Award No. 11031
Docket No. SG-10126

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Levi M. Hall, Referee

PARTIES TO DISPUTE:

BROTHERHOOD OF RAILROAD SIGNALMEN OF AMERICA

UNION PACIFIC RAILROAD COMPANY

STATEMENT OF CLAIM: Claim of the General Committee of the Brotherhood of Railroad Signalmen of America on the Union Pacific Railroad Company that:

(a) The Carrier violated the current Signalmen's Agreement (particularly Rules 4(b), 7, 10(a), and 31(c)) when it failed and/or refused to properly compensate Signalman L. E. Roundy when he was required by the Carrier to leave his regularly assigned position of Signalman in Signal Gang No. 3421, with assigned hours of 7:30 A. M. to 4:00 P. M., with Saturday and Sunday as rest days, and relieve position of Interlocking Repairman regularly assigned to G. D. Gross, with headquarters at East Portland Interlocking Plant, having assigned hours of 4:00 P. M. to 12:00 midnight on Wednesday, Thursday, and Friday, and 7:00 A. M. to 4:00 P. M. on Saturday and Sunday, with Monday and Tuesday as assigned rest days.

(b) Signalman L. E. Roundy now be compensated 8 hours per day at his respective pro-rata rate of pay for July 5, 6, 9, 10, 11, 12, 13, 16, 17, and 18, 1956, dates that he was denied the right to work his regular assigned position in Signal Gang No. 3421.

(c) Signalman L. E. Roundy now be compensated at the Interlocking Repairman's overtime rate of pay for all hours he performed service at the direction of the Carrier outside of his regularly assigned hours of 7:30 A. M. to 4:00 P. M., on July 6, 11, 12, 13, and 18, 1956, including incidental overtime accrued on the Interlocking Repairman's position. [Carrier's File A-10425]

EMPLOYES' STATEMENT OF FACTS: Prior to July 4, 1956, the claimant, L. E. Roundy was regularly assigned as Signalman in Signal Gang No. 3421, with assigned working hours of 7:30 A. M. to 4:00 P. M., Monday through Friday, with assigned rest days of Saturday and Sunday.

G. D. Gross is regularly assigned as Interlocking Repairman at East Portland, Oregon, with assigned hours of 4:00 P. M. to 12:00 Midnight on Wednesday, Thursday, and Friday, and 7:00 A. M. to 4:00 P. M. on Saturday and Sunday, with assigned rest days of Monday and Tuesday.

only to time worked. This is shown in the language of Rule 10(a) of the current Agreement which provides:

> "(a) Time worked preceding or following and continuous with a regularly assigned eight hour work period shall be computed on actual minute basis and paid for at time and one-half rates, with double time computed on actual minute basis after sixteen **continuous hours of work in any twenty-four hour period,** except that time worked during regular assigned work period will be paid for at the straight time rate. In the application of this paragraph (a) to new employes temporarily brought into the service in emergencies, the starting time of such employes will be considered as of the time that they commence work or are required to report."

The Carrier's action is also in accordance with, and supported by, Sections 10(a) and 12(a) of the Vacation Agreement, which were quoted in the Statement of Facts.

For the 11 days that Claimant Roundy worked as an Interlocking Repairman, from July 4 to July 18, 1956, he was paid a total of $269.36, plus $48.75 expenses, and in addition, he received time and one-half for the first shift worked as a Signalman upon his return to his assignment in the signal gang. If the Interlocking Repairman had not been away on vacation and worked the same number of days as an Interlocking Repairman, the former would have received $198.00 compared with the $269.36 received by Claimant Roundy who also received $48.75 as expenses. If Claimant Roundy had worked as a Signalman in the Signal Gang instead of relieving the Interlocking Repairman, he would have received $190.96. By this claim, the Organization would have the Carrier pay Claimant Roundy $577.96 for working 11 days during which he relieved the Interlocking Repairman's position.

What was done here was in accordance with the provisions of the Agreements as well as the established practice on this property under such provisions. Check of the Carrier's records as far back as 1949 indicates that relief for the Interlocking Repairman position at this point has always been provided in the same manner as in the instant situation. No question has ever been raised as to the propriety of such action by the Carrier.

The claim should be denied.

All data used in this Response to Notice of Ex Parte Submission are of record in correspondence and/or have been discussed in conference with the Organization's representatives.

