Form 1 **NATIONAL RAILROAD ADJUSTMENT BOARD**
THIRD DIVISION

Award No. 44214
Docket No. SG-45240
20-3-NRAB-00003-190008

The Third Division consisted of the regular members and in addition Referee Patrick Halter when award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Railroad Signalmen
(
(Kansas City Southern Railway Company

STATEMENT OF CLAIM:

"Claim on behalf of the General Committee of the Brotherhood of Railroad Signalmen on the Kansas City Southern (formerly Tex-Mex):

Claim on behalf of all Tex-Mex Signal Maintainers (M. Garcia, J.M. Gutierrez Jr, R.M. Martinez, M.P. Nevarez, F. Nevarez IV, J.C. Weaver and T.L. Webb), for 8 hours overtime and 8 hours double-time each for April 18, 2017, and 8 hours overtime and 16 hours double-time minus any straight-time worked beginning on April 19, 2017, and continuing each day thereafter until the violation stops, account Carrier violated the current Signalmen's Agreement, particularly Rules 7, 10, 11, and 12, when on April 18, 2017, Carrier instructed Claimants that they were required to remain available for duty 24 hours per day, 7 days per week, without properly compensating them. Carrier's File No. K0617-7295. General Chairman's File No. 17-047-TMEX-185. BRS File Case No. 15884-TexMex, NMB Code No. 174."

FINDINGS:

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

The carrier or carriers and the employee or employees involved in this dispute are respectively carrier and employee within the meaning of the Railway Labor Act, as approved June 21, 1934.

This Division of the Adjustment Board has jurisdiction over the dispute involved herein.

Parties to said dispute were given due notice of hearing thereon.

The claim in this proceeding involves seven (7) employees (Claimants). Each employee occupies the position General Maintainer ("GM") on the KCS' Texas Mexican (Tex-Mex) Railway Company which is comprised of about two hundred fifty (250) track miles across the southeastern landscape of Texas.

Duties for a GM are to maintain and repair signal equipment such as track side signals and crossing protection devices at public road grade crossings. Six (6) GMs are each assigned a territory and the remaining unassigned GM provides support. A GM's regular hours of work schedule is Monday - Friday, eight (8) hours daily - - forty (40) hours weekly - - rest days Saturday - Sunday. An essential function of the position is to perform work outside of regularly scheduled hours responding to trouble calls.

This dispute arises from the Organization's assertion that the Director - Signal Operations (DSO) required, as of April 18, 2017, GMs to remain subject to call for after-hour trouble calls, without pay, at all times in violation of Rule 7 - Monthly rates. Instead of released from duty after completing an 8-hour workday, the DSO requires the GMs to remain on mark up and subject to call at a moment's notice despite their contractual right under Rule 11 - Subject to Call, to mark off at-will thereby rendering themselves unavailable for trouble calls.

On June 14, 2017 the BRS filed a claim stating:

"A) The Carrier violated, and continues to violate, the Tex-Mex/BRS agreement, particularly rules 7, 10, 11, and 12. On April 18, 2017, [DSO] instructed Claimants they were required to remain on call at all times to respond to trouble calls without regard of the fact they are hourly-rated employees.

B) The Carrier should compensate the Claimants for 8 hours overtime and 8 hours double-time for April 18, 2017. The [GMs] should additionally be compensated 8 hours of overtime and 16 hours of double-time, minus any straight time worked, beginning April 19, 2017, and continuing everyday thereafter until this violation is stopped."

With respect to the alleged rules violations, the Tex-Mex/BRS Agreement states as follows:

"Rule 7. Monthly rates.

(a) Employees covered by this agreement will be paid as follows:

General Maintainer - $1327.73 per month (Effective 7-1-78)

The overtime rate will apply for any service performed outside of regular hours of eight (8) per day or forty (40) per week.
Double time rate will apply for any service beyond sixteen (16) hours in any twenty-four (24) hour period.

Employees who are receiving double time rate of pay when their regular assigned work period starts will be paid at time and one-half for the work period and if not released at the end of their regular work period, will revert to the double time rate until released from duty. If not released from duty all subsequent regular work periods shall be paid for at time and one-half rate[.]

