

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Fred W. Messmore, Referee

PARTIES TO DISPUTE:

THE ORDER OF RAILROAD TELEGRAPHERS

**THE ATCHISON, TOPEKA AND SANTA FE
RAILWAY COMPANY
(Eastern Lines)**

STATEMENT OF CLAIM: Claim of the General Committee of The Order of Railroad Telegraphers on the Atchison, Topeka & Santa Fe Railway System, that:

(1) The Carrier violated the agreement between the parties when it required Telegrapher L. F. Francis, regularly assigned 3:45 P.M. to 11:45 P.M. at Tower "A", Ft. Madison, Iowa, to suspend work on his own position and required him to perform service 11:45 P.M. to 7:45 A.M. on another position at the same location June 6 through June 10, 1951; and

(2) The Carrier shall now pay L. F. Francis the equivalent of eight (8) hours' at the straight time rate for each day he was suspended from his regular position, plus the difference between the punitive and the straight time rates for the eight hours each day he was required to perform work outside his regularly assigned hours.

EMPLOYEES' STATEMENT OF FACTS: An Agreement between the parties bearing effective date of June 1, 1951, is in evidence.

The following assignments at Tower "A", Ft. Madison, Iowa, were in effect on June 4, 1951:

M. M. Duffy, 7:45 A.M. to 3:45 P.M. Rest Days—Sat., Sun.
L. F. Francis, 3:45 P.M. to 11:45 P.M. Rest Days—Mon., Tues.
J. R. Campbell, 11:45 P.M. to 7:45 A.M. Rest Days—Wed., Thurs.
D. T. Brummitt (Rest day relief Towerman)

Saturday - Sunday 7:45 A.M. to 3:45 P.M.
Monday - Tuesday 3:45 P.M. to 11:45 P.M.
Wednesday 11:45 P.M. to 7:45 A.M.

Rest days—Thursday and Friday.

Beginning at 11:45 P.M., June 3, 1951, Towerman J. R. Campbell, regularly assigned 11:45 P.M. to 7:45 A.M. at Tower "A", Ft. Madison, Iowa, laid off account illness. It is assumed that there were no available extra

"The claim is valid if the claimant lost any time to which he had a right under the Agreement. On the 4th he could have started on his new assignment at 3:00 P. M. but to have done so would have subjected the Carrier to the penalty provided in the Hours of Service Law, a Federal statute. Agreements must be construed with reference to validly enacted laws under the police power for protection of the public (Award 3849). The enforcement of a provision of a contract must yield to the superior authority of the law; and if the Carrier was forbidden by law to work the claimant at 3:00 P. M. on the 4th, then the claimant has lost 'time' as contemplated by Article 29 (b) on that day. It is agreed that he could not work the position on the 5th as that is the position to which he transferred."

"Therefore, when Article 29(b) is examined in reference to a valid and existing law and in reference to other provisions relative to relief day, we must conclude that the claimant did not lose time to which he had a valid right under the contract." (Emphasis supplied by Carrier.)

There is no rule requiring the Carrier to make use of two regular assigned employees to perform emergency relief.

The Carrier further asserts that even if the Employees' claim were supported by the rules of the current Telegraphers' Agreement, and it is not, Item 2 of that claim is improper and contrary to the consistent holding of the Board that it will not assess a double penalty. See Third Division Awards 2346, 2695, 2823, 2859, 2884, 3444, 4109, 5333, 5423, 5548, 5549, 5638 and others.

In conclusion, the Carrier respectfully asserts that the claim of the employees, in the instant dispute, is entirely without support under the Agreement rules and should be either dismissed or denied in its entirety.

The Carrier is uninformed as to the arguments the Employees will advance in their ex parte submission and accordingly reserves the right to submit such additional facts, evidence or argument as it may conclude are required in replying to the Organization's ex parte submission or any subsequent oral or written arguments or briefs presented by the Organization in this dispute.

All that is contained herein is either known or available to the Employees or their representatives.

(Exhibits not reproduced).

