Award No. 10809
Docket No. SG-10192

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

(Supplemental)

Preston J. Moore, Referee

PARTIES TO DISPUTE:

BROTHERHOOD OF RAILROAD SIGNALMEN OF AMERICA

ATLANTIC COAST LINE RAILROAD COMPANY

STATEMENT OF CLAIM: Claim of the General Committee on the Atlantic Coast Line Railroad Company that:

(a) The Carrier violated the current Signalmen's Agreement, particularly the seniority rules, when it called and used Mr. E. M. Smith, Signalman, a junior Signalman, in the Savannah, Ga., Signal Shops, for overtime service on February 17, 1957, instead of calling and using Mr. A. T. Croom, senior Signalman, in the Savannah, Ga., Signal Shops.

(b) The Carrier now pay Mr. A. T. Croom, senior Signalman, in the Savannah, Ga., Signal Shops, for the amount of time that the junior Signalman was used, seven (7) hours and forty-five (45) minutes (9:45 A.M. to 5:30 P.M. on February 17, 1957) at his respective overtime rate of pay.

EMPLOYES' STATEMENT OF FACTS: Mr. A. T. Croom is regularly assigned to a position of Signalman in the Signal Shop at Savannah, Ga., and has a seniority date in the Signalmen's class of 2-15-41.

Mr. E. M. Smith is regularly assigned to a position of Signalman in the Signal Shop at Savannah, Ga., and has a seniority date in the Signalmen's class of 5-27-48.

Mr. W. C. Brown is regularly assigned to a position of Assistant Signalman in the Signal Shop at Savannah, Ga., and has a seniority date in the Assistant class of 10-16-42.

On Sunday, February 17, 1957, it was necessary for the Carrier to call two men to go to the Signal Shop at Savannah, Ga., pick up a switch machine, transport it by truck to Back Swamp, a distance of about sixty miles, and install the switch machine as a result of one being broken by a train.

Swamp at once, so as to restore its busy double track mail line to normal service as promptly as possible.

Mr. Croom is here asking for overtime that is not granted him by th agreement. Therefore, Carrier respectfully requests that the claim be declined not only on account of its lack of merit, but also due to the fact that the claim before your Board is not the same as that handled on the property.

The respondent Carrier reserves the right, if and when it is furnished with the ex parte petition filed by the petitioner in this case, which it has not seen, to make such further answer and defense as it may deem necessary and proper in relation to all allegations and claims as may have been advanced by the petitioner in such petition and which have not been answered in this, its initial answer.

Data in support of the Carrier's position have been presented to the employes' representative.

Oral hearing is requested.

(Exhibits not reproduced.)

OPINION OF BOARD: This dispute is between The Brotherhood of Railroad Signalmen of America and The Atlantic Coast Line Railroad Company.

Claimant was assigned to the Signal Shop at Savannah, Georgia. February 17, 1957, the Carrier ordered two men of the same craft as Claimant to pick up a switch machine and transport it by truck about 60 miles. Claimants seniority rights began before either of the men who did the work. Claimant now asks for 7 hours and 45 minutes at his overtime rate of pay.

The Carrier contends that Claimant was not available. The Supervisor of the Signal Shop was at home and talking to the Supervisor of Signals by telephone. Claimant lived across the street from Mr. Mears. Mrs. Mears saw Claimant leave. This information was conveyed to Mr. Platt. He made no effort to contact Claimant but called the two men prior to Claimant.

Both parties admit that an emergency existed. This is overtime not a temporary position. The Carrier so admits in the record.

The Claimant was available. The record shows that he left a relative at home for the purpose of calling him if needed. There is nothing in the record to show that the few minutes necessary for Claimant to report would cause harm or inflict hardship upon Carrier's operations.

We are of the opinion that Claimant should have been called.

Claimant is entitled to 7 hours and 45 minutes of pro rata time. We are not disposed to give the overtime rate for time not worked.

For the foregoing reasons, we believe there was a violation 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

That the Agreement was violated.

AWARD

Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 28th day of September 1962.