The straight time hourly rate will be determined by dividing the monthly rate by 176. The monthly rate is based on 176 hours per month. Future wage adjustments shall be made on the basis of 176 hours per month. Any service performed on a holiday or rest day shall be paid for at the overtime rate.

*** * * ***

Rule 10. Calls.

(a) Employees released from duty and notified or called to perform work outside of and not continuous with regular working hours will be paid a minimum allowance of [2] hours and [40] minutes at the time-and-one-half rate; if held longer than [2] hours and [40] minutes, they will be paid at the rate of time and one-half computed on the actual minute basis, until the double time rate becomes applicable as provided in Rule 7 [Monthly rates].

(b) The time of employees so notified in advance will begin at the time required to report. The time of an employee called will begin at the time called. The time of an employee notified or called will end at the time released at designated headquarters point.

(c) Employees so called less than one (1) hour before their regular starting time, shall be paid for one (1) hour at time and one-half rate, if more than (1) hour, shall be paid in accordance paragraph (a) of this Rule.

(d) The provisions of this rule will be applicable to overtime-double time conditions outlined in Rule 7 [Monthly rates].

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Rule 11. Subject to Call.

General maintainers will notify the person designated by the carrier where they may be called. When they desire to leave their headquarters or territory, they will notify the person designated by the carrier that they will be absent, about when they will return, and, when possible, where they may be found.

Rule 12. Work week.

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(a) <u>General</u>. Subject to the exceptions contained in this agreement, the Carrier will establish a work week of forty (40) hours, consisting of five (5) days of eight (8) hours each with two (2) consecutive days off in each seven (7); the work weeks may be staggered in accordance with the Carrier's operational requirements; so far as practicable the days off shall be Saturday and Sunday."

On August 11, 2017, the KCS denied the claim. The Agreement does not authorize compensation for all time spent in an on-call available status. Rule 7 - Monthly rates and Rule 11 - Subject to Call, jointly, show that a GM "released from duty" remains on-call available. Responding to trouble calls outside of regular hours of work is a long-standing practice and "essential feature" of the position that is highlighted in position circulars - - "subject to be called for duty at any time, including but not limited to nights, weekends, holidays, etc."

Rule 11 - Subject to Call specifies a protocol to follow when a GM seeks to mark off or exempt himself from on-call availability and secures cover for his territory. Rule 10 - Calls and Rule 11 - Subject to Call indicate the KCS can require a GM to work outside his regular hours of work with compensation provided in accordance with Rule 7 - Monthly rates and Rule 10 - Calls. As for Rule 12 - Work week, it authorizes the Carrier to require a GM to respond to trouble calls.

Contrary to the BRS' assertion, Rule 11 - Subject to Call does not allow a GM to mark off at-will; however, he can notify the Carrier's designee of his desire to mark off which is granted when "needs permit". After proposing to bargain over this matter in 2010, e.g., compensation for all time spent in on-call available status and voluntary, at-will mark off, the BRS resurrects it in 2017 as a contract violation in this claim. Language in the Agreement executed in 2012 did not contain the BRS' proposals; the status quo continued.

On October 5, 2017, the Organization appealed the claim denial by reiterating its initial position. That is, Rule 11 - Subject to Call provides a contractual right for a GM to absent himself from on-call availability and the Agreement does not authorize the KCS to require a GM to remain on mark up, against his will, without compensation. This is confirmed by wording in the circular which states a GM may be called upon to work outside regular hours of work "except as otherwise provided by applicable bargaining agreement provisions[.]"

The DSO forecast dire consequences should a GM voluntarily mark off and not respond when called; this shows that GMs are not released from duty and free to pursue personal interests on rest days. Since GMs are forced to remain available for trouble calls after released from duty, they remain in continuous service and payment follows. Prior to filing this claim, GMs voluntarily remained on-call available without seeking pay.

This claim is distinguished from negotiations in 2010 where the Organization proposed a "hold on" rule which afforded the Carrier time to ensure coverage by setting the compensation GMs would receive for remaining on-call. Without the BRS' proposal, the Carrier is without a mechanism to require an hourly-rated GM to remain on-call unless compensated under Rule 7 - Monthly rates.

