Award No. 717
Docket No. TE-633

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

William H. Spencer, Referee

PARTIES TO DISPUTE:

THE ORDER OF RAILROAD TELEGRAPHERS

PACIFIC ELECTRIC RAILWAY COMPANY

STATEMENT OF CLAIM: "Claim of the General Committee of The Order of Railroad Telegraphers on the Pacific Electric Railway on behalf of the following Towermen for the amounts set herein opposite their respective names; because of an employee not belonging on the towerman's seniority roster being used in tower relief service:

A. V. Miller	2 days,	$15.72,	March 25th, and	April 1st.
Arlie Skelton	2 "	17.25,	March 26th, "	April 2nd.
Fred Oberacker	1 "	7.86,	March 27th.	
Hans T. Dullnig	1 "	8.62,	March 29th.	
H. B. Riley	1 "	7.86,	March 30th.	
R. E. Griffith	1 "	7.86,	March 31st."	

STATEMENT OF FACTS: "Mr. Lawrence McKoane, Relief Towerman and Local Chairman of the O.R.T., requested leave of absence from March 25, 1936, to April 9, 1936, to attend an O.R.T. meeting in San Francisco.

"Mr. McKoane's assignment as regular relief towerman was to make reliefs as follows:

Tower	Shift	Relieving
6th & Main	First	H. J. Dullnig
Amoca	"	H. B. Riley
Slauson	"	R. E. Griffith
Watts	"	A. N. Miller
Oneonta	"	Fred Oberacker
Subway Terminal	"	Arlie Skelton

"The list of extra towermen carried three extra men. At the time Mr. McKoane requested leave, one of these extra towermen was off on sick leave and the other two were temporarily filling regular assignments. In consequence, the extra list of extra towermen was exhausted.

"In order to relieve Local Chairman McKoane, a signalman who was qualified to work the 6th and Main Front Tower where one of the extra towermen was working was assigned to that tower, thereby, releasing this extra towerman who in turn was used to fill Local Chairman McKoane's regular relief assignment. This permitted Chairman McKoane to be relieved as requested."

An agreement with the Order of Railroad Telegraphers covering station agents and towermen was negotiated and made effective September 16, 1934.

By reference to Article 12 it will be seen that this provides for the filling by advertisement once a month of vacancies or new positions occurring during the preceding month. When the agreement was being negotiated the phrase 'as provided in Article 12' was added at the request of the carrier and was added for the specific purpose of limiting the application of the rule to employes taken from the official seniority lists to those positions which were filled by advertisement once a month, and not to apply the rule to casual and unexpected vacancies which had to be filled at once. As there are only 36 regular tower positions and 6 assigned relief positions, the management felt that only a small extra list could be maintained and it might occasionally have to go outside of the official towermen's seniority list, if all reliefs and emergencies were taken care of. No recognized extra list is maintained for the station agents, assistant agents, etc., because a tri-party memorandum agreement between the Carrier, the Telegraphers and the Clerks' Organizations permits vacancies on the Telegraphers' list to be filled by men taken from the Clerks' list. In consequence, there was no extra list of agents, etc., which could have been drawn upon to fill the vacancy caused by Local Chairman McKoane's relief.

"The management acted in good faith in exerting itself to provide relief for the Local Chairman when he requested relief in connection with his official duties at a time when the extra list was exhausted. He made no objection to being relieved through the use of a signalman and did not at that time contend that it was a breach of the contract. Article 20 (c) is mandatory in regard to relieving employes promoted to official positions with the Order of Railroad Telegraphers, and it has always been the practice to grant them leave of absence without any question. An ordinary telegrapher is only granted leave if relief men are available.

"Article 9 (a) requires that regular employes shall be relieved one day in seven, and the Committee now contends that the Carrier should deliberately violate Article 9 (a) and then pay penalty time for this violation as Article 10 provided for the overtime rate if required to work an assigned relief day.

"It is the opinion of the management that this entire claim is unfair and unjust and the Board is requested to deny the claim."

OPINION OF BOARD: The Division cannot agree with the contention of the carrier that to have called the claimants to work on their regularly assigned relief days would have violated Article 9 (a). This provides that "employes serving on seven (7) days per week positions, shall be assigned one (1) regular day off duty in each period of seven (7) consecutive days." The petitioner stated in its submission—and the carrier did not deny this statement—that the carrier did not wish to be bound by a rule that would have prohibited it absolutely from calling employes on their regularly assigned relief days. This conclusion is also supported by Article 10 which sets forth the methods of payments when regularly assigned employes are called on their relief days for extra service.

As a general rule, it is true, as contended by the petitioner that "every organization expects the work falling within the scope of their agreements with the Carrier to be performed by employes on the official seniority list." It follows that the carrier in the action complained of in this dispute violated Article 2 (c) unless there is something in the rule itself or in some other rule in the agreement which modifies the general rule.

