

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

H. Raymond Cluster, Referee

PARTIES TO DISPUTE:

THE ORDER OF RAILROAD TELEGRAPHERS

THE CINCINNATI UNION TERMINAL COMPANY

STATEMENT OF CLAIM: Claim of the General Committee of The Order of Railroad Telegraphers on The Cincinnati Union Terminal Company property, that:

(a) The Carrier violated the provisions of the agreement between the parties when on December 31, 1952, it failed to call C. W. McClain to perform service on position of "Operator in Charge" in "GC" Office, working hours 3:00 P. M. to 11:00 P. M.

(b) Account of this violation the Carrier now be required to pay C. W. McClain eight hours at the time and one-half rate for December 31, 1952.

EMPLOYES' STATEMENT OF FACTS: There is an Agreement between the parties to this dispute, bearing effective date of April 16, 1936. There are several supplemental agreements, among which is one signed on February 13, 1950, which revised some of the schedule agreement rules to conform to the Forty-Hour Week Agreement.

Normally the Carrier maintains a total of eight regularly assigned positions in "GC" Office, all of which are on a 7-day week basis. Included in the number of assignments are two regularly assigned rest-day relief assignments which are designated as A and B.

C. W. McClain was assigned to relief position A and worked on the following schedule:

Monday	Operator in Charge	3 P. M. to 11 P. M.
Tuesday	Operator	3 P. M. to 11 P. M.
Wednesday	Rest Day	
Thursday	Rest Day	
Friday	Operator	7 A. M. to 3 P. M.
Saturday	Chief Operator	7 A. M. to 3 P. M.
Sunday	Operator	7 A. M. to 3 P. M.

Herman Gang was assigned to position of operator in charge, working 3 P. M. to 11 P. M. Tuesday through Saturday, with Sunday and Monday assigned rest days. His rest day on Sunday is worked by Relief Operator

Under Memorandum of Agreement dated February 13, 1950 conforming current agreement with the Forty Hour Week Agreement, Rule 19(h) reads as follows:

"To the extent extra or furloughed men may be utilized under applicable agreements or practices, their days off need not be consecutive; however, if they take the assignment of a regular employe they will have as their days off the regular days off of that assignment."

Rule 19(i) reads as follows:

"The term 'work week' for regularly assigned employes shall mean a week beginning on the first day on which the assignment is bulletined to work, and for unassigned employes shall mean a period of seven consecutive days starting with Monday."

Under the above two quoted rules, we are obliged to use the extra or unassigned employe to fill a vacancy before we can call in the regular assigned employes, who are off on rest days.

Third Division Awards also substantiate Carrier's position that where extra men may be utilized under agreements, the regular men off on rest days have no claim to work on vacancies when Carrier has extra men who have not worked forty hours in that week.

In the present case we were obligated to use Extra Operator Allison as he did not have forty (40) hours of work in that week as Allison's work week started with Monday, December 29, 1952. The week of December 22nd-28th, he only received three days work. Extra Operator Allison was used to fill third trick operator (Schroeder) position on December 29 and 30, which were rest days for Schroeder, then when we used Mr. Schroeder on December 31st to fill Mr. Gang's vacancy, this gave Extra Operator Allison another day. By transferring Mr. Schroeder from third trick to second trick, also at his request, we were able to use Extra man Allison as contemplated by the rules of our agreement. Had we called Claimant McClain in to work his rest day on December 31st we would have denied Extra Man Allison the right to work and he did not have forty hours in his week, also we would have been liable to time claim from Mr. Allison in not permitting him to endeavor to get his forty hours in the week. It is almost impossible to get an extra operator to handle extra work for only eight employes.

We also note the employes are claiming Mr. McClain should be paid eight hours at time and half rate for December 31, 1952. Numerous awards of the Third Division have held that "the penalty rate for work lost because it was given to one not entitled to it under the agreement is the rate which the occupant of the position would have received if he had performed the work."

The claim that Mr. McClain, the Claimant, be paid eight hours at time and one half rate for December 31, 1952 is without merit and is not supported by any rule of the applicable agreement. There was no violation of the agreement and Carrier respectfully requests that the Board so hold and that the claim be denied.

All facts herein presented have been made known to the representatives of the Union.