On December 1, 2017, the Carrier denied the appeal based on the same reasons in its initial claim denial. For example, Rule 11 - Subject to Call does not allow GMs to mark off at will albeit they can notify the KCS of their desire to mark off. Rule 7 - Monthly rates does not authorize pay for time spent on subject to call; no pay is authorized for on-call availability as Claimants are free to pursue personal interests. The DSO's comments that GMs remain on-call available after released from duty confirms the Carrier's long-standing position.

On February 1, 2018, a conference convened but the parties' positions remained unchanged.

On July 5, 2018, the Organization responded to the Carrier's appeal denial. The BRS asserts that Rule 11 - Subject to Call outlines the process for a GM to follow when he elects to mark off and exempt himself from on-call availability; inclusion of the word "absent" in the rule contemplates that a GM accessing this provision will not be available.

Claimants are hourly-rated so the Carrier's comparison to GMs under the KCS/BRS Agreement and associated arbitral awards is flawed. Those GMs are monthly-rated for all services and, when responding to call on their designated standby day, receive additional pay whereas Claimants are hourly-rated and the Carrier requires Claimants to provide coverage without compensation.

The DSO's harsh directive proves that the Carrier requires Claimants to remain standing by, available to respond at a moment's notice and, if not, they are subject to discipline. There is a difference with a GM volunteering for on-call available with a possibility to earn extra money and the GM forced to remain on call against his will.

As for the BRS proposal in 2010, it provided the KCS with a method to require a GM to remain on-call available at straight-time rate. Regarding the circulars, they are of no value in establishing past practice. Finally, reasons are unique to each individual why no claim has been filed until this claim.

On August 31, 2018, the Organization filed its claim with the Board:

> **"Claim on behalf of the General Committee of the Brotherhood Of Railroad Signalmen on the Kansas City Southern (formerly Tex-Mex):**
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> **Claim on behalf of all Tex-Mex Signal Maintainers (M. Garcia, J.M. Gutierrez Jr, R.M. Martinez, M.P. Nevarez, F. Nevarez IV, J.C Weaver and T.L. Webb) for 8 hours overtime and 8 hours double-time each for April 18, 2017, and 8 hours overtime and 16 hours double-time minus any straight-time worked beginning on April 19, 2017, and continuing each day thereafter until the violation stops, account Carrier violated the current Signalmen's Agreement, particularly Rules 7, 10, 11, and 12, when on April 18, 2017, Carrier instructed Claimants that they were required to remain available for duty 24 hours per day, 7 days per week, without properly compensating them[.]"**

The Board finds this claim was handled on property in the customary manner, up to and including presentation to the highest officer of the Carrier designated to handle a matter of this sort. The claim is properly before the Board for adjudication.

This proceeding presents a matter of contract interpretation arising under the Tex-Mex/BRS Agreement and invoking Rule 7 - Monthly rates, Rule 10 - Calls, Rule 11 - Subject to Call and Rule 12 - Work week. In this situation, the burden and degree of proof resides with the Organization to establish its alleged rules violations. Assessing whether the Organization carried its responsibility on burden and degree of proof, principles of contract interpretation drawn from common law, statutory construction and arbitral jurisprudence in the parties' submissions are instructive for the Board.

Contract interpretation principles are not rigid, undeviating signposts applied as though the dispute fits into a formula. Nevertheless, dictums and adages of interpretation are well-known: apply the plain and ordinary meaning of a word and terms unless indicated otherwise by use, definition or industry practice; construe the agreement as a whole and not selectively; avoid absurd and unlawful results; recognize a presumption against forfeitures; to articulate for inclusion of a phrase or item is to exclude another phrase or item of the same genre. In labor relations the purpose, intent and clarity of language cannot be construed in an vacuum, sealed and

isolated from the background of negotiations and circumstances giving rise to the administration and enforcement of a collective bargaining agreement.

There is no dispute that a GM's regular work schedule consists of an 8-hour day, Monday - Friday, rest days Saturday - Sunday and there is no dispute that the Carrier can call a GM after hours to report for duty and perform work. The incidence of after hour call backs is "only infrequently" - - the Carrier states - - as in "on average, fewer than four times a month" in 2015 and "fewer than three times a month on average" during January 2016 - March 2016 inclusive.

