Award No. 5444
Docket No. TE-5512

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Jay S. Parker, Referee

PARTIES TO DISPUTE:

THE ORDER OF RAILROAD TELEGRAPHERS

THE KANSAS CITY SOUTHERN RAILWAY COMPANY

STATEMENT OF CLAIM: Claim of the General Committee of The Order of Railroad Telegraphers on The Kansas City Southern Railway; that,

1. the Carrier violated the terms of the current agreement between the parties when it used Telegrapher George Grant, who held a regular assignment to the position of Telegrapher-clerk at Lake Charles, Louisiana, to relieve T. M. Sims, the regular incumbent of the Second-trick Telegrapher-clerk position at Shops Yard, Shreveport, Louisiana, on Sims' rest days, May 3, 4, 10, 11, 17, 18, 24 and 25, 1950; and to relieve C. A. Lewis, the regular incumbent of the third trick telegrapher-clerk position at Shops Yard, Shreveport, Louisiana, on Lewis' assigned rest days, April 28, 29, May 5, 6, 12, 13, 19, 20, 26 and 27, 1950, and

2. that said T. M. Sims and C. A. Lewis shall be compensated in an amount equal to eight hours' pay at the time and one-half rate on each of the aforesaid dates that they were thus improperly relieved.

EMPLOYES' STATEMENT OF FACTS: There is an agreement, bearing effective date September 1, 1949, in effect between the parties to this dispute.

At its Shops Yard, Shreveport, Louisiana, Carrier maintains three telegrapher-clerk positions providing around-the-clock telegraph telephone service at that point seven days per week.

T. M. Sims is the regular incumbent of the second trick telegrapher-clerk position, with Wednesdays and Thursdays as assigned rest days; and C. A. Lewis is the regular incumbent of the third trick position, with Fridays and Saturdays as assigned rest days, in this yard office.

The four rest days of the incumbents of second and third trick positions in this Shops Yard office, together with one day as third trick telegrapher in the Shreveport dispatcher's office, comprised a regular rest day relief assignment owned by one T. G. Bakus who was on leave of absence and not available to fill his relief assignment on the dates mentioned in the claim, and there were no qualified extra telegraphers available to fill the position on these days. The Carrier used Telegrapher George Grant, an employe holding regular assignment to telegrapher-clerk position Lake Charles, Louisiana, to fill the relief assignment and perform the rest day relief work on second trick position at Shops Yard, on Wednesdays and Thursdays, May 3,

We do not consider that the mere filing of displacement notice constitutes displacement. The displacement is not effective until the change takes place and the displacer actually takes over the job.

It was necessary for Mrs. Grimes to protect her displacement rights by serving written notice within 30 days from the date her job was abolished.

This is not an actual displacement, until she takes the job. In the meantime, it is Mrs. Burkheimer's position until Mrs. Grimes relieves her. Mrs. Burkheimer then has 30 days in which to protect her displacement rights. She might file notice and then want off for 30 days.

We know of no revision of Rule 5-2 since it was placed in the current schedule."

Mrs. Grimes placed her "bump" in writing, but she laid off account illness before she actually placed herself on the position at Texarkana; therefore, Mrs. Burkheimer was not due to leave her position until she was actually displaced from that position. Mrs. Grimes requested delay in placing herself on her new position for personal reasons.

* * *

In the case here at issue, Mr. Grant was assigned to a position at Lake Charles, but he requested delay in placing himself thereon for personal reasons, and elected to retain his status as an "extra" man temporarily.

The incumbent of the position at Texarkana could not place herself elsewhere until she was actually displaced by Mrs. Grimes. The incumbent of the position at Lake Charles could not place himself elsewhere until he was actually displaced by Grant.

Grant, for reasons of his own, not known to us at this time, elected to remain on the extra list temporarily. He was not refused permission to take the position to which he was assigned, but requested delay in so doing.

In the case here at issue our position is the same as that of General Chairman Ward, Local Chairman Burkhalter and former Superintendent of Personnel Davison in the Grimes'-Burkheimer case, to wit: The position is not disturbed by mere paper assignment or displacement until the person so assigned or who is to exercise displacement rights actually reports to the position.

* * *

The Committee has shown no violation of the agreement and it is the Carrier's position that Telegraphers T. M. Sims and C. A. Lewis were properly paid; that they were relieved on their rest days, which is required under the 40-hour week agreement, and that neither the schedule nor the 40-hour agreement contemplates any such penalty being placed on Carrier in such an instance as is covered by this claim.

