Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 35584
Docket No. SG-35589
01-3-99-3-506

The Third Division consisted of the regular members and in addition Referee Curtis Melberg 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 Railroad (KCS):

Claim on behalf of A. L. Orendorff for eight hours at his time and one-half rate, account Carrier violated the current Signalmen's Agreement, particularly Rule 46, when it failed to compensate the Claimant for service he performed on February 16, 1998, President's Day Holiday. Carrier File No. K0698-5125, General Chairman's File No. 988746. BRS File Case No. 10989-KCS."

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 Claimant, a monthly rated Signal Inspector, was instructed by the Carrier on Sunday, February 15 to report for duty the next day, Monday, February 16, 1998,

President's Day Holiday, for the purpose of filling the fuel tanks of portable generators with gasoline and checking storage battery voltage levels at locations where such equipment was being used during a power outage caused by recent storms. No flashers or tracklights were experiencing trouble at the time.

The Claimant performed the work as instructed and thereafter, contending his work had been "ordinary maintenance," submitted a claim for eight hours pay at the time and one-half rate under Rule 46(a) of the parties' Agreement, which reads as follows:

"RULE 46

MONTHLY RATED EMPLOYEES

(a) Inspectors, Foremen, Signal Shop Foremen, Signal Maintainers, Relief Signal Maintainers, and Special CTC Maintainers will be paid a monthly rate. The monthly rates for such positions are based on 213 hours per month. Future wage adjustments shall be made on the basis of 213 hours per month. Except as otherwise provided, employees filling these positions shall be assigned one regular rest day per week, Sunday, which is understood to extend 24 hours from their regular starting time. Rules applicable to hourly rated employees shall apply to service on Sunday and to ordinary maintenance or construction work on holidays or on Saturdays." (Emphasis added.)

Hourly rated employees are paid at the time and one-half rate for work performed on established holidays.

Supporting the Claimant's contentions here, the Organization argues (1) that the work in question was "ordinary maintenance" because no tracklight or flasher was experiencing trouble at the time and (2) that had an emergency situation existed, the Carrier would have instructed the Claimant to do the work on February 15 or earlier, rather than planning and having him wait until February 16, 1998 to do it.

The Carrier counters with argument that the Claimant's work on February 16 was not ordinary maintenance. It acknowledges such work could be ordinary maintenance, but asserts it was anything but that in the instant case. "Extraordinary"

and "emergency" are two of the terms used by the Carrier to describe the work. The Carrier states:

> "... The work performed was in an emergency situation. There had been a severe ice storm and there were numerous power outages. Ensuring the batteries remained charged and filling the generators with fuel in this type of situation, can hardly be considered routine work. Had the generators run out of fuel, or the batteries lost power, the signal system would have shut down."

The Carrier's contention that an emergency situation existed which justified its using the Claimant to perform the work in question without paying him the additional compensation demanded is an affirmative defense that the Carrier must establish by competent proof, as distinguished from mere contention. As we view the record, the Carrier failed to carry its burden of proof in this regard. While we would agree that a signal system in danger of failing would constitute an emergency situation that must be remedied as quickly as possible, the evidence, in our judgment, does not establish that was the case here. We cannot indulge in conjecture or speculation, and there are too many missing facts. We do not know, for example, how long the storm-caused power outages had existed prior to the time in question, when the standby generators and batteries were last serviced, what were the fuel and voltage capacities of that equipment or how much running time could safely be expected of the equipment between servicing. Also, the question posed by the Organization remains unanswered: if an emergency situation existed, why did the Carrier assign the Claimant the work on February 15 and then have him wait until February 16, 1998 to perform it?

The correctness of the amount of time claimed by the Claimant, eight hours, is not challenged by the Carrier. Accordingly, we sustain the claim as presented.

AWARD

Claim sustained.

ORDER

This Board, after consideration of the dispute identified above, hereby orders that an award favorable to the Claimant(s) be made. The Carrier is ordered to make the Award effective on or before 30 days following the postmark date the Award is transmitted to the parties.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Dated at Chicago, Illinois, this 24th day of July, 2001.