OPINION OF BOARD: The facts are not in substantial dispute. We gather from the record the following as being material. Telephone towerman positions were in effect at Tower "A", Fort Madison, Iowa, a continuing-operated office. The following positions were established at the above office:

Pos. No.	Incumbent	Assigned Hours	Rest Days
340	M. M. Duffy.....	7:45 A. M. to 3:45 P. M.	Saturday-Sunday
345	L. F. Francis.....	3:45 P. M. to 11:45 P. M.	Monday-Tuesday
350	J. R. Campbell....	11:45 P. M. to 7:45 A. M.	Wednesday-Thurs.
2160	J. T. Brumitt.....	Rest day relief	Thursday-Friday

M. M. Duffy worked the first trick, L. F. Francis (claimant) worked the second trick, and J. R. Campbell worked the third trick. J. T. Brumitt worked the rest day relief as follows: The first trick, Saturday and Sunday; the second trick, Monday and Tuesday; and third trick, Wednesday.

On Sunday, June 3, 1951, J. T. Brumitt completed his assignment at 3:45 P. M. and obtained leave for the next three days to move his household goods from Camden to Fort Madison, Iowa. Due to his absence, extra operator H. G. England was used in his place. On June 3, extra employee England had

worked from 7:45 A.M. to 3:45 P.M. on a vacancy at another point. On Sunday June 3, 1951, the third trick telephone towerman, J. R. Campbell, assigned to begin work at 11:45 P.M., laid off on account of illness which extended for the balance of the month of June. He was hospitalized at Topeka, Kansas. The Carrier was unaware of the extent of Campbell's illness, and expected his return to work the next day.

On Monday, June 4, 1951, England worked the second trick, which created a vacancy therein by Brumitt's absence as above indicated. Campbell having been taken to the hospital, there were no available extra operators at that time. The claimant, Francis, was on his assigned day of rest and was notified to work the third trick, Campbell's trick, because of the vacancy created therein. The Employees made no claim that the Agreement between the parties was violated June 3rd to June 5th, as evidenced by the claim.

On Wednesday, June 6th, England, the temporary incumbent of Brumitt's rest day relief position, was scheduled to relieve the third trick position. On June 6th, the claimant Francis had worked the third trick position 7 hours and 15 minutes. The Carrier kept Francis on the third trick position June 6, 7, 8, 9, and 10, the days for which the claim is made. After Francis had his two assigned rest days, he returned to his regular position. Brumitt returned to his regular position on schedule. England began working Campbell's third trick position on June 11th.

The Employees cite numerous rules from the Agreement as being applicable to this dispute. The rules that have some degree of application here are as follows:

Article III, Section 3. "For continuous service after regular working hours, employees will be paid time and one-half on the actual minute basis. Employees notified or called to perform work not continuous with the regular work period will be allowed a minimum of three (3) hours for two (2) hours work or less, and if held on duty in excess of two (2) hours, time and one-half will be allowed on the minute basis. (This Section 3 also applies to service performed on rest days outside of regular work day hours.)"

Article III, Section 4. "Employees will not be required to suspend work during regular hours or to absorb overtime."

Article X, Section 2-a. "A regularly assigned employee will not be taken off his assignment to perform relief work except in cases of emergency, but when so used will be compensated as follows:

- (1) The employee will be paid not less than a minimum day of eight (8) hours for each day he is assigned to work on his assigned position.
- (2) If the employee is required to perform work on the rest day of his own regular assignment, he shall be paid therefore at time and one-half rate.
- (3) Payment for time worked on the emergency position will be at the higher rate of the two positions involved."

Article XX, Section 7. "Subject to the provisions of Sections 8 of this Article XX, temporary vacancies of thirty (30) days or less shall be filled from the extra list by the senior available qualified employee thereon."

In the light of the above stated facts and rules, the Employees contend that no emergency existed after the third trick position was protected on June 3rd by "doubling" Francis and Duffy, for the reason that extra employee England was available to work on June 4; and that where the Carrier was obligated to use Francis (claimant) on his rest days, he should have been used on the second trick position and the extra employee England should have been used on the third trick position.