OPINION OF BOARD: It is not disputed that prior to July 4, 1956, Claimant L. E. Roundy was regularly assigned as a Signalman in Signal Gang No. 3421, with assigned working hours of 7:30 A. M. to 4:00 P. M., Monday through Friday, with assigned rest days of Saturday and Sunday; that one C. D. Gross was a regularly assigned Interlocking Repairman at East Portland, Oregon, with assigned hours of 4:00 P. M. to 12:00 midnight on Wednesday, Thursday and Friday, and 7:00 A. M. to 4:00 P. M. on Saturday and Sunday with assigned rest days of Monday and Tuesday. Gross was on his annual vacation from July 4 through July 18, 1956, and Claimant was required to suspend work on his regularly assigned Signal-

man's position in Signal Gang No. 3421 to fill the position of the Interlocking Repairman during this period.

It is the position of the Claimant that he had seniority rights in his regularly assigned position of Signalman in Signal Gang No. 3421 and that Carrier violated the Agreement effective January 1, 1951, when on the dates specified in this claim, the Carrier required the Claimant to suspend work on his regular assignment and assigned working hours to fill the position of the Interlocking Repairman at East Portland Interlocking Plant and Carrier violated particularly Rules 4(b), 7, 10(a) and 31(c) of the Agreement when it failed and/or refused to properly compensate Claimant.

Claimant maintains the instant dispute involves a change of position, not a change of shift, and that Carrier violated Rule 31(c) when it required Claimant to suspend work on his regular assignment to fill the position of Interlocking Repairman — that Carrier assigned Claimant to the higher rated position of another employe, away from the position on which he held seniority, and doing a different type of work than that required in his position.

On the other hand, it is the contention of the Carrier that the Agreement was not violated, including Rule 7, 10(a) and 31(c). It is Carrier's position that the situation here presented was clearly covered by Rule 16 (Change of Shift) which reads as follows:

> "(a) Employes changed from one shift to another will be paid for the first shift of each change at time and one-half rate, except where change is made in the exercise of seniority or for the convenience of employes or to employes working more than one shift of regular relief assignments.
>
> (b) A Signal Department employe used to relieve an employe of another department will be paid at the overtime rate for all time worked outside the hours of his regular assignment.
>
> (c) Payment of time and one-half, as provided in this rule, will not be considered as overtime in the application of Rule 7 (absorption of overtime)."

Carrier claims the above rule gives to it the right to change employes from one shift to another and provides the penalty for making such changes and that this rule was complied with in the instant case; furthermore, Carrier contends that this has been in accordance with the practice between the parties for a number of years last past in like situations and has been understood by the Carrier and its employes as removing from coverage and operation of Rule 7 (Absorption of Overtime) those cases which fall within the change of shift rule; that this type of situation has always been understood to be, under the Agreement provisions and the practice thereunder, within the operation of the Change of Shift rule.

Furthermore, Carrier contends that both the general rules of the Agreement and the National Vacation Agreement sanction what was done here.

Petitioner does not deny the existence of the practice but contends that long continuation of a practice cannot be considered as a modification of the Agreement and that employes are entitled to bring a stop to practices which violate their Agreement.

That this did constitute a change in position rather than a shift of position was determined in Award 4616 (Carmody) where an analogous change of shift rule was involved and both positions involved appeared in the same classification group in the Scope Rule. The question of practice on the property was not considered in that award. Award 10635 (LaBelle), except for the year and the Claimant, is identical with the facts in the instant case even to the Interlocking Repairman who was to be relieved in the year 1955 and followed Award 4616 in the conclusion that this was a change in position rather than a change in shift. However, the question of practice on the property was not considered in this award, either. We must then accept this award as binding on the parties unless a consideration of the practice on the property alters the situation.

It has, frequently, been held by this Board that the repeated violation of an Agreement does not change it; knowledge of a rule violation is not sufficient to operate as an estoppel as the responsibility for policing the Agreement is primarily that of the Carrier and either party may at any time require the practice to be stopped and the rule applied in accordance with the terms of the Agreement.

In Award 10635, the Board failed to recognize the alleged practice on the property as an element to be considered. Apparently an erroneous attempt was made by the parties in the past to comply with the Vacation Agreement by compensating the Claimant under Rule 16 of the effective Agreement, among other reasons to avoid payment of overtime as provided for in Rule 7 of the Agreement. All through the Morse Award there runs the suggestion that the allowance of vacations should not be made too burdensome on either the Carrier or the employe. Therefore, in order to preserve the integrity of the Agreement, the Carrier, shall compensate the Claimant for 8 hours per day at his respective pro rata rate of pay for July 5, 6, 9, 10, 11, 12, 13, 16, 17, 18, 1956 dates that he was denied the right to work his regularly assigned position; against this should be offset the allowance for the changes in shift which Carrier has erroneously paid to Claimant under 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

That there has been a violation of the Agreement.

AWARD

Claim sustained in accordance with the Opinion and Findings.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 23rd day of January 1963.