

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Jay S. Parker, Referee

PARTIES TO DISPUTE:

THE ORDER OF RAILROAD TELEGRAPHERS

KENTUCKY & INDIANA TERMINAL RAILROAD COMPANY

STATEMENT OF CLAIM: Claim of the General Committee of The Order of Railroad Telegraphers on the Kentucky & Indiana Terminal Railroad that the Carrier, when it failed and refused to pay telegrapher H. M. Albin for time lost from his regular assigned position because of his being required by the Carrier to work other than his regular assignment on August 15, 1947, violated Rules 5, 7 (b), and 20 (b) of the Telegraphers' Agreement; and that telegrapher Albin now be paid for eight (8) hours at pro rata rate in accordance with the terms of the Telegraphers' Agreement.

EMPLOYES' STATEMENT OF FACTS: An agreement, bearing effective date of June 15, 1945, is in effect between the parties to this dispute. Supplementing this agreement, Mediation Agreement, Case A-2070, dated July 13, 1945, is also in effect between the parties to this dispute.

At page 8, Rule 18, of the Telegraphers' Agreement the positions involved in this dispute are listed as follows:

"Position	Tricks	Hourly Rate
'VI' Vincennes St.	All tricks	.96
'FG' Virginia Ave.	All tricks	.92"

The rates of pay have been increased, and were, at the time claim arose, \$1.16 and \$1.12 respectively. Both places are continuously operated block and interlocking towers, and three tricks of eight (8) hours each are regularly assigned at each tower. The assigned hours and assigned rest days at these two towers are as follows:

Position	Trick	Assigned Hours	Assigned Rest Day
Vincennes St.	First	7 A. M. to 3 P. M.	Sunday
Vincennes St.	Second	3 P. M. to 11 P. M.	Monday
Vincennes St.	Third	11 P. M. to 7 A. M.	Thursday
Virginia Ave.	First	7 A. M. to 3 P. M.	Monday
Virginia Ave.	Second	3 P. M. to 11 P. M.	Tuesday
Virginia Ave.	Third	11 P. M. to 7 A. M.	Friday

The Claimant, H. M. Albin, is regularly assigned to the Third trick Vincennes Street with hours and rest day as shown above. All restdays

on Friday, August 15th, account the Hours of Service Law nor could Claimant Horn in Award 2511. The rules of the Agreement cannot, the Referee held in that Award, be interpreted nor applied in a manner that would countenance a violation of the Hours of Service Law, a law enacted conformable to the police powers of the Government. The same principle annunciated there, the facts being comparable, should apply in Claimant Albin's case.

Award 3134: The Referee states in the Award that a joint investigation revealed that the day Claimant claimed he lost in Section (c) of the claim should have been November 30, 1943, and not December 1st. Claimant Popeck, operator-clerk, held a regular seven day assignment at Elmira Passenger Station, his tour being from 4 P.M. to 12 midnight. He worked his regular 4 P.M.-12 midnight assignment on November 29th, but did not work the 12 midnight-8 A.M. assignment, the 8 A.M.-4 P.M. assignment, or the 4 P.M.-12 midnight assignment on November 30th. For not being permitted to work on the 30th, Claimant Popeck filed claim. The claim was sustained, the Board holding that Claimant's regular seven day week job entitled him to be paid for seven days.

Claimant Popeck could not, of course, have worked the 12 midnight-8 A.M. assignment on the 30th account the Hours of Service Law. Had he performed service on his regular assignment from 4 P.M. to midnight on November 30th he could not have worked the 12 midnight-8 A.M. emergency vacancy on December 1st.

Is this case distinguishable from the instant one? Obviously. Claimant Popeck held a seven day week assignment and was permitted to work only six days. Claimant Albin, on the other hand, held a six day week job, and worked six days. He lost no time. Claimant Popeck's case is not, therefore, a precedent for the Albin claim.