Regardless of the frequency for after hour call backs, the BRS asserts that Rule 11 provides a GM with a unilateral right - - "at-will" - - to exclude himself from on-call availability and, moreover, when a GM is available for on-call, all time spent in that status is compensated. The Carrier disagrees; Rule 11 does not provide "at-will" mark off from on-call availability; the rule in practice requires a GM to remain on-call available unless approved for mark off; on-call status always has been uncompensated.

There is symmetry and symbiosis in the Agreement and particularly the rules in this claim. For example, Rule 10 - Calls, states that a GM "released from duty and notified or called to perform work outside of and not continuous with regular working hours will be paid[.]" In other words, pay is rendered only when work is actually performed and when the GM's regular workday has run its 8 hours, he is "released from duty" and no longer in pay status. When there is a break or lapse in time between his "release from duty" and notice to report for duty, compensation begins with his receipt of the call. Rule 10 - Calls is specific in content and application.

According to the BRS, Rule 11 - Subject to Call allows a GM to mark off at-will from on-call availability. The rule states:

> **"General maintainers will notify the person designated by the carrier where they may be called. When they desire to leave their headquarters or territory, they will notify the person designated by the carrier that they will be absent, about when they will return, and, when possible, where they may be found."**

The "Subject to Call" rule is inherently ambiguous because it is dependent or conditioned upon an unforeseen or unanticipated event. Should that occur the GM may be called for duty outside of his regular hours of work or he may not be called

for duty. Unless that event is acted upon by the Carrier ("may be called"), then the GM remains released from duty. The Board finds that the word "absent" in the phrase "will be absent" and arising in the context of labor relations and conditions of employment, is an absence authorized by the Carrier and an excused mark off for the GM. This is corroborated by the parties' practice applying this rule over the course of nearly two (2) decades where a mark off has been not been acted upon by the GM at-will but upon notice to and approval by the Carrier.

Interpreting this rule as allowing at-will mark off renders the notification protocol "where they may be called" or "where they may be found" void of purpose because, once marked off, the Carrier would not be contacting the GM. Giving effect to the phrases aligns them with the KCS position that even after a GM is released from duty he may be called back and, thus, the Carrier needs to know "where [he] may be found" or "where he may be called" unless the GM is unavailable with an approved mark off.

Although the Carrier hedges its position stating that when "needs permit" a GM can mark off from on-call availability, the record shows that GMs notifying the Carrier of their desire to mark off have been positively acted upon. In other words, the KCS presents no situations where it denied, due to operational needs, a GM desiring to mark off from on-call availability. Mark off from on-call availability, a condition of employment for a GM, is dependent on following the notification protocol as written and practiced and "needs permit" is reasonably determined by the Carrier. The Board finds a situation may arise where a GM is on-call available but, when called, unable to report for duty due to an intervening, unanticipated event that precludes him from reporting such as an illness or an exposure to illness (Covid-19). In that situation, a mark off is granted should the GM be called upon by the Carrier to report for duty.

If there is no at-will mark off, then the BRS asserts a GM required to remain on-call available must be compensated for that time without regard to whether he is called to report for duty. This assertion runs counter to the stipulation in Rule 10 - Calls where the parties agreed that an employee is paid at time and a half when "released from duty and notified or called to perform work outside of and not continuous with regular working hours." Further refinement in Rule 10 dictates when compensation accrues - - "[t]he time of an employee called will begin at the time called."

The BRS asserts that requiring a GM to remain on-call available shows that he is not released from duty and, therefore, remains in continuous service entitled to overtime pay. Considering the rules invoked in this claim as a whole, a GM is released from duty upon completion of his 8-hour workday and, thereafter, is not under the Carrier's direction or supervision, not restricted to or quarantined in proximity to Carrier property or the GM's designated territory, and freedom of personal activities and pursuits remain in effect and unlimited. The only work-related accoutrement during on-call status is the Carrier-issued cell phone.

