

Award No. 4955

Docket No. TE-4834

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Peter M. Kelliher, Referee

PARTIES TO DISPUTE:

THE ORDER OF RAILROAD TELEGRAPHERS

**THE DELAWARE, LACKAWANNA AND WESTERN
RAILROAD COMPANY**

STATEMENT OF CLAIM: Claim of the General Committee of The Order of Railroad Telegraphers on the Delaware, Lackawanna & Western Railroad that:

1. The Carrier shall now additionally pay W. H. Gladwin four hours at straight time rate for rest day relief service performed at Northumberland on September 7, 14, 21 and 28, 1947; and

2. The Carrier shall now pay eight hours at straight time rate to the senior extra employe who was unassigned and available but not used for rest day relief service at Northumberland on each day, September 7, 14, 21 and 28, 1947.

EMPLOYES' STATEMENT OF FACTS: An Agreement by and between the parties, bearing effective date of May 1, 1940 and herein after referred to as the Telegraphers' Agreement, is in evidence; except that Rule 8 of said Agreement became null and void effective March 1, 1945, and substituted therefor was a Memorandum Agreement which is incorporated in the November 1, 1947 Agreement as Article 8.

The Northumberland agent-operator, a seven-day position, was regularly owned and occupied by J. W. Blud. The assigned rest day was Sunday. This rest day was not included in or made a part of a regular relief position, instead it was to be protected from the list of unassigned extra employes on a Sunday-to-Sunday basis.

W. H. Gladwin, an extra employe, was assigned to the Northumberland agent-operator position in the place of J. W. Blud, September 2, 1947, through October 2, 1947. Mr. Gladwin was required to work on the rest days, Sundays, September 7, 14, 21 and 28, at straight time rate.

The Organization asserted and still asserts, there were unassigned extra employes available to perform this rest day service but cannot name them because the Carrier's assignment records will not be made available.

POSITION OF EMPLOYES: As indicated in the Organization's Statement of Facts, J. W. Blud was the regular incumbent of the agent-operator, 7-day position at Northumberland. Sunday was the rest day assigned to that position. It was not practicable, because of the location of this position, to include the rest day in a regular relief position, therefore, it was protected

"Upon application of the representatives of the Employees involved in the above award, that this Division interpret the same in the light of the dispute between the parties as to its meaning and application, as provided for in Section 3, First (m), of the Railway Labor Act, approved June 21, 1934, the following interpretation is made:

The question submitted for answer in this interpretation is whether Award 4303 orders that extra employees who substituted for regularly assigned employees and who were required to work on the rest day of the regularly assigned employees be paid time and one-half for the rest-day service. The question is to be answered in the negative in that Award 4303 was not intended to order such payment to extra employees.

Section 1 (a) of the Memorandum of Agreement of November 20, 1946 provides for premium pay for rest-day service for employees occupying seven-day positions. Section 1 (b) provides that extra employees who work on rest days shall be paid pro rata rates. It is urged, however, that when an extra employee relieves a regularly assigned employee at least one day before and one day after the assigned rest day, and is required to work on the rest day, the extra employee must be paid time and one-half for the rest-day service. But as was stated in Award 4304, involving a companion case to the one here under consideration, it would have been easy for the parties to say that extra employees would attain all of the rights of regularly assigned employees upon working a specified number of consecutive days if the parties had intended such, but they did not say so. And as was stated in Award 4322, also a companion case, penalty time is the exception, not the rule, and if a rule does not affirmatively and clearly provide that the employees in question be given such, then it is not in order.

Referee Frank Elkouri, who sat with the Division as a member when Award No. 4303 was adopted, also participated with the Division in making this interpretation."

Another award by your Board which has a definite bearing on the interpretation of the Rest Day Rule on this property with respect to compensation for extra employees is Award No. 4322—Docket TE-4065, which involved a "call" on Sundays and Holidays. The claim was denied.

The Carrier contends that any and all claims involving additional compensation for extra employees who performed work on Sunday or Holiday prior to February 7, 1949, must be governed by Award Numbers 4303, 4304 and 4322 on this property. To entertain the present claim would permit the organization to split claims. It is to be noted that the instant claim occurred during September 1947.

For reasons stated above, it is respectfully requested that the claim be denied.

OPINION OF BOARD: The claimant as the senior unassigned available extra employee was temporarily assigned to the agent-operator position from September 2, 1947 through October 2, 1947. He was required to work on each of the rest days in said period. It is the position of the Organization that the Rest Day Rule is applicable to extra employees under these circumstances and the claimant must be paid the punitive rate that the regular occupant would have received had he worked these rest days. The Carrier contends that the Rest Day Rule is properly interpreted as applying only to regularly assigned employees and the claimant as the senior extra qualified employee available worked these rest days at the straight time rate.

Award Number 4774 made on the property of this Carrier fully considers all of the arguments presented in this case. The Board in that case, under a

substantially identical factual situation in construing the provisions of the Rest Day Rule said:

"Extra employees are not excluded as such. 'An employee' must include an extra employee as much as a regular employee. We think the intended limitation and exclusion of application of the Rule is expressed in that first sentence of the Section, by the phrase 'one (1) rest day without pay in each consecutive period of seven (7) days.' Where an employee does not occupy a position for a 'consecutive period of seven (7) days', Section 1 (a) does not apply to him. Where he does so occupy it, we think Section 1 (a) does apply, and the term 'such employee' in the second sentence following must include any employee who has occupied the described type of position for a 'consecutive period of seven (7) days' whether regularly assigned or an extra. Since each of the three Claimants now before us occupied such positions for more than seven consecutive days, we think they were entitled to the time and one-half rate as provided in the Rule."

The parties are in dispute as to whether any assigned extra employees were available. The Organization states that the extra assignment list was not available. The Board orders a joint check of the records to determine whether an unassigned employee was available. Award 4460.

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 Employees involved in this dispute are respectively carrier and employees 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 Agreement was violated.

AWARD

Claim 1 sustained. Claim 2 remanded as per Opinion and Findings.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: A. I. Tummon
Acting Secretary

Dated at Chicago, Illinois, this 25th day of July, 1950.