

Award No. 2442

Docket No. TE-2300

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Howard A. Johnson, Referee

PARTIES TO DISPUTE:

THE ORDER OF RAILROAD TELEGRAPHERS

ST. LOUIS SOUTHWESTERN RAILWAY LINES

(Berryman Henwood, Trustee)

STATEMENT OF CLAIM: Claim of the General Committee of The Order of Railroad Telegraphers on St. Louis Southwestern Railway Company, that Doc Crouch, regularly assigned telegrapher in the relay office at St. Louis, who was required to work in the place of another employe on another shift in the same office from January 1, 1942, to April 6, 1942, shall be paid at the rate of time and one-half the straight time rate of the position worked in accordance with the "Change in Shift" rule mutually adopted September 4, 1940, by the parties to the telegraphers' agreement.

EMPLOYES' STATEMENT OF FACTS: An agreement bearing date of December 1, 1934, as to rules and working conditions, and December 1, 1941, as to rates of pay, is in effect between the parties to this dispute.

Effective September 4, 1940 a "Change in Shift" rule was mutually adopted by the parties to said agreement, providing that an employe required to work in the place of another employe on another shift shall be paid the rate of time and one-half of the rate of the position worked or that of his assignment, whichever is the greater.

Doc Crouch, regularly assigned telegrapher in the relay office at St. Louis under the telegraphers' agreement, was required by the carrier to work in the place of another employe on another shift in the same office January 1, 1942, to April 6, 1942.

For working in the place of another employe on another shift in the same office, Telegrapher Crouch was paid at the straight time rate of the position worked.

POSITION OF EMPLOYES: In resolving disputes which had arisen as to the appropriate method by which to compensate employes under the telegraphers' agreement when required by proper authority to work in the place of another employe on another shift, the following "Change in Shift" rule to govern in such cases was mutually adopted, effective September 4, 1940, between the General Superintendent of the St. Louis Southwestern Railway Company and the General Chairman of The Order of Railroad Telegraphers, parties to the telegraphers' agreement:

Excerpt from Exhibit No. 32:

"As to Mr. Hazel working at Stamps evidently I was misinformed as I heard that Hazel was instructed to get off at train at Stamps and work on account of regular man having to attend court and that as soon as relief man was available relief man was sent to relieve Hazel, regardless of circumstances Article 16 reads in part: 'and in all cases they will be allowed actual necessary expenses while away from their regular assigned station' and I request that you please allow Hazel 74 cents per hour, his regular rate at CB, and actual expenses. * * *"

Excerpt from Exhibit No. 33:

"It is impossible to write rules covering everything and I feel that we should cooperate with the management, as far as possible, to protect the service. Without being technical, I think we could interpret Article 16 of the agreement to cover clerical positions as well as positions covered by the scope rule, * * *."

This shows that the Employees formerly placed the same interpretation on Article 16 which the Carrier still maintains, that is, the assigned telegrapher used on another position in emergency must be paid not less than his regular compensation, plus expenses while away from his home station. Therefore, their claim in the present case is in effect request for a change in the agreement by interpretation.

Telegrapher Crouch was used in an emergency, as contemplated by Article 16 of the Telegraphers' Agreement. The settlement of September 4, 1940, referred to by the Employees in their Statement of Claim as an obligation that he be paid time and one-half rate, covered an entirely different matter not similar to the present case and has no bearing upon the present case. The Carrier, therefore, respectfully requests that the Employees' claim be denied.

OPINION OF BOARD: This claim is based upon what the Organization terms "the 'change in shift' rule mutually adopted September 4, 1940, by the parties to the telegraphers' agreement." But the record does not show the adoption of any such rule by agreement of the Organization and the Carrier, either on that date or any other. As distinguished from a rule, which is an understanding specifically agreed upon to govern in all applicable circumstances, the record shows only the settlement of certain specific controversies, which seem to be relied upon to constitute a new rule. But the September 4, 1940, settlement of the Morris claim, which is especially relied upon for that purpose, had nothing to do with changes in shift. Morris' shift had not been changed, and there was no question as to the basis of pay upon a change. He had merely worked overtime in addition to his regular shift and the question was how he should be paid for the overtime. In that case it was admitted that he should receive pay for the five hours' overtime, at the time and one-half rate as provided by the rules, and the only question was whether the basis should be his own rate or the rate of the position worked. Therefore, it is entirely clear that the settlement of September 4, 1940, even if it constituted a new rule, could not constitute a change in shift rule.

