Award No. 4322

Docket No. TE-4065

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Frank Elkouri, Referee.

PARTIES TO DISPUTE:

THE ORDER OF RAILROAD TELEGRAPHERS

DELAWARE, LACKAWANNA & WESTERN RAILROAD COMPANY

STATEMENT OF CLAIM: Claim of the General Committee of The Order of Railroad Telegraphers on the Delaware, Lackawana and Western Railroad Company, that:

(a) Extra employe F. Korshalla, shall be allowed time and one-half rate with a minimum of three hours on each date July 14, 21, 28, September 1, 22, November 2, 1946, and January 5, 26, February 9, 16, 1947 (Sundays and/or holidays), when and because on these dates, as an extra employe substituting for regular employes, he was notified to and did perform "call" service at Kingston and Plymouth Junction Tower (6-day positions) within the hours of the respective week day assignment, and

(b) Retroactively to March 1, 1945, and currently, any and all extra employes who have performed or may perform "call" service on six-day positions on Sundays and/or holidays within the hours of the week-day assignment, shall be allowed time and one-half rate with a minimum of three hours for each occasion, the same as has been and is allowed to regular employes.

EMPLOYES' STATEMENT OF FACTS: An agreement by and between the parties, known as the Telegraphers' Agreement, bearing effective date of May 1, 1940, except Articles 8 and 24 which bear effective date of March 1, 1945, is in evidence; copies thereof are on file with the National Railroad Adjustment Board.

On the dates mentioned in the Statement of Claim, extra employe, F. Korshalla, was notified to and did perform "call" service at Kingston and Plymouth Junction Tower within the hours of the week-day assignments, substituting for the regular employes. Mr. Korshalla claimed pay in accordance with Section 2 of the March 1, 1945 agreement. See Employes' Exhibit No. 4. The Carrier allowed payments in accordance with Rule 5 of the May 1, 1940 agreement.

The Carrier has retroactively allowed and is currently allowing only two hours' pay at time and one-half rate to any and all extra employes for such "call" service performed on Sundays and the specified holidays, when occupying 6-day positions. The instance recorded in the next above paragraph is illustrative, yet specific, of the carrier's application of the rule involved.

quires negotiation and conference on disputed claims on the property in advance of bringing disputes before this Division. Making effective this requirement will in the long run, prove beneficial to all concerned."

And in **Award 9948** the First Division said:

"The evidence of record shows that claim handled with carrier **was that of Conductor Shipp**—the claims **for other** conductors required to perform like service on subsequent dates were not involved but were added to the original claim by the Committee when making their submission to the First Division. **Therefore this latter feature of the claim will not be passed upon.**"

Neither the Carrier nor this busy Board should be bound to develop claims for unknown and unmentioned persons.

As the First Division of the Board said in **Award 7206:**

"The Carrier is not bound to develop claims for employes."

And in Award 7218:

"Claim as to all others who performed similar service dismissed."

Accordingly claim A should be denied and Claim B should be denied or dismissed.

Exhibits not reproduced.

OPINION OF BOARD: The Agreements covering this claim are the Telegraphers' Agreement of May 1, 1940, and the Memorandum of Agreement executed November 20, 1946. Petitioners contend that Extra employes who perform "call" service on six-day positions on Sundays and/or holidays within the hours of the week-day assignment are required to be paid time and one-half rate with a minimum of three hours for each occasion.

This Board must determine the rights under this contract from the four corners of the Agreement. Unless language expressly or impliedly authorizing payment as claimed here can be found in the Agreement itself, this Board cannot read into it such a meaning. In Award No. 2491 this Board said:

"We can only interpret the contract as it is and treat that as reserved to the carrier which is not granted to the employes by the agreement."

In Award 2132 the Board said:

"* * * it is not advisable, even to reach a result which might appear equitable to read into a rule something which is not there. * * *"

And, in Award 2622 the Board said:

"Far better for all concerned is a course or procedure which adheres to the elemental rule, leaving it up to the parties by negotiation or other proper procedure to make certain that which has been uncertain."

The one provision which might possibly be held to sustain this claim for a minimum of three hours at time and one-half rate is the second paragraph of Section 2 (Six [6] day positions) of the Memorandum of Agreement. That paragraph is as follows:

"An employe occupying a position required to work on Sundays and the specified holidays less than the hours of his regular week-day assignment within the hours of such assignment shall be

paid at the rate of time and one-half with a minimum of three hours at the rate of time and one-half for three hours work or less."

But does this provision include Extra employes? The Board thinks not. The words "his regular weekday-assignment" refer to employes having such. Extra employes do not have regular week-day assignments. This claim has been made for Extra employes as such; Claimants have admitted that they were Extra employes, employes not holding regular assignments. The words "An employe" are qualified by the words "his regular week-day assignment". Without the words "his regular week-day assignment" it might well be held that the term "An employe" was meant to include an "Extra" employe. But, if this had been the intent of the parties, no additional words would have been needed. The fact that more words were added must have some significance; they cannot be considered as mere surplusage. What is their purpose? The only possible one is to modify or limit the application of the words "An employe" to those having a "regular week-day assignment". Penalty time is the exception, not the rule, and if a rule does not affirmatively and clearly provide that the employes in question be given such, then it is not in order.

Since the Memorandum of Agreement of November 20, 1946, did not modify the prior method of determining pay for Extra employes for such time as that involved in this claim, the method used for Extra employes prior to the adoption of said Memorandum of Agreement should continue to be used; the status of Extra employes is the same as it was under the Agreement of May 1, 1940, except as it was changed or modified by the Memorandum of Agreement of November 20, 1946. The Record indicates that Extra employes had been paid for "Call" service under Rules 5 and 8 of the Agreement of May 1, 1940. The Memorandum of Agreement did not supersede Rules 5 and 8 in the matter of payment of Extra employes for "call" service.

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 did not violate the Agreement.

AWARD

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: A. I. Tummon
Acting Secretary

Dated at Chicago, Illinois, this 17th day of February, 1949.