OPINION OF BOARD: At the time this dispute arose, five regularly assigned employes, two regularly assigned relief employes and one extra employe were employed at Carrier's "GC" office. Claimant was assigned to one of the regular relief positions and worked from 3:00 P. M. to 11:00 P. M. on Monday and Tuesday, rest days Wednesday and Thursday, and from

7:00 A.M. to 3:00 P.M. on Friday, Saturday and Sunday. Operator-in-Charge Herman Gang worked 3:00 P.M. to 11:00 P.M. Tuesday through Saturday, with Sunday and Monday rest days. Operator E. C. Schroeder worked 11:59 P.M. to 7:00 A.M. Wednesday through Sunday, with rest days Monday and Tuesday.

On Tuesday morning, December 30, Gang reported that he was sick and would be unable to work that day. The extra employe was not available to fill this position because he had worked from 11:59 P.M. to 7:59 A.M. on the night of December 29 and was thus barred by the provisions of the Federal Hours of Service Law. Schroeder, who was off on his rest day, was called to fill the vacancy. On the next morning, Wednesday, December 31, Gang again notified the Carrier that he could not work that day because of illness. The extra employe had worked the same hours the night before and was again unavailable because of the Hours of Service Law. This day, Wednesday, December 31, was a regular work day for Schroeder and was a rest day for Claimant. Schroeder requested that he be permitted to continue to fill Gang's position until he returned to duty. Carrier consented to his request and assigned the extra man to work on Schroeder's regular assignment, which, being from 11:59 P.M. to 7:00 A.M., was at a time when the extra man was eligible to work under the Hours of Service Law.

The claim is for 8 hours' pay at time and one-half because Carrier did not call Claimant on his rest day to relieve Gang on December 31, rather than relieving Gang by taking Schroeder off his regular assignment.

Essentially, the claim is based upon the contention that Schroeder was improperly removed from his regular position under Rule 10, which provides that employes will not be required to suspend work during regular hours or to absorb overtime, and under Rule 17, which provides that regularly assigned employes will not be required to perform services on other than their regular positions except in cases of emergency. It is clear from the record that Schroeder was not "required" to perform services on Gang's position, but rather that he requested that he be permitted to do so. Certainly, under the circumstances of this case, no claim would lie for Schroeder based on Rules 10 and 17, and if Schroeder has no claim based on these rules, it is difficult to see how Claimant is in any better position.

The question remains whether there is any other rule which gives Claimant the affirmative right to be called on his rest day to fill a vacancy such as occurred in this case. The only rule cited as giving him such a right is Rule 14, dealing with seniority and promotion, which provides in subparagraph (a) that "seniority will be effective when vacancies occur . . ." The argument is that since Claimant was senior to Schroeder, he had a prior right to the vacancy caused by Gang's illness.

Carrier contends that "vacancy" under Rule 14 does not mean a vacancy on a regular position due to illness. In addition, Carrier asserts that under the forty-hour week agreement provisions, it had a duty to provide work for the extra man if possible, before calling a regular employe such as Claimant on his rest day.

The problem here is one of reconciling and giving meaning to each of the rules involved—the seniority rules, the rules as to suspending work and the use of regular employes on assignments other than their own, and the forty-hour week rules. Considering the purposes of all these rules in connection with the facts and circumstances of this case, we think that Carrier's action was proper. Schroeder worked on Gang's position, rather than his own, at his request. It appears that Carrier acceded to his request because it would accommodate him and at the same time provide a day's work for the extra man; not because it would enable Carrier to avoid calling Claimant to fill the vacancy. As the Board said in Award No. 6686, under quite similar circumstances,

"In this docket the evidence discloses that the 'motivating cause' for the suspension of claimant from his regular position was to fill the vacancy so created by using an extra clerk who was not qualified for the relief clerk position but was qualified to fill claimant's position. Such use of an extra man rather than the use of a regular man on his rest days is in accord with the stated purposes of the 40 hour week agreement."

We think the principle stated in the above quotation is applicable here. The net effect of what was done in this case was that Schroeder got his regular pay and worked on a position on which he wanted to work; the extra man was enabled to work an additional day, which was in accordance with the general purposes of the forty-hour week provisions; and Claimant lost nothing and rested on his rest day, which was also in accordance with the general purposes of the forty-hour week provisions. We do not think that any rule of the Agreement was violated by Carrier's action in this case.

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 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 not violated.

AWARD

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: A. Ivan Tummon
Executive Secretary

Dated at Chicago, Illinois, this 17th day of July, 1957.