

Award No. 10775
Docket No. TE-9864

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

(Supplemental)

Eugene Russell, Referee

PARTIES TO DISPUTE:

THE ORDER OF RAILROAD TELEGRAPHERS
JACKSONVILLE TERMINAL COMPANY

STATEMENT OF CLAIM: Claim of the Committee of The Order of Railroad Telegraphers on the Jacksonville Terminal that:

1. *Carrier violated the Agreement between the parties when it failed and refused to pay C. E. Kelly on September 7, 1956 and J. H. Anderson on January 29 and March 26, 1957, at the proper rate of pay for work performed.*

2. *Carrier shall compensate C. E. Kelly and J. H. Anderson for the difference between what they were paid and what they should have been paid amounting to \$1.20 on each day.*

EMPLOYES' STATEMENT OF FACTS: The Agreements between the parties are available to your Board and by this reference are made a part hereof.

At the time cause for the claim arose, C. E. Kelly was the regularly assigned occupant of the position of third shift leverman at Beaver Street Tower, assigned rest days Thursday and Friday, with a basic straight time rate of \$2.21 per hour. On Friday, September 7, 1956, one of his rest days, he was called to work a vacancy on a position at Myrtle Tower. Through the application of Article 7 of the Agreement, he received time and one-half on this date. He was paid time and one-half on the rate of the position in Myrtle Street Tower (\$2.11 per hour) instead of time and one-half on the rate of his regular position.

At the time cause for the claims arose, J. H. Anderson was the regularly assigned occupant of position 16-30 at Beaver Street Tower, assigned rest days Monday and Tuesday, with a basic straight time rate of \$2.31 per hour. On Tuesday, January 29, 1957 and on Tuesday, March 26, 1957 (both rest days) he was called to work a vacancy on a position at Myrtle Tower. Through the application of Article 7 of the Agreement, he received time and one-half on these dates. He was paid time and one-half on the rate of the position in Myrtle Tower (\$2.21 per hour) instead of time and one-half on the rate of his regular position.

of the position actually worked, and having no claim under Articles 10 or 11 of the schedule agreement — their claim must be denied in its entirety.

All matters herein submitted have been handled in correspondence, discussed in conference, or are well known to the claimants' committee.

OPINION OF BOARD: The record shows that Claimant C. E. Kelly held regular assignment (11:00 P. M. to 7:00 A. M.) at Beaver Street Tower. Assigned rest days of the position were Thursday and Friday of each week. The negotiated rate of pay was \$2.21 per hour.

On Friday, September 7, 1956, Leverman H. S. Marsh was not available to work his assignment (4:00 P. M. to 12 midnight) at Myrtle Avenue Tower. The negotiated rate of pay for this position was \$2.11 per hour. Service requirements of Carrier necessitated filling the position and in accordance with Article 5, Kelly was used to fill the temporary vacancy. He was paid for 8 hours at time and one-half (\$2.11) rate.

Claimant Anderson, on dates relevant hereto, held regular assignment (7:00 A. M. to 3:00 P. M.) at Beaver Street Tower. Assigned rest days of the position were Monday and Tuesday of each week. The negotiated rate of pay was \$2.31 per hour.

Article 11 reads:

"An employe temporarily transferred to a position paying lower rate of wages than his regular assignment, will be paid at the rate of his regular position; when transferred temporarily to a position paying a higher rate of wages, he will be paid the rate applying to such position.

"If any such employe would receive time and one-half rate through the application of Article 7 on any day such service is performed the time and one-half rate shall apply on that day or days."

Here, there is no dispute about the fact that Claimants were entitled to time and one-half pay for the work performed on the dates involved; the sole issue is whether such payment should be made at the lower rate of the position temporarily filled or at the higher rate of Claimant's regular assignment. In the absence of a clear exception to the contrary, the higher rate as specified in the first paragraph of Article 11 is applicable to both straight time and time and one-half payments, and we so rule.

Carrier argues that Claimants were not "transferred" or required to work on the dates of claim; that the work was "offered" or "proffered" and that in "voluntarily" accepting the work there was no transfer within the meaning of Article 11. In this contention we believe Carrier errs. While it may be true that Carrier "requested" the Employees to work on their rest days, on temporary vacancies, such request does have a connotation of more than an "offer." It must be remembered that the Carrier retained as the employer, the residual power to "direct" the Employee to perform service on his rest days, if he was available. Then too, both of the Claimants were, in accordance with Carrier's own position, exercising a contractual right in accepting the work.

Under the rules and the facts set forth in the record, it is our opinion that whether it be said that Carrier "requested" or "offered" or "directed" the Claimants to perform service on the rest days involved in this claim, that they were temporarily transferred within the meaning of Article 11.

FINDINGS: The Third Division of the Adjustment Board, upon the whole record and all the evidence, finds and holds:

That the parties waived oral hearing;

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 13th day of September 1962.