On May 28, 1941, a settlement of a second claim on behalf of Morris was made which did involve a change in shift. His regular assignment had been as telegrapher from 10:00 A. M. to 6:00 P. M. He was temporarily assigned to relieve an assistant test telegrapher from 4:00 P. M. until 12:00 Midnight. In that settlement Morris was given time and a half based on the assistant test telegrapher's rate, a settlement having theretofore been reached in a companion case on behalf of Godsey, an extra telegrapher who was used to fill Morris' regular assignment but who was found to have been competent, and therefore entitled under Article 14 to fill the assistant test telegrapher's assignment and was therefore compensated accordingly.

The basis urged by the Organization on the second Morris settlement is significant. It is shown in the General Chairman's letter of December 16, 1940, to the General Superintendent, in which he wrote:

"You will recall, no doubt, in our conference August 23 we discussed at length our complaint against **regularly assigned telegraphers performing relief work**, and especially in the C. G. office at Tyler.

"You will recall that at that time I pointed out to you that we had talked with everyone in authority about the **violation** and had threatened time claims time after time, and it did not seem to do any good; and we served notice upon you at that time that when and if the violations again occurred we were going to bring it to a showdown.

* * * * *

"Telegrapher O. E. Godsey * * * is qualified to work any position in the C. G. Office * * *. * * * He has previously worked the assistant test telegrapher job in C. G.

* * * * *

"It is your responsibility to take care of the extra work with extra men, and there is a **penalty** attached for your using **regularly assigned men** and that penalty is time and one-half at the rate of pay of the position worked."

It is clear that the claim was not based upon any "change in shift rule" and that it was not suggested that any such rule existed either under the Morris settlement of September 4, 1940, or under the decision upon Question 21, Interpretation No. 4, Supplement 13 to General Order 27, made by the United States Railroad Administration many years before. The reference to time and one-half **penalties for violation of the rule against regularly assigned telegraphers performing relief work** when qualified extra telegrapher Godsey was available shows that the basis of the claim consisted of the following rules and exceptions:

"ARTICLE 14. Extra Work. The senior extra employe shall have preference to extra work but will not be permitted to displace on positions where transfer is required unless same will continue five (5) days or more."

"ARTICLE 10-1. Working at Wrecks. An employe regular or on extra board, employed at a wreck, washout, or account of other casualty, shall be paid at rate of pay established for his regular position, with a minimum of \$4.48 per day of eight hours or less, overtime at regular rates, and, in addition, shall be allowed necessary expenses while away from home station, not to exceed \$2.50 per day."

"ARTICLE 16. Regularly Assigned Employees Performing Relief Work. Regularly assigned employees will not be required to perform relief work except in cases of emergency and when required to perform relief work, and in consequence thereof, suffer a reduction in the regular compensation, shall be paid an amount sufficient to reimburse them for such loss, and in all cases they will be allowed actual necessary expenses while away from their regular assigned station."

The record shows that in reply to that letter the General Superintendent stated that Godsey was not qualified, but authorized a test to determine the question: that on April 28th, his qualification having been proven, Godsey's claim was settled; and that on May 28th, in a letter mentioning the two related claims, he settled the Morris claim.

In other words, the basis of the claim and of the settlement was not the violation of a "change in shift rule," but of Article 14 giving the relief work to qualified extra telegraphers except in cases where it is necessary to use regularly assigned employees on relief work "at a wreck, washout, or account of other casualty" under Rule 10-1, which obviously did not apply to the claim, or in other cases of emergency under Article 16, which obviously could not apply if Godsey was qualified for the relief work, since if a qualified extra telegrapher was available there was clearly no emergency requiring the working of Morris, a regularly assigned telegrapher.

