Award No. 10575
Docket No. TE-8514

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

D. E. LaBelle, Referee

PARTIES TO DISPUTE:

THE ORDER OF RAILROAD TELEGRAPHERS

THE MONONGAHELA RAILWAY COMPANY

STATEMENT OF CLAIM: *Time claim of Naida F. Hunter for 8 hours* account of calling third trick regular operator at "HU" Tower in advance of regular starting time January 2, 1955, basing claim on Article IV (m) of the Telegrapher's Agreement.

EMPLOYES' STATEMENT OF FACT: The claimant Naida F. Hunter is an extra employe. "HU" Tower (Brown's Run Jct., Pa.) is manned seven days per week with the exception of the second trick on Sundays, the week day hours of which are 3:45 P. M. to 11:45 P. M. On Sunday, January 2, 1955, it was necessary to open "HU" Tower on the second trick at 10:45 P. M., one hour in advance of the starting time of the regular third trick, 11:45 P. M.-7:45 A. M., in order to handle a coal train. The claimant, an extra employe, was available to cover this extra assignment on date at issue but instead the regular third trick employe, with tour of duty 11:45 P. M. to 7:45 A. M., was called ahead of his assigned hours to perform this extra service. Because the claimant was not properly called and used, she submitted time claim for 8 hour's pay at pro rata which was denied. This claim was then handled in accordance with the Agreement up to and including the highest officer of the Company designated to handle such matters, as evidenced by Exhibits, "A", "B", "C", "D", "E", "F", and "G". Having failed to settle this claim on the property, it is submitted to your Honorable Board for determination.

POSITION OF EMPLOYES: The governing Agreement between the parties became effective August 1, 1947 and amended September 1, 1949 in accordance with the provisions of the 40-hour Work Week Agreement. The following Rules of the Agreement are invoked in support of claim:

ARTICLE 1 — SCOPE

> "These Rules and Rates of Pay shall constitute an Agreement between the Monongahela Railway Company and its Block Operators represented by The Order of Railroad Telegraphers, and shall govern the hours of service and working conditions of the said employes in the positions classified herein."

Carrier submits that the claim is without merit and should be denied.

OPINION OF BOARD: The instant case involves an incident which occurred at "HU" Tower on January 2, 1955. "HU" Tower, located at Browns Run Junction, 21.4 miles south of Brownsville, is regularly assigned by Telegrapher Operators on twenty (20) eight hour tricks, each week. The only trick not assigned is the second trick, 3:45 P. M. to 11:45 P. M. on Sundays.

The Claimant Naida F. Hunter is an extra employe. On Sunday, January 2, 1955, it was necessary to open "HU" Tower, on the second trick at 10:45 P. M. one hour in advance of the starting time of the regular third trick 11:45-7:45 A. M., in order to handle a coal train. Claimant, an extra employe, was available to cover this extra assignment on date of issue but instead the regular third trick employe, with tour of duty 11:45 P. M. to 7:45 A. M. was called ahead of his assigned hours to perform this extra service. Claimant submitted a time claim for 8 hours pay at pro rata rate, claiming that under the rules she should have been called: This claim was denied.

Carrier denies that it had any obligation to call Claimant for the particular work involved and claims it had the right to call the third trick operator to report for work one hour earlier, as it did under Article V, paragraph (e) of the "Time Allowances" Rules.

The pertinent rules involved here are as follows:

"ARTICLE 1 — SCOPE

"These Rules and Rates of Pay shall constitute an Agreement between the Monongahela Railway Company and its Block Operators represented by The Order of Railroad Telegraphers, and shall govern the hours of service and working conditions of the said employes in the positions classified herein."

"ARTICLE IV — WORK WEEK AND REST DAYS

NOTE: "The expressions "positions" and "work" used in this rule refer to service, duties, or operations necessary to be performed the specified number of days per week, and not the work week of individual employes."

(a) — **GENERAL** — Subject to the exceptions contained in this agreement, the work week shall be 40 hours, consisting of five days of eight hours each, with two consecutive days off in each seven; the work weeks may be staggered in accordance with the carrier's operational requirements; so far as practicable the days off shall be Saturday and Sunday.

(h) — **"Rest Days of Extra or Furloughed Employes** — To the extent extra or furloughed men may be utilized under applicable section of this agreement 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.

(i) — **"Beginning of Work Week** — 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.

(m) — "**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 forty hours of work that week; in all other cases by the regular employe.

"ARTICLE V — TIME ALLOWANCES

(a) — "Eight consecutive hours, exclusive of meal hour, shall constitute a day's work, except that where two or more shifts are worked eight (8) consecutive hours with no allowance for meals shall constitute a day's work.

(e) — "Employes 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.

(f) — "An extra employe called for service and not used, shall, unless notified before leaving home not to report for service, be allowed three (3) hours' pay at the straight rate of the position for which called.

(h) — "Regularly assigned employes will not be required to work at other than their regular positions, except in case of emergency. When required to work temporarily at other than their regular positions, employes shall be paid at the higher rate of the two positions and in addition shall be allowed any actual necessary expense incurred and straight time rate for any additional time consumed in traveling to and from such temporary assignment. No time shall be lost because of this temporary service.