Article 2 (c) of the agreement provides:

> "Positions covered by this agreement will be filled by employes taken from the official seniority lists as provided in Article 12."

The clause "as provided in Article 12" clearly requires that Article 2 (c) shall be read in connection with Article 12. Article 2 (c) does not stand

alone. There is some nexus between the two rules. It is appropriate next to determine what connection there is between the two articles of the agreement.

Article 12 (a) provides:

> "The Local Chairman shall be furnished in January of each year, a seniority list of employes. The Carrier will, between the first and tenth of each month advertise all vacancies occurring and new positions created during the previous month. Applications for such positions must be filed in duplicate within ten (10) days from date advertised, one copy thereof to be promptly returned to applicant."

It is the contention of the petitioner that the cross-reference from Article 2 (c) to Article 12 means no more than that positions covered by the telegraphers' agreement shall be filled by employes taken from the official seniority lists which Article 12 (a) requires the carrier to furnish to the Local Chairman in January of each year. The carrier, in defense of its position, insists that the cross-reference in question means that Article 12 in its entirety is a limitation upon the Operation of Article 2 (c). Specifically, the carrier insists that under Article 12 it is obligated to call men from the seniority list of the telegraphers only when filling positions and vacancies which Article 12 requires it to advertise.

It is the opinion of the Division that the contention of the petitioner is well taken. The normal presumption under a collective agreement of the character under consideration is that an employe not appearing on a given seniority list will not be used to perform work of the class involved. The arguments set forth in support of the carrier's position, while persuasive, are not, in view of other considerations, sufficient to overcome the normal presumption. It will be noted that Article 12 deals with two separate matters: (1) the duty of the carrier to furnish a seniority list to the Local Chairman in January of each year, and (2) duty of the carrier to advertise new positions created or vacancies occurring during the preceding month. It seems clear that the nexus between Article 2 (c) and Article 12 is the seniority list. In brief, the parties, in the opinion of the Division, meant to say in substance that positions covered by this agreement will be filled by employes taken from the official seniority list which the carrier is required to furnish to the local chairman in January of each year. The soundness of this interpretation is further attested by the fact that the carrier entered into an agreement with the Order of Railroad Telegraphers and the Brotherhood of Clerks under which it is permitted to fill vacancies covered by the telegraphers' agreement with men taken from the seniority list of the clerks. But no such agreement exists permitting the carrier to fill such vacancies with employes from the seniority list of signalmen.

The carrier urged further in support of its position that "when the agreement was being negotiated the phrase 'as provided in Article 12' was added at the request of the carrier for the specific purpose of limiting the application of the rule to employes taken from the official seniority lists to those positions which were filled by advertisement once a month, and not to apply the rule to casual and unexpected vacancies which had to be filled at once." The petitioner denies that any such understanding was had at the time the agreement was entered into. Regardless of which is right in its contention, it is a salutary rule of the common law that parole evidence should not, generally speaking, be received when the effect of it will alter or modify the terms of a written agreement.

It was also urged on behalf of the carrier that the carrier could have engaged a new employe for the work involved, and have placed him on the official seniority list of the telegraphers. From this premise it was argued that there can be no valid objection to the action that the carrier did take. The question whether, under the rules of the agreement, the carrier could rightfully have followed this procedure is not now before the Division for

determination. It is sufficient here to note that the carrier did not follow the procedure in question.

The record indicates that the present dispute originated when the carrier, as required by Article 20 (c) of the agreement, gave a leave of absence to Local Chairman McKoane, a regularly assigned relief man, to attend to official business of the Order of Railroad Telegraphers. Moreover, it was stated by the carrier and not denied by the petitioner that the Local Chairman, when plans for his leave were being arranged, "made no objection to being relieved through the use of a signalman and did not at that time contend that it was a breach of contract." In these circumstances it seems somewhat unfortunate that the petitioner should have presented and pressed this claim. It is, however, the opinion of the Division that a proper interpretation of the rules involved justifies an award in favor of the claimants.

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 carrier in taking the action complained of violated Article 2 (c) of the agreement, and that the claimants herein are entitled to be compensated under the provisions of Article 10.

AWARD

The claim is sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: H. A. Johnson
Secretary

Dated at Chicago, Illinois, this 12th day of August 1938.

DISSENT TO AWARD NO. 717

We dissent to this award, the conclusions upon which it is based, and more particularly to the arbitrary limitation placed upon the nexus between Articles 2 (c) and 12. It is clear that such limitation upon the nexus between these two rules is needed to admit of the conclusions reached by the award. However, neither abstract analysis of the bond between those two rules, nor practical consideration of the situations which may be covered by the tie between those two rules, and certainly not by the literal wording of the rules as they are bonded thereby, can the limitation imposed by the opinion and conclusions of this award be reached.

/s/ C. C. COOK
/s/ GEO. H. DUGAN
/s/ A. H. JONES
/s/ J. G. TORIAN
/s/ R. H. ALLISON