The basis for the time and one-half penalty does not appear in the rules, but it is claimed in the above letter by the General Chairman and admitted throughout the record by the Carrier.

In his official letter of June 6, 1941, to other officials, in which he referred to the second Morris claim and to "this change in shift rule," the Superintendent of Personnel said:

"Claim was based upon the following quotation from Interpretation No. 4, Supplement 13 to General Order 27.

"Question 21. How shall an employee be paid when required by proper authority to work in place of another employee on another shift?

"Decision. The employee shall be paid in accord with provisions of Section (B), except as provided in Section (C) of Article V."

It is not contended that the above letter constituted a new rule, or that the official in question had any power to make new rules or articles, either on his own initiative or in negotiations with the Organization. The letter obviously expressed a mistake as to the basis of the second Morris claim.

As authority for this claim the Organization cites a number of claims which have been settled by the Carrier. The latter insists that they were settled only after it had been determined that a qualified extra had been available, that Rule 16 therefore did not apply, and that the penalty claimed by the General Chairman in the second Morris case came into effect. However, the Organization contends that in at least two of those instances there was no qualified extra available.

Whether the old interpretation relied upon constitutes a change of shift rule applicable to all cases in which a regularly assigned employee was used in relief work regardless of the availability of a qualified extra, it is apparent that the subsequent adoption of Rule 16 as it now reads removes from its application the emergency cases in which there are no qualified extras available and an emergency therefore arises requiring the relief use of a regularly assigned employee. Rule 16 is still applicable to the latter class of cases, even though by mistake or otherwise the Carrier may in a few instances have settled claims erroneously on the basis of the time and one-half penalty insisted upon by the General Chairman in the second Morris case.

This conclusion is in accordance with Award No. 815 of this Division, in which it was held that the other rules were modified by Rule 9 (which is substantially identical with Rule 16 above), that the assignment of the regularly assigned telegrapher to relief work "was made necessary by an emergency; the sickness of Clark, the unavailability of employees to fill the assignment, and the necessity of protecting the service during Clark's assigned hours."

Decision No. 3932, Docket No. 4396, of the United States Railroad Labor Board, promulgated on November 24, 1925, related to a case in which time and one-half was claimed on an overtime basis because the two shifts were worked within one twenty-four hour period. The Board's statement said in part: "The employees contend that Mr. Gardner is entitled to 12 hours' pro rata rate for 8 hours' service performed May 11; that he had completed his

regular assignment May 10, 4:00 P. M. to 12:00 Midnight, and was called to protect the agent's hours of assignment instead of doubling the two operators four hours each to protect the emergency service." The emergency was the illness of the agent telegrapher reported at 2:30 A. M., making it necessary to have Gardner perform the relief work on that same day from 8:00 A. M. to 4:00 P. M. The employes based their claim on the overtime rule but the Carrier contended that it did not constitute overtime service "since the work performed was not in connection with but entirely separate and apart from his regular assignment," and that it therefore came within Article 10, paragraph (a) (identical with Article 16 of these Rules), there being no extra operator available. The Board sustained the claim without giving its reason. It is clear, however, that Gardner worked overtime and that the overtime rule properly applied even though the overtime constituted relief work in an emergency. Otherwise the Board could not have sustained the claim, which was based only on the overtime rule and not upon any "change in shift rule," which was not claimed nor even suggested in that case. That award, therefore, does not constitute a precedent contrary to Award No. 815 of this Division.

We thus come to the question involved in the companion claim, Award 2441, Docket TE-2303, namely, whether D. P. Harrison, the senior extra available telegrapher, was qualified for the work so as to disprove the existence of an emergency necessitating the relief use of the regularly assigned telegrapher, Crouch. Having determined that Harrison was qualified, this claim must be sustained.

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 employe involved in this dispute are respectively carrier and employe 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 violated the agreement.

AWARD

Claim sustained in accordance with Opinion and Findings.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: H. A. Johnson
Secretary

Dated at Chicago, Illinois, this 27th day of January, 1944.