

Award No. 10445

Docket No. TE-8531

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Martin I. Rose, Referee

PARTIES TO DISPUTE:

THE ORDER OF RAILROAD TELEGRAPHERS

WABASH RAILROAD COMPANY

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

1. The Carrier violated the terms of the Agreement between the parties when it required telegrapher C. W. Heiple, to suspend work on his regular assignment at Bement, Illinois, on Sunday, February 20, 1955.

2. The Carrier shall now compensate Claimant for eight (8) hours at the pro rata rate of his position at Bement, Illinois, representing the time lost.

EMPLOYEES' STATEMENT OF FACTS: The Agreements between the parties to this dispute are by reference thereto made a part of this submission.

This claim arises out of carrier's refusal to pay Telegrapher C. W. Heiple, regularly assigned rest day relief employee Bement, Ill., eight (8) hours at the pro rata rate of his assigned position from which he was suspended on Sunday, February 20, 1955 due to being "transferred by order of the Company" to perform relief service.

At the time this dispute arose, Telegrapher C. W. Heiple was the regular occupant of a rest day relief assignment at Bement composed of the following:

| | |
|----------------------------|--|
| Agent-Telegrapher-Leverman | 7:00 A. M.-3:00 P. M. Sunday-Monday |
| Telegrapher-Leverman | 3:00 P. M.-11:00 P. M. Tuesday-Wednesday |
| Telegrapher-Leverman | 11:00 P. M.-7:00 A. M. Thursday. |
| REST DAYS | Friday - Saturday. |

The above three positions are rated: \$2.125; 1.905; 1.905 respectively.

There is no essential disagreement as to the facts in the case, which are: On Saturday, February 19, 1955, second shift Telegrapher—Leverman C. W. Gardner advised the train dispatcher at Decatur, Ill., that Telegrapher-Leverman W. C. Welch, regularly assigned third shift telegraph-leverman at Bement had reported sick and would not be able to protect his position commencing

The first is that except in so far as it has restricted itself by the agreement the assignment of work necessary for its operation lies within the carrier's discretion."

The Telegraphers' Agreement in effect on this property is also void of any commitment by the Carrier to provide payment to a regularly assigned telegrapher at the pro rata rate of his assignment which he is unable to work due to the intervention of the Federal Hours-of-Service Law, as was the claimant in the instant case.

The claimant by working the third trick position at Bement in emergency and then being prevented from working his regular assignment the following day due to the intervention of the Federal Hours-of-Service Law, suffered no loss in pay. On the contrary, as he was allowed time and one-half for working the assignment to which diverted, his earnings were increased. Therefore, the Committee's allegation set forth in Item No. 2 of its ex parte Statement of Claim that the claimant be compensated for eight (8) hours at the pro rata rate of his position — "**representing the time lost**" is without substance.

CONCLUSION

The claim presented on behalf of Telegrapher Heiple should be denied for the following reasons:

1. There is no rule in the Telegraphers' Agreement which restricts the Carrier's right to use regular employees for relief in an emergency such as existed in the instant case.
2. Claimant was used in emergency and was compensated at punitive rate in conformity with the applicable rule of the agreement.
3. Claimant did not sustain any loss as a result of being used in emergency on his rest days.
4. There is no rule in the Telegraphers' Agreement which provides for the payment claimed.

The Carrier affirmatively states that the substance of all matters referred to herein has been made the subject of correspondence or discussion in conference between the representatives of the parties hereto and made a part of the particular question in dispute.

OPINION OF BOARD: Claimant is the occupant of a regular relief assignment at Bement, Illinois. His assigned work days are Sunday through Thursday, and the rest days are Friday and Saturday. The position provides rest day relief for occupants of all three shifts at the station involved including the Agent-Telegrapher position 7:00 A. M. to 3:00 P. M. on Sunday.

On Saturday, February 19, 1955, Claimant's second rest day, the regular third trick, 11:00 P. M. to 7:00 A. M., Telegrapher-Leverman reported off sick on short notice and no qualified extra employees were available. Carrier called the Claimant and assigned him to work the third trick for which he was paid at the time and one-half rate under the rest day rule. By reason of having worked the third trick position Claimant was precluded by the Hours of Service Law from filling his regular assignment of relieving the Agent-Telegrapher position on Sunday, February 20, the first work day of his next work week.

Petitioner contends that under these circumstances various rules of the applicable Agreement, particularly Rules 5(d), 7, Section 1(e) and 9(a) and (c) require the Carrier to pay the Claimant for Sunday, February 20, 1955.

Carrier maintains that there is no rule in the Agreement to support the payment claimed.

The dispute stems from the effects of the proviso in the Federal Hours of Service Law which reads as follows:

"Provided, that no operator, train dispatcher or other employe who by the 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 or 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 only during the day-time, except in case of emergency, when 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 in any week. . . ."

The illness of the third trick Telegrapher-Leverman so that he could not work his trick beginning on February 19, coupled with the short notice thereof and the unavailability of qualified extra employes to fill the position, created an emergency within the meaning of this proviso. See Awards 2827, 3488. In the exercise of its management prerogative, the Carrier chose to meet the emergency by assigning the Claimant to fill the position. Such action of the Carrier was the proximate cause of the disqualification of the Claimant, by reason of the Hours of Service Law, from working his regular assignment on the next day which was his first regular work day of his succeeding work week. We are not referred to any provision of the Hours of Service Law which bars the Claimant from recovering pay for that day if the rules of the Agreement provide for payment under the confronting circumstances. See Awards 2827, 3488, 3631. The concatenation of events which resulted in this claim distinguishes this case from Awards 2433, 2511, 4975, 5072, 6843, 9475 cited for the Carrier.

Rule 5(d), relied on by Petitioner, states:

"Employes will not be required to suspend work during regular working hours, or to absorb overtime."

Rule 9, to the extent relied on by the Petitioner, reads, in part, as follows:

"(a) Regularly assigned employes transferred by order of the Company or to accept bulletined positions, will be paid for time necessary to make the change on basis of position vacated.

* * * * *

"(c) When a regularly assigned employe is temporarily assigned to a position paying a lower rate than his regular position, he will be paid at his regular wages. If transferred to a position paying a higher rate, he shall receive such higher rate of pay, and be allowed in addition his expenses when filling such temporary assignment, not to exceed . . ."

In regard to Rules 9(a) and (c), the Carrier states:

"The obvious intent and purpose of Rule 9, paragraphs (a) and (c), is to assure that an employe is not placed in a worse position as to compensation and expenses as a result of the Carrier, in the exercise of its authority as an employer to supervise and direct the manner of rendition of the employes' service, in transferring him from one position to another on its initiative."

The Carrier's assignment of Claimant to fill the third trick illness vacancy on February 19, was a transfer for the occasion. It had the effect of removing the Claimant from the performance of his work during regularly scheduled hours on February 20, by reason of the impact of the law which was made operative in regard to the Claimant by the assignment. As a result, even though the Claimant was paid the penalty rate under the rule for working on his second rest day, February 19, his position as to compensation was worsened with respect to the succeeding work week because he could not earn a day's pay on Sunday, February 20, his first work day of that work week. See Award 6781. For these reasons, Claimant is entitled to such compensation under Rule 9(a). By its terms, that rule does not appear limited to transfers of station accounts. No inference in this regard can be drawn from Award 6278, referred to for Carrier. The rule in that case contained a clause expressly covering "Actual time consumed in checking in and out of position" and the award determined a dispute with respect to that clause.

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 Agreement was violated.

AWARD

Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois this 28th day of March 1962.