OPINION OF BOARD: H. M. Albin was a regularly assigned tower telegrapher with hours from 11 P.M. to 7 A.M. six days a week with Thursday as his rest day. Due to an emergency he was given an assignment 3 P.M. to 11 P.M. within the 24-hour period of his rest day with the result he was unable to work his regular Friday assignment because prohibited by the Federal Hours of Service Law. He was paid for this emergency service under Rule 20 of the agreement and actually lost no time or compensation by reason of having performed service on his rest day instead of working his regular trick the succeeding day. The claim is for pay at straight time for the day of the regular assignment. Albin did not work.

That the existing agreement must authorize enforcement of a claim of the kind heretofore described will be conceded. Claimant insists that it does and as supporting its position relies upon terms and provisions of that instrument about to be quoted.

Rule 5, commonly referred to as the guarantee rule, reads:

"Regularly assigned employes will receive one (1) day's pay within each twenty-four (24) hours, according to location occupied or to which entitled if ready for service and not used, or if required to be on duty less than the required minimum number of hours. This rule shall not apply in cases of reduction of force nor where traffic is suspended because of conditions not within the control of the Company.

NOTE: It is understood that those employes regularly assigned to, or occupying, assignments designated as working six (6) days per week shall receive one (1) day's pay within each twenty-four (24) hours of such assignments."

Rule 7, pertaining to overtime, so far as its terms are applicable to matters in dispute, provides:

"(b) Employees will not be required to suspend work during regular hours or to absorb overtime."

Rule 20, providing for emergency service reads:

"(a) Regularly assigned employees will not be required to work other than their regular assignments except in case of emergency. When so used they shall receive fifty (50) cents per day in addition to the higher rate of the two positions.

(b) When employees are required to work other than their regularly assigned hours, they will not incur loss of time in changing to and/or from their regular assignment."

The question presented for decision is not entirely new to this Division. In Award No. 2511 a claim of this same organization based upon a similar factual situation, except that in that case the telegrapher involved was not required to work on his rest day, was denied. Save for the "Note" portion of Rule 20, heretofore quoted, which was not a part of the agreement on the date of the incident giving rise to that dispute, the rules relied on by the Claimant were also similar in substance. In the opinion of such award, it is said:

"We think that the employee's claim for a day's pay at straight time is also without substance. Perhaps, technically, there was a twenty-four hour period in which he did not receive a day's pay. But actually he did receive six days' pay at straight time for work performed on six different eight hour shifts. In any event to have worked his regular third trick assignment in addition to the second trick would have constituted a violation of the Hours of Service Law. The rules cannot be interpreted nor applied in a manner that would countenance a violation of any law enacted pursuant to the police powers of the Government."

We have re-examined Award 2511 so far as applicable to the point here in question and approve its result as sound in principle. It follows that it is decisive of the instant dispute.

The addition of the "Note" to Rule 5 does not have that effect. It will be noted that it is explanatory of what precedes it and what was a part of the rule in force on the date of the handing down of the award mentioned. The phrase, shall receive one (1) day's pay within each twenty-four (24) hours of such assignments," appearing in the note or additional portion of such rule is practically the same as the phrase, "Regularly assigned employees will receive one (1) day's pay within each twenty-four (24) hours," as it appeared in the old and still remains in the new agreement. On that account the added language in the note cannot be regarded as imposing any new or additional liability when applied to the facts of the instant case.

Another and perhaps as sound a reason for denial of the claim as any of those heretofore given is that after rendition of Award 2511 on March 24, 1944, the parties entered into the present agreement without making any new or additional provision for a day not worked where, because of having worked an extra assignment on an off day, a workman actually receives six days' pay for work performed on six different eight-hour shifts of a six day assignment. The parties were bound to know of this Division's holding with respect to claims of the kind involved at the time of negotiations resulting in the execution of the current agreement on June 15, 1945. Having failed under such conditions to expressly provide for their payment, this Division cannot now be expected to say that they intended to do so or read something into the contract that is not there.

None of the awards cited to the Referee support the Organization's position. The nearest in point is Award 2742 of this Division. All it holds is that a claim for loss of time on account of the hours of service law should be sustained where the terms of the involved contract expressly so provide. That, as we have seen, is not the situation here.

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 current agreement does not provide for or authorize payment of the claim.

AWARD

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: A. I. Tummon
Acting Secretary

Dated at Chicago, Illinois, this 27th day of July, 1948.