Contra, the Carrier contends that an emergency existed and, as a consequence thereof, it was justified in using Francis on a position other than his own, as provided for by Article X, Section 2-a. Had the Carrier used the employes as suggested by the Organization, it would have violated Article XX, Section 7 of the Telegraphers' Agreement.

When is an emergency created, or when does it exist? "Sickness or accident, or some unforeseen occurrence that could not be anticipated" creates an emergency. See Awards 6015, 6686. Certainly, employe Campbell's illness created an emergency. Whether he would be ill for a day or longer certainly could not be anticipated by the Carrier.

As stated in Award 3609: "This Board has held that sickness constitutes an emergency within the meaning of the federal act, and that in case of sickness it is permissible, where no telegraphers are available, to require other employes to remain on duty the four additional hours as permitted by the Act * * *. While absence due to illness or injury should not constitute an emergency for a long and indefinite period of time, we think it not unreasonable to hold under the facts here presented that an emergency existed within the meaning of the federal law during the 13 day absence. The act itself, by providing that for three days a week an employe might be worked four additional hours, contemplates an emergency, within its meaning, might extend over a period of time."

We cited Award 3609 for the principle as we have stated it. Also, the federal act referred to therein is involved in this case; we shall speak of it later.

We also make reference to the following appearing in Award 6288: "* * * it was done by Carrier acting in good faith and not an attempt by Carrier to willfully or arbitrarily deprive employes coming under the Telegraphers' Agreement from performing work which rightfully belonged to them, and we are of the opinion that Carrier, having the discretion to act in an emergency as here existed, did so without actually depriving any of its employes compensation, since none of them suffered any resultant loss."

We might add that the facts indicate that the claimant in the instant case was barred by the Hours of Service Law from filling his own assignment. This law provides, so far as here applicable, that no operator, train dispatcher, or other employe who by use of the telegraph or telephone dispatches, reports, transmits, receives, or delivers orders pertaining to or affecting train movements shall be required or permitted to be and remain on duty for a longer period than nine hours in any twenty-four hour period in all towers, offices, places, and stations continuously operated night and day, nor for a longer period than thirteen hours in all towers, offices, places, and stations operated during the day time, except in case of emergency, when the employes named in this proviso may be permitted to be and remain on duty for four additional hours in a twenty-four hour period of not exceeding three days a week.

In any event, the rules cannot be interpreted nor applied in a manner that would countenance violation of any law enacted pursuant to the police powers of the Government.

The enforcement of a provision of a contract must yield to superior authority of the law. See Award 4975.

As we comprehend the facts, this dispute began June 6, 1951. The Carrier, by necessity, was required to have a qualified employe to work the second trick which had been worked by Francis on the two preceding days. At that time Campbell was off duty, sick. Brumitt was off on leave. Francis was unavailable due to Hours of Service Law. There were no extra telegraphers available. We believe that under the facts and circumstances, the Carrier was within its rights by invoking Article X, Section 2-a of the Agreement to take England off his regular assignment (the three day temporary

vacancy in position No. 2160) and to use him to fill the second trick vacancy. At 11:45 P.M., when the third trick began, the Hours of Service Law had tolled as to Francis and he was available to fill that vacancy, and we say properly so.

We also believe the following to be applicable and controlling in principle.

"Treating Article X as a special rule, as we think it should be treated, it seems inconsistent to hold that it is to be regarded as an exception to the general rules in Article III and VII. No inequity results in such an application. The claimant lost no time, and was paid at the higher rate applicable to the two positions on which he worked * * *." We have heretofore set out Article X, Section 2-a referred to in the above award. See Awards 6768, 2511, 3132.

We conclude, from the record in its entirety and the awards herein cited or referred to, that the Carrier did not violate the Agreement, and the claim should be denied.

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 Carrier did not violate the Agreement.

AWARD

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: (Sgd.) A. Ivan Tummon
Secretary

Dated at Chicago, Illinois, this 19th day of January, 1955.