"ARTICLE XIII — EXTRA LIST EMPLOYES

"Senior employes on the extra list, if available and qualified will be given preference, but one extra employe will not be permitted to displace another extra employe on an unfinished assignment except when a senior employe has completed a temporary assignment and a junior extra employe is holding a later temporary vacancy, seniority shall rule."

We have considered the facts and the various rules involved and come to the conclusion that Article IV, (m) governs this controversy and that Carrier violated the Agreement by calling the third trick operator to report one hour in advance; we hold that Article V(e) does not apply in this case.

In considering the claim of Claimant under Article IV (m), it is obvious that by its wording, it gives the Carrier an option, if it so desires, to call an available extra or unassigned employe who would not otherwise have forty hours of work that week: the Rule then states, "in all other cases by the regular employe."

As stated in First Division Award 19080, (Sembower):

"It is inescapable that 'may' is a contingent word, Webster's Dictionary says so: 'Liberty, opportunity; permission; possibility; contingency-used especially in clauses of purpose'."

The option or choice given to Carrier involves only the extra employe and not the regular employe. Failure to exercise the option as to the extra employe means that the regular employe is entitled to the work. If the Carrier had raised the point on the property that Claimant was not entitled to file such claim on the ground that the second trick operator had a prior right to make it, such contention might have merit, if timely presented.

The essence of the claim by the Organization is for violation of the Rules of the parties' Agreement. The claim for the penalty on behalf of the individual claimant named is merely an incident thereto. That the claim might have been made in behalf of another having, as between them, a better right to make it, is of no concern to the Carrier. That fact does not relieve it of the violation and the penalty arising therefrom. No claim has been filed by such second trick operator: if he should, since he is represented by the Organization, Carrier could not be compelled to pay more than once. See Awards 2282, 5195, 4359 and 9334.

The claim will be sustained solely in the interest of maintaining the integrity of the Agreement and as a penalty for what we believe was a violation thereof.

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 Employes involved in this dispute are respectively Carrier and Employes 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 3rd day of May 1962.

DISSENT TO AWARD NO. 10575, DOCKET NO. TE-8514

Award 10575 is in serious error. The only issue for decision by the Board was whether the claimant, an extra employe, had a mandatory right under Article IV (m) of the Agreement to be called and used for eight hours on January 2, 1955.

Article IV (m), relied upon in support of the claim and quoted in the Award, is strictly a permissive rule so far as an extra employe is concerned. This the majority has properly recognized.

The entire dispute on the property and as submitted to the Board, as evidenced by the Statement of Claim itself, was whether, under Article IV (m), the extra employe had a mandatory right to be called for service on the date involved. Having concluded that the very rule relied upon did not confer upon the extra employe such mandatory right, thus removing the only basis for the claim, then it is elementary that any claim in behalf of the extra employe should properly have been denied. No amount of dicta can change the rule, or give to the extra employe a mandatory right not given by the Agreement. Likewise, there can be no penalty accruing to any employe whose Agreement rights were not violated.

The expressed desire of the majority "of maintaining the integrity of the Agreement" properly required denial of this claim because it is not supported by the rule relied upon as the basis therefor. Consequently, we dissent.

/s/ P. C. Carter

/s/ R. A. Carroll

/s/ D. S. Dugan

/s/ W. H. Castle

/s/ T. F. Strunck

ANSWER TO DISSENT TO AWARD NO. 10575, DOCKET TE-8514

The dissenters apparently have permitted their emotions to distort both their perception and judgment. This is evident when they say that the only issue for decision was whether the Claimant, an extra employe, had a mandatory right under Article IV (m) to be called and used on the date involved.

The record clearly shows that the entire dispute as it was handled on the property consisted of a disagreement about whether Article IV (m) or Article V (e) applied when the Carrier required work to be performed during the second trick hours on a day which was not a part of any assignment.

The Employes took the position that Article IV (m) applied; and since the Carrier had not complied with its terms by using either the available extra employe who had not worked forty hours in that work week or the regular second trick employe, they filed claim for one of the two employes who should have been used. They had no way of knowing which of these two employes the Carrier would have chosen if it had complied with the rule, so they chose as claimant the employe first mentioned in the rule.

The Carrier contended that Article V (e), the call rule, applied and permitted use of the third trick employe on a call basis ahead of his regular starting time.

This difference of opinion about applicability of the two rules constituted the entire dispute on the property. Never at any time prior to its third submission did the Carrier contend that the Claimant did not have a mandatory right to the work under Article IV (m). The contention very plainly was that the Claimant had no right to be used because the Carrier could use the third trick employe under Article V (e).

If the Carrier had made the contention which the dissenters apparently believe it did, it would have entailed an admission that Article IV (m) applied.

This the Carrier did not do, either on the property or in its submissions to the Board. The Carrier staked its entire case on Article V (e). It made an observation in its last submission to the Board that Article IV (m) is not mandatory in its provision for using extra employes, but it never contended that the claim was invalid because it was made for the extra employe rather than for the regular second trick employe.

The referee correctly noted that the Carrier had not made the defense on the property which was being urged upon him as grounds for denying the claim, and correctly held that it was not admissible. He was also correct and in accord with many prior awards when he observed: "That the claim might have been made in behalf of another having, as between them, a better right to make it, is of no concern to the Carrier."

The award correctly disposed of the only dispute which was properly before the Board; and the dissent enhances, rather than detracts from, the value of the decision.

J. W. Whitehouse
Labor Member