Award No. 10839
Docket No. TE-9529

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Roy R. Ray, Referee

PARTIES TO DISPUTE:

THE ORDER OF RAILROAD TELEGRAPHERS

THE TEXAS & PACIFIC RAILWAY COMPANY

STATEMENT OF CLAIM: Claim of the General Committee of The Order of Railroad Telegraphers on the Texas and Pacific Railway, that:

1. The Carrier violated the terms of the Agreement when it failed to compensate B. C. Tatum, the regular assigned third trick telegrapher at Sweetwater, Teras, for time and one-half in addition to vacation pay when it cancelled his assigned vacation without proper notice and required him to work the assigned vacation April 28 through May 9, 1956, inclusive.

2. Carrier shall now compensate B. C. Tatum, eight hours at the time and one-half rate for each day April 28 through May 9, 1956.

EMPLOYES' STATEMENT OF FACTS: In accordance with the procedures followed on this railroad, Claimant B. C. Tatum, third trick operator at Sweetwater, Texas, submitted the following choices for his vacation in the year 1956:

"TEXAS AND PACIFIC RAILWAY CO."

Under the Vacation Agreement of employes covered by Agreements with the Fifteen Cooperating Non-Operating Labor Unions, vacation periods of 5, 10 or 15 days during 1956 will begin on dates listed below:

Jan.	2	.....	Apr.	3	.....	July	3	.....	Oct.	2	.....
Jan.	9	.....	Apr.	10	.....	July	10	.....	Oct.	9	.....
Jan.	16	.....	Apr.	17	.....	July	14	3rd choice	Oct.	16	.....
Jan.	23	.....	Apr.	24	.....	July	24	.....	Oct.	23	.....
Jan.	30	.....	May	1	.....	July	31	.....	Oct.	30	.....
Feb.	6	.....	May	8	.....	Aug.	7	.....	Nov.	6	.....
Feb.	13	.....	May	15	.....	Aug.	11	2nd choice	Nov.	13	.....
Feb.	20	.....	May	22	.....	Aug.	21	.....	Nov.	20	.....
Feb.	27	.....	May	29	.....	Aug.	28	.....	Nov.	27	.....
Mar.	6	.....	June	5	.....	Sept.	4	.....	Dec.	4	.....
Mar.	13	.....	June	12	.....	Sept.	11	.....	Dec.	11	.....
Mar.	20	.....	June	19	.....	Sept.	18	.....	Dec.	18	.....
Mar.	27	.....	June 30 thru July 11th, first choice			Sept.	25	.....	Dec.	25	.....

Claimant Tatum was required to perform work during the vacation period beginning April 28 and in accordance with Section 4 quoted above, was entitled to be paid the time and one-half rate for the work performed in addition to his regular vacation pay.

In accordance with the rules of the agreement properly applied to the facts in this dispute, Claimant Tatum is entitled to a sustaining award.

(Exhibits not reproduced.)

CARRIER'S STATEMENT OF FACTS: Claimant Telegrapher B. C. Tatum is regularly assigned to third trick telegrapher position at Sweetwater, Texas. In 1956, his vacation had been scheduled to start on April 28, to continue through May 9th. Because of a shortage of extra men, caused by a considerable number of telegraphers—both regular and extra—being sick, it was impossible to relieve claimant starting April 28, without doubling the telegraphers at Sweetwater, in violation of the Federal Hours of Service Law.

Claimant's vacation was postponed, and was afforded him at a later date—namely, September 15-28, inclusive.

POSITION OF CARRIER: This case turns upon one question: Does a situation which will cause the Carrier to violate the Federal Hours of Service Law constitute an emergency? The answer, obviously, is "Yes". The Vacation Agreement (Page 51 of Schedule Agreement) provides in part:

> "Each employe who is entitled to vacation shall take same at the time assigned, and, while it is intended that the vacation date designated will be adhered to so far as practicable, the management shall have the right to defer same provided the employe so affected is given **as much advance notice as possible;** not less than ten (10) days' notice shall be given **except when emergency conditions present."** (Emphasis supplied.)

When claimant's vacation became due, there was no extra telegrapher available to relieve him. Furthermore, if claimant had been allowed to go on vacation at that time, the other telegraphers at Sweetwater would have doubled—that is, worked twelve hours each. Such is a violation of the Federal Hours of Service Law.

If this was not an emergency, then the phrase "except when emergency conditions prevent" might just as well have been left out of the Agreement. But that part of the Agreement was written to cover emergency situations. This was one of those cases.

The Carrier asserts that the claim is entirely without merit, and we request your Board to so decide.

It is affirmed that all data submitted herein in support of the Carrier's position has heretofore been presented to the Organization and is hereby made a part of the question in dispute.

OPINION OF BOARD: Claimant B. C. Tatum, the regular assigned third trick telegrapher at Sweetwater, Texas, was scheduled to begin his ten (10) day vacation on April 28, 1956, following his regular assigned rest days of April 26 and 27. On April 27, Claimant was told that he could not take his vacation at the scheduled time because no one was available to

relieve him. He worked the entire ten days of his scheduled vacation. Claimant took the position that his scheduled vacation was cancelled without proper notice required by Article 5 of the Vacation Agreement and he requested eight hours pay at the rate of time and one half for each of the ten days in addition to the straight time rate he was paid and this forms the basis of the present claim. Claimant was later assigned another vacation period, September 15 to 28, 1956, which he accepted under protest contending that he had already worked his vacation period.

