

Award No. 10713

Docket No. TE-9532

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

(Supplemental)

Robert J. Wilson, Referee

PARTIES TO DISPUTE:

THE ORDER OF RAILROAD TELEGRAPHERS

THE ANN ARBOR RAILROAD COMPANY

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

(1) Carrier violated the Agreement between the parties when it failed to use qualified idle extra telegrapher B. L. Larson to fill the six-day accumulated rest day vacancy on the third shift telegrapher's position at Boat Landing, Frankfort, Michigan, January 19-24, 1956, but instead permitted the regular occupant of the position to fill said vacancy.

(2) Carrier shall now compensate B. L. Larson a day's pay at the pro rata hourly rate (\$2.00) of the position at Boat Landing for each of the days specified herein on which claimant was deprived of filling said vacancy in violation of the Agreement.

EMPLOYEES' STATEMENT OF FACTS: There is in evidence an Agreement between the parties to this dispute effective September 1, 1955, as revised.

This claim stems from Carrier's failure to use idle extra telegrapher B. L. Larson, Claimant, who was available and qualified to fill the accumulated rest day vacancy on the third shift telegrapher's position at Boat Landing, Frankfort, Michigan, during the period January 19 through 24, 1956. Instead, Carrier permitted the regular assigned occupant of the position, Telegrapher Hovey, to work the six day unassigned vacancy, five of which were accumulated rest days, while the sixth day was a current rest day of the week during which the accumulated rest days were being observed.

The position in question is one of seven days. Mr. Hovey, the occupant of the position performs service six days each week Thursday through Tuesday. Actually, however, Mr. Hovey's work week is Friday through Tuesday, rest days Wednesday and Thursday. The Wednesday rest day is incorporated into a regular relief assignment. Thursday, the second rest day, is accumulated for five consecutive weeks. Accumulation is by Agreement, see Employees' Exhibit TE-5.

definition of that word used in Rule 9, Section 1(e) fifth paragraph of the Telegraphers' Agreement, as to its permissive or discretionary character, is likewise applicable to its use in Article 1, Section 1(b), second paragraph, of the Mediation Agreement of July 13, 1945, Case A-2070.

As a matter of fact, Article 1, Section 1(i) of the Mediation Agreement of July 13, 1945, Case A-2070, reading:

"(i) While it is the intent of this agreement that, where practicable, employees will be relieved on their rest days, it is understood that an employee can be required to work on his rest day, subject to the rules herein set forth with respect to pay for work performed on such rest day."

likewise contemplates that an employee, such as Mr. Hovey, can be required to work on his rest day subject to the rules with respect to pay for work performed on such rest day.

The position of the carrier is also supported by Rule 9, Section 2(d) of the Telegraphers' Agreement, effective September 1, 1955, which reads as follows:

"(d) — 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 employee who will otherwise not have forty (40) hours of work that week; in all other cases by the regular employee." (Emphasis ours.)

With regard to that rule, it is the position of the carrier that by the use of the permissive or discretionary word "may" as contained therein, the carrier could have used the claimant, an extra employee, to perform work on the unassigned rest days of the position of Third Trick Telegrapher at Boat Landing, Frankfort, Michigan; but that it was not mandatory that she be used; and that in the event she was not so used it was necessary to use the regular employee, Mr. Hovey. As Mr. Hovey was used, that rule was complied with.

The Agreement between The Ann Arbor Railroad Company and its employees represented by The Order of Railroad Telegraphers contains no rules which makes it mandatory for the carrier to use the claimant, an extra employee, under circumstances such as are herein involved, and the claims as set up in the Employees ex parte Statement of Claim should, therefore, be denied.

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.

(Exhibits not reproduced.)

OPINION OF BOARD: W. R. Hovey was the regularly assigned incumbent of the third shift position at Boat Landing. The tour of duty was Friday through Tuesday with Wednesday and Thursday as rest days. The position was a seven day position.

The Claimant was the senior idle extra telegrapher and at the time involved in this case was available to perform the work.

It was agreed to by the parties that W. R. Hovey the incumbent of the third shift assignment would accumulate Thursday rest days for a period of five weeks and then take them in consecutive rest days. The Wednesday rest day was covered by relief assignment. The accumulated rest days involved were due January 19 through January 23rd.

W. R. Hovey worked through this period and was paid at the rate of time and one-half.

Claim was filed that the Carrier violated the Agreement when it failed to use the extra senior telegrapher to fill the six-day accumulated rest days of the regular incumbent but instead required him to work this period.

The Organization takes the position that work on rest days should as a matter of contractual right be performed by Employees in the following order: First by the regular relief Employee if any; second by an extra Employee and third if none available by the regular occupant of the position on an overtime basis.

The Carrier maintains that there is no rule in the Agreement which requires it to use an extra Employee in lieu of the regular assigned occupant to fill the position during the period involved in this case.

We have carefully studied the rules of the Agreement and we can find no provision which in our opinion would require that the Carrier use an extra Employee on unassigned days instead of the regular incumbent of the position.

There are two specific provisions in the Agreement that apply to the issue before us.

Rule 9, Section 2(d) provides as follows:

"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 employee who will otherwise not have 40 hours of work that week; in all other cases by the regular employee."

Rule 9, Section 2(b) VI provides as follows:

"While it is the intent of this rule that where practical, employees will be relieved on their rest days, it is understood that an employee may be required to work on his rest days subject to the provision herein set forth with respect to pay for work performed on such rest days."

Where a provision of an Agreement is specific in content it will prevail over rules general in nature.

It is our opinion that the above rules specifically give an option to the Carrier to use the regular incumbent of a position on unassigned days.

In the case before us the regular incumbent worked on his rest days and was paid at the prescribed overtime rate in accordance with the terms of the Agreement. Therefore, the claim is 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 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 not violated.

AWARD

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 26th day of July 1962.