

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Francis J. Robertson, Referee

PARTIES TO DISPUTE:

THE ORDER OF RAILROAD TELEGRAPHERS

THE MINNEAPOLIS AND ST. LOUIS RAILWAY COMPANY

STATEMENT OF CLAIM: Claim of the General Committee of The Order of Railroad Telegraphers on The Minneapolis and St. Louis Railway Company that the Carrier violated the provisions of the Mediation Agreement of July 13, 1945, covering rest days, and also the terms of the current agreement, when it relieved Telegraphers R. J. Hoelz, H. D. Hodges and G. M. Crose, regularly assigned to the positions of second, third and first tricks, respectively, at Albert Lea, Minnesota, on their assigned days of rest during the months of May and June, 1947, with a regularly assigned agent-telegrapher from another station; and,

That telegraphers R. J. Hoelz, H. D. Hodges and G. M. Crose shall be compensated at the time and one-half rate for eight hours on each day they were so relieved.

JOINT STATEMENT OF FACTS: There are three assigned telegraphers at Albert Lea, Minnesota, providing continuous telegraph service, each telegrapher occupying a position requiring a Sunday assignment of regular week day hours. On May 14, 1947, the Carrier issued to the claimants by telegraph the following instructions:

"MS X G Cedar Lake May 14-1947
EWL
Oprs.

F. W. Scheuble protect second trick at Albert Lea Friday May 16th. 3rd trick Sunday A. M. May 18 and first trick Tuesday May 20 to furnish Oprs. rest day and will continue to relieve each Opr Albert Lea until further notice.

EES . . . 942 A. M. . . . G"

Beginning with Sunday May 18, 1947, and continuing up to and including Tuesday, June 24, 1947, Agent-Telegrapher F. W. Scheuble, assigned to the agent's position at Hartland, Minnesota, was used to provide the weekly rest day relief for the three positions at Albert Lea. Agent-Telegrapher Scheuble's assignment at Hartland, Minnesota was protected by his wife on the days he was used at Albert Lea.

POSITION OF EMPLOYEES: An agreement, bearing effective date of August 1, 1939 is in effect between the parties to this dispute.

The claims involved in this dispute arose as a result of the method used by the Carrier in providing rest day relief for the three telegraphers

This arrangement was, in Carrier's opinion, entirely practical, inasmuch as it followed the same plan and pattern that had been used to provide relief for the three positions at Albert Lea at various times during the war period, in accordance with the provisions of the Memorandum Agreement hereinbefore referred to. (That Memorandum of Agreement terminated automatically June 30, 1947. The instant claims cover relief furnished at Albert Lea from May 18th to June 24th, 1947.)

It was the purpose of the Carrier to provide the relief at Albert Lea by use of Agent Scheuble, only until a qualified extra telegrapher was available to provide that relief.

Carrier believes that the plan used was not only entirely in accord with the provisions of the Mediation Agreement of July 13, 1945, but also with the principles, intent and spirit of that Agreement.

Section 1 of the Agreement states in part, "it is the intent of this agreement that where practicable, employes will be relieved on their rest days * * *". (Underscoring ours.)

The Carrier provided a practical plan for relieving the telegraphers at Albert Lea on their assigned weekly rest days. The relief telegrapher carried seniority on the Telegraphers' roster on the District which includes Albert Lea. No extra telegrapher was deprived of any work during the time he was so used. Certainly, the primary, and in fact the entire, purpose of the Mediation Agreement of July 13, 1945, is to provide a weekly rest day for telegraphers when it is possible to do so.

Carrier, recognizing the purpose and intent of the Mediation Agreement, provided for the weekly rest days at Albert Lea, by use of a telegrapher coming within the scope of the Telegraphers' Agreement, the only telegrapher that was available for that purpose.

It is Carrier's opinion, therefore, that no article of either the current Telegraphers' Schedule, effective August 1, 1939, or the Mediation Agreement of July 13, 1945, was violated, and respectfully requests your Honorable Board to so find.

(Exhibits not Reproduced)

OPINION OF BOARD: Carrier assigned a regularly assigned Agent-Telegrapher from Hartland, Minnesota to relieve the three claimants on their assigned rest days at Albert Lea, Minnesota. Claimants were regularly assigned around-the-clock on seven-day positions with varying assigned rest days. Employes assert a violation of the National Rest Day Rule of July 13, 1945, relevant part of which is quoted in the Position of Employes.

We believe it is clear from the provisions of the National Rest Day Rule and Awards of this Board interpreting the same that work on rest days should be assigned in the first instance to a regularly assigned relief man if there be such, secondly, to an extra man, then, if an extra man is not available, to the regular occupant of the position on an overtime basis. Here there was neither a regularly assigned relief man nor an available extra. The Carrier would, therefore, be in violation of the Rest Day Rule unless the assignment made was permissible under a Memorandum Agreement between the parties dated December 21, 1944, pertinent part of which reads as follows:

"At stations where agents or telegraphers are regularly assigned and where such employe's wife, daughter or other immediate members of his family are competent to perform station duties, it will be permissible, upon advice from the agent of his desire to do so, to use him as a telegrapher at any point on the seniority district or on adjoining seniority districts, to fill vacancies which cannot be protected by extra telegraphers on the seniority district on which the work occurs, and during his absence from his regular assignment it will not be bulletined but will be filled by using such qualified member of his family."

It is to be noted that the Rest Day Rule was promulgated approximately eight months after the Memorandum Agreement which is quoted in part above. Thus, some question arises with respect to whether or not said Agreement should be considered as covering a situation which was not in contemplation of the parties at the time of its consummation. It is clear from the correspondence appearing in the record and exchanged between the parties prior to and after the execution of the Memorandum Agreement that it was designed to cover situations when the Agent had to be used at another station in emergencies. No emergency exists where a regularly assigned telegrapher is available to fill the position on his assigned relief day. Accordingly, the claim should be sustained.

Should the penalty be at the pro rata rate or the punitive rate? This subject was very thoroughly reviewed by Referee Carter in Award 4244 and that to a degree has crystallized the principle as now generally adopted and accepted. Referee Wenke in Award 4447 had occasion to consider the proper penalty for a claimant who was not assigned to work on a position on her rest day. In that Award it was held that the pro rata or straight time rate was the proper penalty. While the facts in that case were different than those present herein, it is exemplary of the principle that merely because an employe is denied the right to work on his rest day in violation of an agreement it does not follow that the penalty should be at the punitive rate. (See also Award 4603 which is illustrative of the same principle.) That is because it is the contract rate of the position which should be imposed as the penalty, not the punitive rate which would accrue to the claimant (had he worked) as a personal right by reason of his rest day status. Here, the contract rate of the position is the rate which would be payable to a relief or extra man and that would be the pro rata rate. The fact that no relief position had actually been bulletined or filled because of the shortage of telegraphers or that no extra was available does not alter the contractual rate and hence the claim should be sustained at the pro rata or straight time rate.

It is noted that the claim for Friday, May 16, 1947 on behalf of claimant and Hoeltz has been withdrawn. That day, of course, should not be included in the monies payable under this Award.

FINDINGS: The Third Division of the Adjustment Board, upon the whole record and all the evidence, finds and holds:

That both parties to this dispute waived oral hearing thereon:

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 Carrier violated the Agreement.

AWARD

Claim sustained to extent indicated in Opinion and Findings.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: A. J. Tummon
Acting Secretary

Dated at Chicago, Illinois this 24th day of February, 1950.