

Award No. 9393

Docket No. TE-8287

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Roscoe G. Hornbeck, Referee

PARTIES TO DISPUTE:

THE ORDER OF RAILROAD TELEGRAPHERS

THE DELAWARE AND HUDSON RAILROAD CORPORATION

STATEMENT OF CLAIM: Claim of the General Committee of The Order of Railroad Telegraphers on the Delaware and Hudson Railroad, that:

1. Carrier violated the agreement when it failed to use G. H. Barnes, regular occupant first shift position, "FA" Tower, Oneonta, New York, to perform service required on his position February 19, 20, 26, 27, 1955.
2. Carrier shall compensate G. H. Barnes for 8 hours at one and one-half times the regular rate of \$1.925, for each day (February 19, 20, 26, 27, 1955) of such violation.

EMPLOYES' STATEMENT OF FACTS: There is in full force and effect a collective bargaining agreement between The Delaware and Hudson Railroad Corporation, hereinafter referred to as Carrier or Management, and The Order of Railroad Telegraphers, hereinafter referred to as Employees or Telegraphers. The agreement was made effective July 1, 1944, and has been in several respects amended. The agreement, as amended, is on file with this Division and is by reference included in this submission as though set out herein word for word.

This dispute was handled on the property in the usual manner through the highest official designated by Carrier to handle such disputes and failed of adjustment. The dispute concerns interpretations of the collective bargaining agreement and is, as provided in the Railway Labor Act, amended, properly submitted to this Board for award; this Division having jurisdiction of both parties and subject matter.

The dispute involves interpretation of the Forty-Hour Week Agreement relative to relief of a regular employe on a rest day when the regularly assigned rest day relief employe is not available.

At Oneonta, New York the Carrier maintains a facility designated as "FA" Tower. The tower is manned by three regular seven-day positions. The shifts for regular assigned hours are as follows:

First Shift	7:00 A. M. to 3:00 P. M.
Second Shift	3:00 P. M. to 11:00 P. M.
Third Shift	11:00 P. M. to 7:00 A. M.

did not perform any service on February 14 and 15, 1955. Beginning Wednesday, February 16, 1955, he covered the agent's position at Tunnel, N. Y., remaining thereon through March 4, 1955.

By working February 19 and 20, 1955, Extra Telegrapher A. E. Farone had but five days of work in the week beginning February 14, 1955. However, he did receive pay for seven days during the week beginning February 21, 1955.

The organization based their claim on the result of Decision No. 31 of the Forty-hour Week Committee which, under date of March 24, 1950, recommended the adoption of a rule conforming to the following principles:

"An extra employe cannot claim extra work in excess of 40 hours in his work week if another extra employe who has had less than 40 hours in his work week is available, except that if filling the assignment of a regular employe he may continue thereon, subject to any limitations in the individual agreement with respect to retentions of assignments by extra employes. When an extra employe takes the assignment of a regular employe, he assumes the conditions of such assignment, including the work-week and rest days thereof."

The carrier had no such dispute before the Grievance Committee organized to resolve disputes brought about by the Forty-hour Week Rules. Neither was carrier requested to adopt Decision No. 31.

In this case, the rest day work at 'FA' Tower for first trick on Saturday and Sunday was assigned to a regular relief employe and therefore did not come under the term "unassigned work" as provided in Article 3½, Section 1 (N), reading:

"(N) Work on Unassigned Days: Where work is required by the carrier to be performed on a day which is not a part of any assignment, it may be performed by an available extra or unassigned employe who will otherwise not have 40 hours of work that week; in all other cases by the regular employe."

When this relief position was temporarily vacant, the position could be filled in the same manner as any other vacancy. The carrier filled it by using an available extra man. The restrictions of performing work on a day which is not a part of any assignment did not apply.

Without prejudice to its position, as set forth herein, the carrier asks the Board to take cognizance of the claim being made at the time and one-half rate. The Board has consistently held that work not performed is not compensable as work performed under the overtime or call rules. Awards 4728, 4815 and 5195 are but a few that so decide.

Management affirmatively states that all matters referred to in the foregoing have been discussed with the committee and made a part of the particular question in dispute.

(Exhibits not reproduced)

OPINION OF BOARD: The Carrier asserts that this claim should be barred for the failure of the Organization to observe a requirement of Article V of the August 21, 1954, National Agreement, effective January 1, 1955, which, in so far as applicable, provides:

ARTICLE V (b):

"If a disallowed claim or grievance is to be appealed, such appeal must be in writing and must be taken within 60 days from receipt of notice of disallowance, and the representative of the Carrier shall be notified in writing within that time of the rejection of his decision. Failing to comply with this provision, the matter shall be considered closed, * * *."

Reliance is placed on the failure of the Local Chairman to notify the Chief Dispatcher in writing of the rejection of his denial of the claim and like failure of the Local Chairman or the General Chairman to give such notice to the Superintendent of the carrier.