CARRIER MEMBERS' DISSENT TO AWARD 10809, DOCKET SG-10192

The Majority ignored the arguments advanced by the Carrier or treated them with indifference and the result is a decision completely at odds with a proper construction of the contract.

There was a wreck at a location on Carrier's property about 50 miles from the regular work location (Back Shop) of Claimant and the employes used in this case. The Carrier needed a new switch machine at the site of the wreck and the Supervisor was called to have someone deliver it. The Claimant had gone to church, and the Supervisor, who lived across the street was made aware of this fact and recommended that a junior available employe should be called.

The Carrier defended the use of the junior available employe on three grounds:

1. There was no rule requiring the use of the senior employe under the circumstances;

2. This was an emergency and Carrier could use any available employe;

3. The Claimant was not available and Carrier is not required to do a useless thing in calling him when he is not available.

In regard to the first point, the Carrier showed that there was a rule in the contract giving the "senior available employe" certain work but that portion of the rule did not apply here. The rule reads:

> "Rule 32. (f). Temporary positions or vacancies of five (5) work days, or less, may be filled by any available employe, **but when it is known they will be of more than five (5) work days' duration, the senior employe entitled thereto** will be given an opportunity to fill the position of vacancy." (Emphasis supplied.)

This rule expressly granted a **senior employe** the right to fill a vacancy or position which was 5 days or more in duration, but also expressly stated that temporary positions or vacancies of less than 5 days "may be filled by **any** available employe . . .", which is exactly what Carrier did here. The Majority purports to answer this argument with this high-powered remark:

> "This is overtime not a temporary position. The Carrier so admits in the record."

On the remotest possibility that the reader may be led astray by this patently inconsistent assertion, let it be clearly understood that the Carrier did not admit "this is overtime not a temporary position". The Carrier has better sense than to make such a remark. The Carrier did admit it was work performed at the overtime rate. The Carrier **did not say** it was not a temporary position; on the contrary, the Carrier argued to the Referee that it was a temporary position and the question of overtime was wholly immaterial to this argument. This remark by the Majority is equivalent to saying:

> "Those are apples not fruit."

The fact that they are apples does not make them any the less — fruit. The fact that this work was performed at the overtime rate does not make it any the less — work on a temporary position.

You might have overtime on a temporary position, just as you might also have it on a permanent position. The fact that work is performed at the overtime rate does not have any relevancy to the question whether it is a temporary position or vacancy, nor does it mean that the work was not performed on a temporary position. Whether the straight time or overtime rate is payable is contingent upon whom the Carrier uses as well as other rules of the contract. The Majority reached the horrendous conclusion that simply because the overtime rate was paid that it could not have been a temporary position. In order to avoid the effects of Rule 32(f) and sustain this claim, the Majority was compelled to reach this ridiculous conclusion. Had it been found that this was a temporary position, as it rightfully was, then Rule 32(f) would have denied the claim, because it does justify the use of any available employe.

The second point made by the Carrier was that this was an emergency and any available employe was entitled to be used. The Majority concedes it was an emergency, but then makes this gratuitous remark

> "The Claimant was available. The record shows that he left a relative at home for the **purpose of calling him if needed.** There is nothing in the record to show that the few minutes necessary for Claimant to report would cause harm or inflict hardship upon Carrier's operations."

Contrary to what the Majority states, the Claimant did not leave someone at home "for the purpose of calling him if needed." The Claimant's statement to the Local Chairman repudiates this. He said:

> "I left for church about ten minutes to ten. My Son Rev. Robert E. Croom and his wife were at my house she was sick, they could not go to church, there was no call for me before I left and he said no one called for me, and I surely would have worked, should I have been called."

Moreover, the record does not indicate how long it would have taken to locate the Claimant had he been called and the matter was not even discussed. The Majority's efforts to justify their award causes them to depart from the record and make statements which even the Organization did not make, let alone prove.

While some of those matters may appear trivial, they go to the heart of the Carrier's operation. The Carrier must be permitted a certain latitude in conducting its operations under the contract, and this is even more essential under emergency conditions. It should not be penalized by "hindsighters" who have "eons" of time to evaluate facts which Carrier did not possess when its decision was made.