Any ambiguity in wording or awkward phrasing in these rules has been massaged and nursed for the past 2 decades through the interpretation and application by the parties. This covers a period of time when GMs were monthly-rated and continues to the present where they are hourly-rated. Under both compensation schemes, the wording in the Agreement remained unchanged. There is no indication in 2003 the BRS notified or communicated to the Carrier that the GMs conversion to hourly-rated required the KCS to pay them for all time spent in an on-call available status. Time dedicated to on-call availability never has been compensable under Rules 7, 10, 11 and 12 and arbitral awards show that whether GMs are monthly-rated or hourly-rated, they are not compensated for time in an on-call status.

The BRS asserts that GMs voluntarily elected not to seek compensation for time in an on-call status in the past but are exercising their contractual right now for payment. If GMs are due compensation for on-call availability, then their pay triples according to the KCS' estimates. Crediting the BRS' assertion means that employees occupying GM positions for nearly 2 decades unanimously decided to voluntarily forego their contractual right to premium levels of compensation. The Board finds this assertion is an unlikely act of individual self-sacrifice.

The BRS distinguishes this claim from its proposal in 2010 where the Organization sought to amend Rule 11 such that a GM would be on-call only if he "wished to be called" and the Organization sought straight-time pay for all time in on-call available status. The proposal and this claim are materially and substantively the same in effect on the GM and the KCS, only the forum is different. The axiom that a party does not attain in grievance arbitration what was not attained in negotiations applies here. The result of negotiations was no change, that is, the status quo in wording and practice remained in effect.

As for the DSO's comments, he restated and reaffirmed the Carrier's position that a GM cannot voluntarily exempt himself from on-call availability and must follow the mark off protocol in Rule 11 - Subject to Call. As with other conditions of employment, should an employee not adhere to and follow the applicable rules, discipline may follow.

Rule 11 - Subject to Call specifies where a GM can be reached and does not allow at-will mark off. Rule 7 - Monthly rates and Rule 10 - Calls address compensation when a GM is not released from duty at the end of his workday or, when released, notified to return for duty. Rule 7 does not address pay for on-call availability or subject to call and Rule 10 is pay for work, not for availability. The Agreement does not require compensation for all time in an on-call available status. Until it does, on-call availability remains a condition of employment without pay when subject to call, with pay when called to duty.

In sum, the Board finds that the Organization did not carry its burden and degree of proof such that the alleged rules violations are not established. Therefore, paragraph A) and paragraph B) in the claim are not sustained. The Board will deny the claim.

AWARD

Claim denied.

ORDER

This Board, after consideration of the dispute identified above, hereby orders that an Award favorable to the Claimant(s) not be made.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Dated at Chicago, Illinois, this 30th day of September 2020.

LABOR MEMBER'S DISSENTING OPINION TO NATIONAL RAILROAD ADJUSTMENT BOARD THIRD DIVISION AWARD NO. 44214 SG-45240

(REFEREE PATRICK HALTER)

A review of the Majority's findings indicates a fundamental failure to grasp the true crux of the dispute brought before it. The findings are riddled with points worthy of dissent but for the sake of brevity we will focus on several major errors in the Majority's decision.

The Majority understood that the issue revolved around the Claimants being "Subject to Call" and their ability to "mark off" from call availability. However, the Majority's missed the critical point of the dispute, it was not the Organization's position that all time "Subject to Call" is paid, but that when the employees *notify the person designated by the carrier that they will be absent* but are instructed by Carrier to remain available, that the employee is now being "held for service". This point was argued in both the written submission and oral arguments before the Board, but its findings lack any consideration of this key fact. In support of that position the Organization referenced a similar case with similar facts in **Third Division Award No. 28801** which held:

> "First, the Claimant did not volunteer for the standby call. He was ordered to be available by the Carrier. The Organization correctly asserts that the Claimant's neglect of this duty to be available was subject to discipline, as evidenced by the Carrier's acknowledgement that Claimant was removed from service in a similar situation several weeks before the incident in question.
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> These factors would restrict an employee from attending to his personal affairs to a far greater extent than a normal standby situation. Therefore, the Board concludes that this dispute falls under the line of cases cited by the Organization in its submission. For example, in Third Division Award 1070 this Board stated:
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> > 'In this case there was no mere request that the employees involved inform the carrier as to whether they may be reached; these employees were officially instructed to hold themselves available for duty during the two-day period covered by the claim. Since they were thus held for duty in line with their regular assignments, they are entitled to compensation as they would have earned if they had actually performed the work in contemplation.' **(Emphasis added)**

