numerous awards cited here by the parties, as applied to the provisions of Rule 16 and 16 (d), brings us to the conclusion that the claim here before us should be sustained. We agree with the opinion in Award 9436, wherein it is stated, and covers a situation similar to the facts before us here, as follows:

"The Organization claims compensation for the claimants for one day's work at the time and one-half rate. The Carrier states that if the claim is sustained the claimants should receive compensation at the pro-rata rate because it is a penalty payment for work not performed.

"This Referee is in accord with the findings in Awards 4571, 5579, 9309, and 9257, wherein it was held that since the regular occupant of the position was denied the overtime work because the Carrier violated the effective Agreement, and if the Carrier had not violated the effective Agreement he would have been compensated at the time and one-half rate if he had performed the work, that, therefore, the penalty rate for the work lost, because it was given to one not entitled to it under the Agreemet, is the rate which the regular occupant of the position would have received if he had performed the work. Therefore, the claim will be sustained for one day's pay for each of the claimants at the time and one-half rate."

The claim should be sustained and payment be made in accordance with Rule 16 of the Agreement.

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

AWARD

Claim sustained as per Opinion and Findings.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 21st day of July, 1961.

DISSENT TO AWARD No. 10009 — DOCKET No. SG-9542

Award 10009 is erroneous in, among other things, awarding punitive pay for work not performed because —

(1) Rule 16, upon which the sustaining Award is premised, provides overtime (punitive) pay only for "service performed" outside regularly established working periods; and,

(2) The awarding of punitive pay in this case is contrary to the principle established by a preponderance of Awards of this Division (preponderant to the extent that they are almost universal), and followed by this same Referee in Awards 6358, 8766, 8771, 8776, 9748 and 9749 which hold that the proper rate of pay for work not performed is the pro rata and not the punitive rate.

/s/ R. A. Carroll

/s/ P. C. Carter

/s/ W. H. Castle

/s/ D. S. Dugan

/s/ J. F. Mullen

ANSWER TO DISSENT TO AWARD 10009, DOCKET SG-9542

Part 1 of the foregoing dissent makes sense only when viewed as though Carrier had a right to deprive Claimant of the overtime. That Claimant was wrongfully denied the opportunity to perform the overtime service is not cause for also denying him the benefit of Rule 16. What the dissenters are contending is that Carrier should gain an advantage from its own wrongdoing.

Part 2 is not factually correct. Examination of our awards, and I have examined several thousand in connection with this case, will show that it is not now "almost universal" that the proper rate for work not performed is the pro rata and not the punitive rate. Down through the years, especially since Award 3193, a principle that has stood the test either expressly or in effect is that the proper penalty for work lost because it was given to one not entitled to it is the rate the regular employe would have received

if he had performed it. Claimant, by virtue of Rule 16(d), qualified as the regular employe.

Another principle that has survived is that the proper rate for work lost is the contract rate. In this case the work was performed outside the regularly established working period which under Rule 16(b) is to be paid for at the time and one-half rate up to sixteen hours.

Award 10009, as is disclosed by the reference to Award 9436, is not at variance with other comparatively late awards of the Division.

/s/ G. Orndorff
G. Orndorff
Labor Member