Article 5 of the Vacation Agreement provides:

> "5. Each employee who is entitled to vacation shall take same at time assisgned, and while it is intended that the vacation date designated will be adhered to so far as practicable, the management shall have the right to defer same provided the employee so affected is given as much advance notice as possible: not less than ten (10) days notice shall be given unless emergency conditions prevent. If it becomes necessary to advance the designated date, at least thirty (30) days notice will be given affected employee.
>
> "If a Carrier finds that it cannot release an employee for a vacation during the calendar year because of requirements of the service then such an employee shall be paid in lieu of the vacation allowance hereinafter provided."

An amendment to this Article by the Agreement of 1954 reads :

> "Such employee shall be paid at the time and one half rate for work performed during his vacation period in addition to his regular vacation pay."

The Organization's position is that since the Claimant was not given at least ten days notice, the scheduled period beginning April 28th remained his "vacation period" and since he worked those days he was entitled to the time and one half rate under Section 4, Article 1 of the Agreement of August 1954, in addition to his regular vacation allowance required under Article 5 of the 1941 Agreement. And it asserts that the payment for the period from September 15 to 28 was compensation for improper suspension from work, the vacation being forced upon Claimant by Carrier. Carrier contends that an emergency condition existed on April 27 due to shortage of extra telegraphers which excused it from giving the ten day notice and hence no violation of the Agreement occurred.

The decisive question for determination is whether under all the facts as presented in the record, the shortage of extra telegraphers constituted an "emergency condition" which relieved Carrier from its obligation to give Claimant ten days notice of the deferment of his vacation.

Carrier's claim of an "emergency condition" rests upon the ground that on April 27th, when Claimant's scheduled vacation was deferred all available extra employes were working and that there was a shortage caused by both regular and extra men being sick. But this situation did not suddenly arise on April 27th. As early as April 16th no extra employes were available for relief purposes. When the regular first trick operator had to leave his job on that day for an indefinite period, the regular rest day relief employe (the last possible replacement employe) was required to take his place and two

other employes (one being Claimant) had to work their rest days until April 25th, when an extra employe became available. In other words by April 16th it was apparent that no extra employes were available and Carrier could then see that unless the situation changed radically it would have no one to relieve Claimant for his vacation. It could then have given the ten day notice. Instead it chose to take the chance that the situation might improve and relief help might be available by the 28th. Since Carrier did not give the required notice, it has the burden of proving the existence of an emergency condition which would excuse it.

The Agreement does not define "emergency" or "emergency condition". We must, therefore, give these words their usually accepted meaning. Webster's dictionary says emergency "is an unforeseen combination of circumstances requiring immediate action". In the present case the shortage of extra employes at the time of Claimant's scheduled vacation was not sudden nor was it unforeseeable. In the light of conditions on April 16th Carrier did or certainly should have anticipated that the situation on April 28th would likely not be improved. It should then have taken steps to have necessary relief employes available or have given Claimant the proper notice. Under these circumstances the condition on April 28th cannot be classed as an "emergency condition" as that term is used in Article 5 of the Vacation Agreement. Carrier has, therefore, failed to sustain its burden.

Carrier has insisted that the only way it could have granted Claimant's vacation would have been by doubling other employes and that this would have been a violation of the Hours of Service Act. This is also an affirmative defense and the Carrier has failed to prove either that it would have been necessary to double employes or that doubling for a few days in this situation would have been a violation of the Act.

It follows from what has been said that the Carrier violated the Agreement when it deferred Claimant's scheduled vacation without the ten day notice.

We turn, therefore, to the question of the compensation to which Claimant is entitled. Carrier suggests that even if there was no emergency and Carrier's action violated the Agreement, Claimant is not entitled to any compensation beyond that which he has already received. In support of this theory, it say that Section 4 of the Amendment of 1954 to the Vacation Agreement does not apply because Claimant was later given a vacation in September. If this line of reasoning were accepted, we would have a wrong without a remedy. If Carrier can postpone an employe's scheduled vacation at will without any proper notice where no emergency exists without incurring any liability and force the employe to take his vacation at some later time, Article 5 would be meaningless and the employe would have no security whatever in his assigned vacation. In our view this is contrary to the spirit as well as the language of the Agreement.

Where Carrier gives an employe proper notice, requires him to work his vacation period and affords him no vacation during the Calendar year, it must pay him time and one half for work during the vacation period in addition to regular vacation pay.

In this case where Carrier violated the Agreement by taking away Claimant's vacation period without adequate notice it becomes obligated to compensate him for it at the regular rate and also pay him the time and one-half rate for the period of work. It cannot purge itself of this obligation by

forcing Claimant over his protest to accept another vacation period at a later date. The enforced vacation under these circumstances cannot be used to lessen Carrier's liability.

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 11th day of October 1962.