

Award No. 5652

Docket No. TE-5675

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Adolph E. Wenke, Referee

PARTIES TO DISPUTE:

THE ORDER OF RAILROAD TELEGRAPHERS

MISSOURI PACIFIC LINES IN TEXAS AND LOUISIANA

STATEMENT OF CLAIM: Claim of The Order of Railroad Telegraphers on the Missouri Pacific Lines in Texas and Louisiana that:

(a) The Carrier violated the terms of the agreement between the parties when it used an employe not covered by the Agreement to fill a temporary vacancy in the position of Agent at New Braunfels, Texas, instead of advancing employes in that office to perform the relief service.

(b) That the employes adversely affected by this violation of the Agreement be reimbursed for loss in pay on the following basis:

J. E. Lovin, 8 hours each day at the rate of time and one-half for June 1, 8, 15, 22, 1950.

C. J. Schuh, 8 hours each day at the rate of time and one-half for June 6, 7, 13, 14, 20, 21, 27, 28, 1950.

J. B. Burson, 8 hours each day at the rate of time and one-half for June 2, 3, 9, 10, 16, 17, 23, 24, 1950.

EMPLOYES' STATEMENT OF FACTS: There is in effect an agreement between the parties covering Rates of Pay, Rules and Working Conditions, dated October 15, 1940, and supplemental agreement dated July 26, 1949, generally recognized as the Chicago 40-Hour Week Agreement which became effective September 1, 1949.

Included in the scope and coverage of the agreement are five regularly assigned positions at New Braunfels, Texas, namely:

***Agent**

First—Telegrapher-leverman

Second—Telegrapher-leverman

Third—Telegrapher-leverman

Swing—Telegrapher-leverman

The position of second telegrapher is assigned 4 P.M. to 12 Midnight, to any regular assigned hours except for one rest day each week. It is a six-day per week position.

OPINION OF BOARD: The Order of Railroad Telegraphers makes this claim in behalf of J. L. Lovin, C. J. Schuh and J. B. Burson on the grounds that Carrier violated the terms of its Agreement with The Order of Railroad Telegraphers when it used employees not covered thereby to fill a temporary vacancy in the position of Agent at New Braunfels, Texas.

By letter agreement dated March 30, 1943 the star agency at New Braunfels was included in the Telegraphers' Agreement. It was included subject to certain conditions including the following:

"(2) That the foregoing positions will be advertised to the employees on the railroad on which the agency is located and will be filled in accordance with seniority and qualifications. Qualifications will be the deciding factor, the General Manager to be the sole judge."

"(5) That in advertising these positions when they become vacant it will be the distinct understanding that Section 2 herein will govern as to the filling of the positions."

The right reserved to the Carrier of being sole judge of the applicant's qualifications does not take the position out from under the Telegraphers' Agreement. Carrier is bound to make its selection from employees covered by the Telegraphers' Agreement. See Rule 36 (b) of the Agreement and Award 3820 of this Division. The position is subject to all the provisions of the Telegraphers' Agreement except such as are modified by the terms of the letter of agreement of March 30, 1943, none of which are here involved except 2 and 5. Under 2 and 5 thereof Carrier has, in case the position is actually filled, reserved the right when filling it to be the sole judge of the qualifications of those eligible. Since the position was not actually filled during the temporary vacancy with which we are here concerned, this reserved right of the Carrier is not here involved.

The factual situation here involved is as follows: A. Biel, who held the position of star agent at New Braunfels, was granted a leave of absence and, by reason thereof, was off duty from June 1 to 28, 1950, inclusive. During this time Carrier had the Chief Clerk, a position not under the Telegraphers' but under the Clerks' Agreement, perform Biel's duties. This violated the Scope of the Telegraphers' Agreement.

T. R. Stewart, third trick telegrapher-leverman in the New Braunfels office and senior of the four telegrapher-levermen working therein, made claim with the Carrier for the difference in pay in what he earned as a third trick telegrapher-leverman during the period of June 1 to 28, 1950, inclusive, and what he would have earned if he had occupied the position of star agent during that period. This claim was based on his right to the work by reason of Rule 3 (g) of the parties' Agreement. Carrier paid this claim. It was a similar claim to that allowed by this Division's Award 3820.

The claim now made by these Claimants is that if, under Rule 3 (g), T. R. Stewart had been advanced to the position of star agent then Claimant C. J. Schuh, who holds the relief assignment, would have been advanced to the third trick occupied by T. R. Stewart and, there being no other extra telegrapher available, each of the three telegrapher-levermen, J. L. Lovin, J. B. Burson and C. J. Schuh, would have had to have worked on their Relief Days when available. These days are set forth in the claim.

Rule 3 (g), insofar as here material, provides:

"Temporary positions or vacancies of less than thirty (30) days in offices where more than one employee is employed will be filled by advancing employees in such offices according to their Seniority, if they so desire."

The penalty for work lost is the rate of the position. Here the work lost by violation of the Scope Rule was that of the star agent. For this violation Carrier properly paid the claim presented on behalf of T. R. Stewart. The rule is that penalties will not be pyramided. To allow this claim would be a double penalty.

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 Employee involved in this dispute are respectively Carrier and Employee 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 by using an employe not covered thereby to perform the duties of the star agent at New Braunfels.

AWARD

Claim (a) sustained to the extent of the Findings.

Claim (b) denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: A. Ivan Tummon
Acting Secretary

Dated at Chicago, Illinois, this 21st day of February, 1952.