The record indicated that the Supervisor's wife had observed Claimant and his family going to church and since they ordinarily lived alone, they had no reason to suspect that the son and his wife were visiting. In short, the Carrier's officer did not call Claimant's house because he felt it would be a useless and a ridiculous thing to call when he was convinced there was no one at home. Under normal circumstances there would have been no one there. Why should Carrier be penalized because of such unusual circumstances. It certainly acted as any reasonable person would have under emergent conditions. A rational person does not ordinarily call someone when he is convinced they are not at home. The Supervisor was convinced that Claimant had left his home for church and this was true. Therefore, a call to his house would have been futile based upon the Supervisor's knowledge at the time. Our decision should have been predicated upon the facts as the Supervisor knew them — not upon the facts as they were subsequently developed — because it was an emergent condition requiring spontaneous action. The Majority recognized this but then ignored it by sustaining the claim.

For the foregoing reasons among others, we dissent.

/s/ **W. F. Euker**
W. F. Euker

/s/ **R. E. Black**
R. E. Black

/s/ **R. A. DeRossett**
R. A. DeRossett

/s/ **G. L. Naylor**
G. L. Naylor

/s/ **O. B. Sayers**
O. B. Sayers

LABOR MEMBER'S ANSWER TO CARRIER MEMBER'S DISSENT TO AWARD 10809, DOCKET SG-10192

The Dissenter's argument is divided into three parts, the first of which is predicated upon the proposition that "There is no rule requiring the use of the senior employe under the circumstances." This point is argued on the assertion that the work constituted a temporary position rather than overtime to an existing position. If the assertion of the Dis-

senters were correct we would have been confronted with the handling of a seven (7) hour and 45 minutes "temporary position," for that was the duration of the work in question. How temporary can one be?

The Dissenters state:

> ". . . let it be clearly understood that the Carrier did not admit 'this is overtime not a temporary position'. The Carrier has better sense than to make such a remark. The Carrier did admit it was work performed at the overtime rate. The Carrier **did not say** it was a temporary position; . . ."

The Dissenters are absolutely correct, and apparently the Carrier also had better sense than to argue that a temporary position existed; that argument was one advanced first and only by the Carrier Member of the Board in panel discussion of the claim. The Board correctly found that his seven hour and 45 minute "temporary position" did not exist.

The subject matter of the remainder of the dissent was fully considered by the Board and correctly found to be without merit. The Board has regularly held that seniority must be considered even in the assignment of overtime. See Third Division Awards 495, 2341, 2426, 2490, 2716, 2717, 2994, 4200, 4393, 4432, 4531, 4841, 5346, 6144, 6756, and 9748.

The Board has also regularly held that a Carrier must make a reasonable effort to call an employe who is entitled to work before calling another. See Third Division Awards 2341, 2716, 2994, 3822, 4200, 4393, 4432, 4531, 4700, 4803, 5271, 6013, 6144, 6474, and 9391, and First Division Awards 16440, and 16493.

The only error in Award 10809 lies in its allowing pro rata rate for punitive rate lost. Here again, the Board has regularly held for the position of the employes; for example, in Award 8188 the Board reaffirmed its Award 3277 which states:

> "The penalty rate for work lost because it was given to one not entitled to it under the Agreement, is the rate which the occupant of the regular position to whom it belonged would have received if he had performed the work. Award 3193 and 3271. If Claimant had been permitted to perform the work he would have received time and one-half for the Sunday work and time and one-half for the overtime work on Monday. The latter for the reason that the Monday work on the platform commenced at 7:30 A. M., and terminated at 8:00 P. M. If the employes entitled to the work had performed it, they, too, would have been entitled to two and one-half hours at the overtime rate. Consequently, the claim for two and one half hours at the overtime rate on Monday is properly sustainable."

To allow the rate lost, results in no bonus to a claimant, it simply makes him whole.

Except for the payment to the claimant, there is no error in Award 10809.

/s/ **W. W. Altus**
W. W. Altus