

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Adolph E. Wenke, Referee

PARTIES TO DISPUTE:

THE ORDER OF RAILROAD TELEGRAPHERS

THE CENTRAL RAILROAD COMPANY OF NEW JERSEY

STATEMENT OF CLAIM: Claim of the General Committee of The Order of Railroad Telegraphers on The Central Railroad Company of New Jersey, that the 2nd and 3rd trick towermen regularly assigned in the Linden Street Tower, Allentown, Pennsylvania, on December 23 and 24, 1945, shall each be paid four (4) hours' overtime on each of these days under Article 25 (a) and 27 (a) of the telegraphers' agreement, because when the 1st trick towerman in this tower was absent from duty on these days, due to illness, an employe not covered by said agreement was substituted instead of using each of the claimants four (4) hours in addition to their regular assignments to perform the work of the 1st trick towerman position on these days.

EMPLOYEES' STATEMENT OF FACTS: An agreement by and between the parties bearing effective date of June 15, 1944, is in evidence; copies thereof are on file with the National Railroad Adjustment Board.

At page 29 of the aforementioned agreement, there are listed at Linden Street, Allentown, Pennsylvania, three (3) towerman positions, the then rate of pay 79 cents an hour. These positions, on the dates here involved, were regularly assigned to Towermen Delp, Quigney and Mitchell; assigned hours 7:00 A. M. to 3:00 P. M., 3:00 P. M. to 11:00 P. M. and 11:00 P. M. to 7:00 A. M., respectively.

On December 23 and 24, 1945, Towerman Delp was absent from his position. The Carrier on these days permitted and/or required Arthur Kreiss, an employe covered by and earning seniority under an agreement between the Carrier and its Maintenance of Way employes, to protect Towerman Delp's vacancy. Kreiss, the maintenance of way employe, does not have rights under the telegraphers' agreement.

The Organization claimed four (4) hours' overtime for each Quigney and Mitchell on each of the dates involved. The Carrier denied the claim.

POSITION OF EMPLOYEES: As indicated in the Employees' Statement of Facts, at Linden Street Tower, Allentown, Pennsylvania, three towerman positions were operative prior to, on and subsequent to the dates here involved. The three positions belonged regularly to Towermen Delp, Quigney and Mitchell, assigned hours as hereinabove indicated.

Towerman Delp, on December 23 and 24, 1945, was absent from his 7:00 A. M. position account illness. The Organization is not in possession of the Carrier's records, hence it does not know whether or not an extra board

The claimants, Quigney and Mitchell, were employes regularly assigned to positions working eight hours a day and are not entitled to extra work when regular extra or extra employes are available, as per Article 15:

"(a) Regular extra towermen and regular extra agents will be used for relief and extra work at the discretion of the Carrier.

(b) Extra employes, when available and qualified, will be used in the order of their seniority for extra and relief work not covered by regular extra towermen or regular extra agents."

"Article 27—Notified or Called.

(a) Employes notified or called to perform work before their regular starting time, or not continuous with the ending of their regular work period, will be allowed a minimum of three hours for two hours work or less, and if held on duty in excess of two hours, time and one-half will be allowed on the minute basis."

The above article is applicable to employes notified or called to perform service and prescribes the manner in which they should be paid. There is nothing in the language or implied in this article making it mandatory on the part of the Carrier to notify or call the claimants for this vacancy, but only prescribes the manner they would be paid if notified or called.

3. ARTHUR KREISS HAD ESTABLISHED AN EQUITY IN THE EXTRA WORK WHEN NO SENIOR EXTRA MAN WAS AVAILABLE.

Kreiss had qualified and was used to relieve the towermen at Linden Street, Allentown, on many occasions prior to December 23rd and 24th, 1945 but did not have sufficient seniority to hold a regular or regular extra assignment under the O. R. T. scope. In the performance of this extra work he did establish some equity to extra work when no senior extra employe was available. There is no provision in the O. R. T. agreement that regularly assigned employes be given preference to this extra work as they had already received what was guaranteed under Article 30.

The Carrier does not agree that the regularly assigned employe is entitled to extra work or has any claim other than to the work of the position on which he is assigned.

The attention of your Board is called to Award 3133.

CONCLUSION: 1. Claimants suffered no loss of pay, but were paid for each of their respective assignments in accordance with the applicable rules.

2. There is nothing in the agreement which guarantees that the claimants are entitled to more than six days work or pay each week.

3. No rule of the agreement was violated and the rules cited by the employes are not relevant.

4. The employe used must be considered entitled to extra work when no senior extra man is available.

The claims are without merit, not supported by any contractual provisions, and should be denied.

OPINION OF BOARD: The General Committee claims the regularly assigned second and third trick towermen in the Linden Street Tower, Allentown, Pennsylvania, should be paid for four hours overtime on December 23 and 24, 1945. The basis for the claim is that the Carrier used an employe not covered by their Agreement to fill the position of first trick towerman in this tower on each of said days when the regularly assigned employe of that position was absent due to illness.

The Carrier, in its Linden Street Tower at Allentown, Pennsylvania, maintained a twenty-four-hour towerman service, consisting of three tricks. These tricks were as follows: The first was from 7 A. M. to 3 P. M. with Delp assigned thereto; the second was from 3 P. M. to 11 P. M. with Quigney

assigned thereto; and the third was from 11 P. M. to 7 A. M. with Mitchell assigned thereto. On December 23 and 24, 1945, Delp was absent from the first trick because of illness. There being no qualified extra towerman available the Carrier used Arthur Kreiss, a Maintenance of Way employee, to fill the first trick position on each of those days.

Since the work here involved belonged to the employees covered by the Telegraphers' Agreement it could not be assigned to and performed by other employees of the Carrier not covered thereby. As said in Award 3371:

"It has been repeatedly held by this Board that work embraced within the scope of an agreement cannot be removed therefrom and assigned to employees not subject to its terms. This is true even if in performing the work it is necessary for the employee subject to the terms of the agreement to work overtime in order to perform the work."

See, also, Awards 3193 and 3375.

However, the Carrier says Kreiss was qualified to do the work and sets forth other occasions when he was used as an extra towerman, when no extra towerman was available, and claims that he has thereby established some rights to such work.

It may be true that Kreiss was qualified to perform the duties of a towerman and that he has on other occasions been used for that purpose, nevertheless, such use is in violation of the Agreement. Merely because such violations have been frequent, undetected, and not penalized does not make them right and within the contract. Nor does it make Kreiss an employee within the provisions of the Telegraphers' Agreement. He was and, as far as the record shows, still is an employee covered by the Maintenance of Way Agreement. He therefore had no right to and, under the circumstances here, could not be used to do work coming within the scope of the Telegraphers' Agreement, no matter how well qualified he may have been to do that work. See Awards 2706 and 2827.

As to the basis upon which the claim should be allowed, we have said, under like situations, that the penalty rate for work lost because it was given to one not entitled to it under the Agreement is the rate which the occupant of the regular position, to whom it belonged, would have received if he had performed it. See Awards 3193 and 3488. We therefore find the claim should be allowed on a pro rata basis.

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 Employee involved in this dispute are respectively carrier and employee 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 has violated the Agreement.

AWARD

Claim allowed on a pro rata basis.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: H. A. Johnson,
Secretary.

Dated at Chicago, Illinois, this 26th day of March, 1948.