Furthermore, in **Third Division Award No. 1675** this Board stated:

> "'It was stand-by service. It was of value to the Carrier or otherwise it would not have required Ashford to have been subject to call during the period of time. As someone has said, 'They also serve who only stand and wait.'
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> Similarly, in Third Division Award No. 2640 this Board based its finding that pay for stand-by service was appropriate because during the time period in question the Carrier had the authority to command and direct the activities of the employee. As the record in this case shows, during the one-day period in question the Carrier had the authority to direct and command the activities of the Claimant. If the Claimant were not available, he was subject to discipline, as indicated by his discipline for the earlier incident.
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> ***
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> Under these circumstances the Board concludes that the Claimant was required to perform a service for the Carrier during the twenty-four hour period in question here, and that service constituted compensable 'work' as defined under the Agreement. Therefore, the Claimant is due to be compensated at the applicable rate for twenty-four hour period which he was on call." **(Emphasis added)**

Just as in the above cited case, the situation in this case did not involve voluntarily remaining "Subject to Call". The Carrier was informed the employee would be absent and upon being directed to remain available for call by Carrier the employees unable to pursue personal ventures which would delay or prohibit their response to Carrier's call, in effect held for duty. The Majority notes "freedom of personal activities and pursuits remain in effect and unlimited" but this is simply not true; a few examples would be the inability to go on a weekend vacation hours away from the employee's home which would unreasonably delay call response time or the ability to have alcoholic beverages, as an employee is federally regulated and tested for substances when performing Hours of Service covered work and cannot be on the property under the influence. The facts of this case demonstrated that the employees were "held for service" and the lack of reference or consideration of this fact in the record lead to misguided findings.

Furthermore, the Majority's findings attempt to alter the Agreement from notifying the person designated by carrier that they will be absent to with Carrier approval and when needs permit employees may be absent. Despite the plain definition of absent, not present in a place, the Majority implies that to be absent implies permission. This finding runs counter to the Majority's cited interpretation principle of applying the plain and ordinary meaning of a word. Moreover, the alleged past practice of a "protocol" in Rule 11 was unsubstantiated and a unilaterally implemented policy by Carrier which is in conflict with the clear agreement language. If the parties intended for there to be an authorization process or protocol, they surely would have said such as was done with similar rules on other properties. One example is drawn from **Third Division Award No. 826**, where the "subject to call" Rule stated:

> "Employees assigned to, or filling vacancies, on a section or plant will be subject to call. Such employees will notify the designated officer where they may be called and will respond promptly when called. When such employees desire to leave their home station or section they will secure authority from the designated officer who will grant permission if the requirements of the service will permit." **(Emphasis added)**

The provision at hand lacks this restrictive language and the Majority's attempt to insert such language, rather than apply the clear language, was outside its jurisdiction. Additionally, in the above cited Award it dealt with a similar issue to the instant case and rendered the same finding regarding being held for duty, stating:

> "When the carrier, in violation of Section 11 of Article II, required these employees to remain in hearing distance of the company telephones, it required service of them within the meaning of Section 8 of the same article. Certainly, the carrier would not have imposed this requirement upon the claimants if it had not felt that their standing-by would be of value to it. "They also serve who only stand and wait."

Furthermore, the nearly identical agreement language was at issue and similar facts concerning a unilateral restriction on the employee's flexibility, **Third Division Award No. 22787**, held:

> "Basis for these claims is the application of Rule 16 (a) of the Agreement in effect between the parties at the time of events germane to this dispute:
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> > 'SUBJECT TO CALL 16(a) Employees assigned to regular maintenance duties recognize the possibility of emergencies in the operation of the railway, and will notify the person designated by the management where they may be called. When such employees desire to leave _their home station or section they will notify the person designated by the management that they will be absent, about when they will return, and, when possible, where they may be found. Unless registered absent, regular assignee will be called.'