Claim should be denied.

OPINION OF BOARD: The regularly assigned incumbents of the second and third trick telegrapher positions in the Shops Yard Office, Shreveport, Louisiana, are claimants Sims and Lewis, respectively. On all dates here in question the rest days of these positions were Wednesdays, Thursdays, Fridays and Saturdays and these four days, together with one day as third trick telegrapher in the dispatcher's office at the same point constituted Regular Relief Assignment No. 5, a position to which Telegrapher Backus was assigned.

Commencing on or about May 1, 1950, and including all dates involved in this dispute, Backus, the regular occupant of Position No. 5, was laying

off and it became necessary for the Carrier to fill the temporary vacancy on that position.

The record is indefinite but by diligent research we think it can be stated with accuracy that prior to April 13, 1950, Telegrapher Grant, an extra telegrapher, had been working extra in other of the Carrier's offices at Shreveport than those here involved.

March 20, 1950, Carrier bulletined the position of Telegrapher-Clerk, Lake Charles, Louisiana, stating bids for the position would be received until March 30. Grant and other employes filed bids. On April 15, 1950, by Bulletin No. 5, the Carrier gave notice that Grant was the senior successful bidder and awarded him the position. In fact, this bulletin stated that such position, and one other, bid in by another employe, **are hereby assigned** to such employes.

On the date he was awarded the Lake Charles position, Grant was in his status as an extra telegrapher at offices of the Carrier to which we have referred. Thereafter, for reasons of his own and to suit his personal convenience, he made request of the Carrier that he not be transferred to that location immediately. This request was granted. Subsequently, when Backus laid off on Relief Position No. 5, he was assigned by the Carrier to fill the temporary vacancy and continued to do so until May 28, 1950. Later, he continued to work extra on other positions. The fact is that as a result of the foregoing action on the part of the Carrier, Grant was never physically transferred to the position he had bid in and had been awarded at Lake Charles for the reason that before he and the Carrier got around to agreeing on when that should happen a senior employe exercised displacement rights thereto.

The record in this case refers to two agreements, one effective May 1, 1942, and the other, apparently negotiated on July 14, 1950, but made effective as of September 1, 1949, because of existing provisions of the 40-Hour Week Agreement. The Referee writing this opinion has carefully examined both agreements. The one last negotiated appears to have embodied therein all theretofore existing provisions of the 1942 contract At least that is true of all provisions of the contract relied on by the parties. For that reason all rules hereinafter mentioned will have reference to the Rules Agreement effective September 1, 1949.

Rule 4-2 is the foundation on which the Organization rests its case in that unless the confronting facts disclose the Carrier's action was in violation thereof there can be no sound basis for a sustaining Award. So far as pertinent to the issue involved, it reads:

> "4-2. **Bulletins.** Vacancies and new positions (other than those known to be temporary) coming within the terms of this agreement will be bulletined within five (5) days to the General Office, Kansas City, and to all offices on the division on which they occur for ten (10) days, and will be awarded to senior qualified bidder within thirty (30) days from the date of vacancy * * *"

The claimants' position with respect to violation of this rule is that its terms required the Carrier to award the bulletined position at Lake Charles within thirty days from the date of the vacancy. In connection with this point, they insist, and we think properly so, it must be assumed there was a vacancy on such position as of the date of the bulletin, otherwise there would be no occasion to advertise the position. They then contend that under the rule the Carrier was required to award the successful applicant the position within thirty days, i. e., not later than April 19, 1950, and point out that he was assigned to the position well within that date, namely, on April 13, 1950. Finally, they argue that from and after that date Grant must be regarded as the regularly assigned occupant of such position and that thereafter he lost his status as an extra telegrapher. Otherwise stated, its claim is the rule required that Grant be actually transferred to the Lake Charles position on

the date he was assigned thereto, or at least not later than April 19th, and that Carrier's action in failing to do so and in permitting him to work extra on his request as heretofore related, was in violation of its terms.

The Carrier's position on the point now under consideration is that although Grant had actually been awarded the Lake Charles position under bulletin, he did not become a regularly assigned employe on that position unless and until he actually commenced work on his first tour of duty at that point, hence, since he had not done so on the dates in question he had not lost his status as an extra telegrapher and was available as such for work on the positions and on the dates in question. More broadly stated, its claim is that it could take whatever time it desired, after assigning the position at Lake Charles as it had done by bulletin, before it actually transferred Grant to that location, therefore its private arrangement with him, which as we have heretofore indicated, resulted in his never being transferred, was not in violation of the provisions of Rule 4-2.