The claim progressed to other officers of the carrier and to its highest officer designated to handle such claims and notices of rejection of the decisions were properly made and the claim was acted upon and denied. At no time during the proceedings on the property was the provision of the Agreement now relied upon invoked.

It is recognized that certain jurisdictional requisites, such as authority over a party or the right to decide the subject matter of a dispute, may be raised at any stage of proceedings. That situation is not involved in this submission.

It is equally well recognized that purely procedural steps not affecting jurisdiction may be waived, if the elements of a waiver attend. That is the development found on this record.

Waiver is the intentional relinquishment of a known right.

Here the Carrier had the right under the Agreement to invoke the provision as to notice in writing of the rejection of the Organization of the decision against it. It was charged with knowledge of that privilege. With this knowledge it elected to disregard the provision for its benefit and to act on the claim on its merits. This action constituted a waiver of the right which it could have invoked had it done so in a timely manner.

We, therefore, hold that the contention of the Carrier Member that this Board may not now consider the claim because of the provision of the Agreement invoked comes too late because it has waived its right to assert it.

Our holding is supported by the overwhelming weight of authority of this Board. Awards Nos. 1553, 3269, 3950, 5140, 5227, 6500, 6744, 6769, 7848, 7850, 8225, 8411, 8675 and 8693.

We are mindful that there are Awards of this Board to the contrary which have been cited and which we have considered. It would serve no good purpose to discuss them other than to say that upon the precise issue here they are in the minority and where they can not be distinguished on the facts, we disagree with them.

We also note, that this opinion is restricted to and based entirely on the ground that there has been a waiver by the carrier of its rights under the provision of the Agreement now asserted, and without consideration of the other question urged in behalf of claimant that the record does not exemplify the claim that no written rejections of the decisions of the carrier were sent to its officers or that they may not have been waived.

We come then to consider the claim on its merits.

Mr. G. H. Barnes, for whom the claim is made, was the regular incumbent of the first-shift position of Telegrapher at the F. A. Tower of the carrier at Oneonta, New York, a seven day position with rest days on Saturday and Sunday. Compensation is sought for four rest days upon which he was available for service but was not called. It is claimed that the work on these days was improperly assigned to Mr. Arthur Farone, an Agent-Telegrapher, who was temporarily assigned to Tunnel, New York. It is conceded that the owner of the regular rest day relief assignment was not available on any of the days set up in the claim.

The Organization asserts that the order in which the rest day assignments should have been made was:

1. To the regular rest day relief.
2. To the qualified extra employe.
3. To the regular incumbent,

and that Mr. Barnes being the regular incumbent of the position to be relieved was entitled to the assignments.

The foregoing order of rest day relief assignments is stated and approved in many Awards of this Board. None is cited to the contrary. The rule has become stare decisis.

See Awards Nos. 3979, 4192, 4728, 4815, 5233, 5236, 5475, 5900 and 6524.

The Carrier maintains that Mr. Farone, whom it says was on the Extra Board, was a qualified extra employe and entitled to the assignment in preference to Mr. Barnes.

If Mr. Farone was not entitled to the rest day relief assignments then, obviously, they were improperly denied to Mr. Barnes.

Although Mr. Farone may have been on the Extra Board at the time involved he was not then available because he was serving as Agent-Telegrapher at Tunnel under direction of the Carrier. He was obligated to remain there for the duration of his assignment. It lasted for several weeks. In the second week, at least, he worked for forty hours. During his tenure at Tunnel, he was to all intents the Agent-Telegrapher with all the rights and charged with all the obligations of that position. It is our opinion that, in this situation, he lost his status as a qualified extra (available) employe with respect to the assignments which he was given.

Award 5049, Kelliher, Referee, in its facts so parallels those found here as to constitute a binding precedent, if sound, which we believe it to be. The facts are stated in the opinion:

"R. D. Moyer was assigned to a temporary vacancy in the "Z" Office, Scranton, relieving T. J. Shepard on vacation during the period July 1 through July 14, 1947. This was a seven-day position and Sunday was the assigned rest day. J. W. Blud was the regular incumbent of the Northumberland seven-day position. Sunday was also the assigned rest day of this position but this rest day was not

included in a regular relief position but was protected from the extra list. On Sundays, July 6 and 13, 1947, the Carrier required R. D. Moyer to perform rest day relief work on the Northumberland position at the straight time rate."

It was held that:

"R. D. Moyer was not an extra employe and the rest day work, not having been assigned to a regular relief position or protected by an extra employe, belongs to J. W. Blud, the regular occupant of the Northumberland position."

Other supporting Awards, although differing slightly in operative facts, are 6970, 6978 and 7174.

The claim asks payment for Mr. Barnes for the days set up at time and one-half rate. Awards are cited for and against such payment.

Without citing or commenting on these Awards, we are satisfied that the trend and weight of authority in this Board favors the allowance of pro rata compensation instead of time and one-half.

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 the Agreement was violated.

AWARD

Claim allowed. Compensation to be paid to Mr. Barnes pro rata for the time set up in the claim.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois this 10th day of May, 1960.