Events cited in the claims occurred on various dates in June, July, August, September and December of 1977. They followed the issuance, by the Signal Supervisor, of a letter dated June 23, 1977, to "All Signal Maintainers" which stated:

> "Signal Maintainer check-out sheets have been provided to the following locations:
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> Dispatcher's Office – Chicago
> Dispatcher's Office – South Pekin
> JB Tower – West Chicago

NY Tower – Nelson

Effective immediately, a record will be kept at the above locations showing the time checked out and the time checked back in. Maintainers will check out with their designated check-out point as indicated below. Each group will have at least one maintainer available for call on nights and weekends. Therefore, if all but one maintainer has checked out in a group, the remaining man will not be allowed to check out.

According to the Organization, the Claims herein are based upon the application of such directive and are made by the Signal Maintainers not allowed to 'check out' as per the June 22, 1977, directive, who thus considered themselves 'subject to call.'

The record reflects eloquent arguments by both parties by the Organization (among other things) that the Claimants were on 'standby time' and entitled to compensation, and by the Carrier that it must be able to sustain operations continuously and thus must have access to qualified employees on an emergency basis at all times. Neither argument is squarely on point with the issue before the Board. What is, is whether or not the Carrier made a unilateral change to the language and application of the appropriate Rule. We find in the affirmative in that regard. Rule 16 (a) is neither vague and thus in need of clarification, nor is it ambiguous and subject to various applications. Apparently, what the Carrier sought to deal with was the potential for all Signal Maintainers to register absent and it thus be devoid of qualified employees on an emergency basis. We find no such potential under this Rule; indeed, an affirmative obligation rests upon such employees to ensure that the Carrier knows where all may be found if they are away from their home stations. Essentially, the Carrier has deprived the Claimants of this degree of flexibility, presumably on the dates set forth -herein. Such action exceeds the restrictions set forth in Rule 16 (a) and thereby changes its application.

We suggest, however, that the extent of the Claims may be violative of laws and statutes; we also conclude that no specific Rule under the Agreement can be cited as applicable in this regard. What is involved is a demand of punitive compensation for a loss of flexibility for the Signal Maintainers who were not permitted to "check out" on the various weekends cited in the claims."

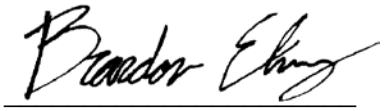
The above cited Awards demonstrate the logical application of the clear Agreement provision involved in the instant dispute. Moreover, it involved similar circumstances with a directive from a Carrier Manager, less threatening in the above case, which was counter to the clear language. The Majority erred in viewing the issue as the ability to "mark off at-will", an option provided to the employees through clear language, and failed to recognize the true issue of the Claimants being owed compensation for time they desire to be absent but are directed to remain available, in continuous stand-by service, for Carrier. The Majority's decision to permit and endorse threats of discipline for exercising rights under the agreement exceeded its jurisdiction and demonstrably without substance.

The Majority also states:

> "Interpreting this rule as allowing at-will mark off renders the notification protocol 'where they may be called' or 'where they may be found' void of purpose because, once marked off, the Carrier would not be contacting the GM."

Regarding this point, this was an attempt to insert context rather than applying clear language and there is a lack of consideration to the historical context of Railroad Operations at the time that Rule 11 was drafted. The reference to "where they may be called" is made in the first sentence of Rule 11 and is not included with the second part of the provision which deals with the employee being absent. This provision, as with many railroads, is a requirement for the employee to have the phone number, they wished to be called at, registered with the Carrier for call purposes. The historical context for the "where they may be found" ties to when an employee leaves their territory, to help an adjoining maintainer for instance, and informs the Carrier where they can be found. In context this provision was drafted before the age of cell phones and the Carrier would rely on location to ascertain which Carrier landline or code lien, located at signal location, to use to contact the employee. Contrary to the Majority's findings, under the proper interpretation for the employee's ability to be absent when desired, the components of the provisions serve a purpose; however, those purposes were misconstrued or misunderstood in the Majority's findings.

In conclusion, the Organization respectfully dissents to the Majority's finding in this case. For all of the foregoing reasons, this award is devoid of precedential value for use by any arbitration board created under the Railway Labor Act.



Brandon Elvey
Labor Member