Turning to the question thus raised by the parties, it should be stated at the outset that certain arguments advanced require little attention and that we shall give it consideration in the light of the established rules (1) that if the Carrier permits an employe to either work or refrain from working a position it must assume responsibility for that action, (2) that individual employes and the Carrier are not permitted to make agreements which are contrary to the provisions of the collective agreement and thereby nullify its terms. (See Award No. 5174).

We are unable to agree with the construction placed upon the provisions of Rule 4-2 by either of the parties. Conceding there are some discrepancies in our Awards and without pointing out the distinguishing features to be found in those to which we refer (See Awards Nos. 2174, 2263, 2818, 3437 and 3942) we think all of them recognize the principle that under a rule such as is here involved the transfer to a position bid in and awarded by bulletin must be made within a reasonable time and that what that reasonable time is must be determined from all the facts and circumstances of the particular case. Applying that rule, and keeping in mind the record makes it appear the Carrier (1) entered into a personal arrangement with Grant, at his request, delaying his transfer to the position at Lake Charles, (2) does not deny it could have transferred him promptly, (3) takes the position it was not required to transfer him to such position although he had bid it in and it had been assigned to him, until it got ready to do so regardless of the period of time involved, (4) was not confronted with any extraordinary or unusual circumstances which made prompt transfer impossible, and (5) by its action created a situation under which he was never transferred to such position, we are constrained to hold the delay in the transfer was unreasonable and in violation of the rule. For our purposes it necessarily follows that on the dates in question Grant was not to be regarded as an extra telegrapher and hence was improperly used as such when assigned to the temporary vacancy in question.

Notwithstanding the conclusion just announced, the question still remains whether the claimants were entitled to fill such vacancy on their days off.

Many specious reasons are advanced by the Carrier in support of its position that this was not required or even permitted under provisions of the existing agreements. These have been rejected without comment in order to not prolong a lengthy opinion. However, several are not of the character mentioned and on that account should be given consideration.

One of these contentions is that since the effective date of the 40-Hour Week Agreement, the Carrier has a right to fill positions requiring relief with other regularly assigned employes, hence even if Grant be regarded as the incumbent of the Lake Charles position it could properly use him on Relief Position No. 5. Assuming that to be true, regular incumbents can only be used if other provisions of the Agreement are complied with. One of these requirements is that a regularly assigned employe cannot be shifted from his

position without negotiation or other agreement. That was the effect of the Carrier's action with respect to Grant. Therefore, he was improperly used on the position in question.

Next, it is argued it is the duty of the Carrier to give the incumbents of seven-day positions their days of rest and that the Carrier could not work the claimants on such days. Conceding the first premise, we do not agree as to the second. Rule 7-7(1), particularly paragraph VI thereof, clearly indicates that under certain conditions that may be done.

Finally, it is contended that commencing with the effective date of the 40-Hour Week Agreement, employes have no right to demand overtime work on rest days and that once the rest days of their positions have been included in a regular relief assignment the occupants of the first mentioned assignment have no demand right to the work which is included in the latter. Assuming, without deciding, there may be some merit in these contentions, we are not called upon nor do we intend to pass upon them under the confronting facts.

It must be kept in mind that every case must be decided upon its own facts. Resort to the record reveals the Carrier concedes that in the instant case if Grant had been removed from the extra relief position and required to go to Lake Charles it would have been necessary that the regular men (the claimants) work on their rest days as no other extra or relief men were available. In deciding this case we cannot disregard or go behind that admission. Having made it, the Carrier is bound thereby. Nor are we disposed to disregard it, particularly in view of the fact that later in the record Carrier admits that if it had not held Grant at Shreveport on extra the telegrapher at Lake Charles would have been released and available for service on the very position in question.

Therefore, we hold that under conditions and circumstances such as have been heretofore related, claimants were entitled to the work in question and have established their right to a sustaining award, with reparation limited, since they did not perform work on the dates therein involved, to the pro rata rate.

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 the Carrier violated the Agreement as indicated in the Opinion and Findings.

AWARD

Claim 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 6th day of September, 1951.