

NATIONAL RAILROAD ADJUSTMENT BOARD  
THIRD DIVISION

Edward F. Carter, Referee

PARTIES TO DISPUTE:

THE ORDER OF RAILROAD TELEGRAPHERS  
MISSOURI PACIFIC RAILROAD COMPANY

**STATEMENT OF CLAIM:** Claim of the General Committee of The Order of Railroad Telegraphers on the Missouri Pacific Railroad Company, that

- (1) The Carrier violated the provisions of the Current Agreement between the Carrier and the Organization when it required or permitted W. E. McGimsey, holding seniority on the Northern Kansas Division of the Carrier with a regular assignment at Downs, Kansas to relieve J. Holthusen at Upper Yard, Atchison, Kansas, regular assigned hours 12:00 midnight to 8:00 A. M. on June 16, 1946 and
- (2) J. Holthusen shall be compensated for eight (8) hours at time and one-half rate on account of this improper action by the Carrier as Holthusen would have been used and compensated as claimed herein had the Carrier not violated the agreement.

**EMPLOYEES' STATEMENT OF FACTS:** Claimant J. Holthusen was the regular assigned occupant of the position at Upper Yard, Atchison, Kansas, assigned hours 12:00 midnight to 8:00 A. M. June 16, 1946, and had been so employed for a considerable period of time. His assigned rest day was Sunday each week. June 16, 1946 was Sunday. Prior to June 16, 1946, claimant had been working his rest day and receiving time and one-half payment therefor.

Telegrapher W. E. McGimsey, holding seniority rights on the Northern Kansas Division, but without seniority rights on the Omaha Division,—the division on which Upper Yard, Atchison is located, was being permitted to break in as Train Dispatcher at Atchison under an agreement other than the one here involved, and while so breaking in as a Train Dispatcher was required and permitted by the Carrier to relieve Claimant Holthusen on Sunday, June 16, 1946.

**POSITION OF EMPLOYES:** There is an agreement in effect between the parties to this dispute effective June 1, 1942 as to Rules and rates of pay amended from time to time thereafter.

One such amendment pertinent to this claim is a Mediation Agreement (Case A-2070) signed at Chicago, July 13, 1945 providing for a rest day.

The employees will show that McGimsey held no seniority rights on the district where the work in question was performed and had no right to this work. The employees will show that the Rules provide Claimant Holthusen should have been used to perform the work in question and compensated at the time and one half rate with a minimum of eight hours.

hours of his regular week day assignment and is clearly for the purpose of discouraging the Carrier from requiring an employe to work on his rest day and not for the purpose of increasing the wages of the employes involved.

The Carrier has here acknowledged its willingness to pay a proper penalty for failing to observe seniority district lines, that penalty being to pay to the claimant a day's pay at the pro rata rate—the amount for which it was entitled, under the agreement, to have had this work performed by a proper relief employe had one been available. To require the Carrier to pay a penalty at the rate of time and one-half would be to impose a double penalty. The time and one-half rate being the penalty applicable when an employe has **actually been required to work.**

This Division has in a number of awards recognized this principle, see Awards 2346, 2695, 2823, 2859 and 3049 for a few. While these awards do not involve this particular agreement the principle involved is the same and all have recognized that the penalty rate is not applicable as a **penalty for work not performed.** See also Award 3587.

**OPINION OF BOARD:** The present case is identical in principle with that involved in Award 4244. On the basis of the reasoning of that award and the awards cited therein, the claim before us is sustained at the pro rata rate.

**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

The Agreement was violated.

#### AWARD

Claim (1) sustained. Claim (2) sustained at the pro rata rate.

NATIONAL RAILROAD ADJUSTMENT BOARD  
By Order of Third Division

ATTEST: A. I. Tummon  
Acting Secretary

Dated at Chicago, Illinois, this 21st day of December, 1948.