

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Louis Yagoda, Referee

PARTIES TO DISPUTE:

THE ORDER OF RAILROAD TELEGRAPHERS

SOUTHERN RAILWAY COMPANY

STATEMENT OF CLAIM: Claim of the General Committee of The Order of Railroad Telegraphers on the Southern Railway that:

1. Carrier violated the Telegraphers' Agreement when on the 18th day of July, 1957, it caused or required Claimant E. D. Shelton, extra employe, to forego assignment on second-trick telegrapher position, Leadvale, Tennessee, consequently causing claimant to lose two days' work, namely, Friday, July 19, and Saturday, July 20, 1957.

2. Carrier shall compensate E. D. Shelton for time lost July 19 and 20, 1957, in the amount of \$17.16 per day, total amount due \$34.32.

EMPLOYES' STATEMENT OF FACTS: The second shift telegrapher position at Leadvale, Tennessee, has a work week beginning on Wednesday and has assigned rest days of Monday and Tuesday. The regular assigned occupant of this position is R. H. Giffin. The carrier excused Mr. Giffin for an indefinite time and on Tuesday, July 16, Claimant E. D. Shelton, senior extra employe, was required and assigned to perform the work on the second shift telegrapher position at Leadvale, beginning Wednesday, July 17. The position at Leadvale is a seven day position.

After having been assigned and starting work on the second shift position at Leadvale on July 17, Claimant Shelton was instructed by an officer of the carrier in authority to suspend work on the second shift Leadvale and to protect the rest day relief position at KY Tower, Knoxville and John Sevier Yard, beginning on Thursday, July 18, on the third shift John Sevier. The rest day relief position at KY Tower and John Sevier Yard is programmed to work as follows: Sunday and Monday, first shift KY Tower — Tuesday and Wednesday, second shift KY Tower — Thursday, third shift John Sevier Yard — Friday and Saturday rest days.

When Claimant Shelton was removed from the second shift position at Leadvale and required to work the rest day relief assignment, the carrier required M. L. Jennings, the regular assigned third shift Leadville employe, to work the second shift Leadvale position and then required a junior extra employe, I. D. Courtney, to work in place of Jennings on the third

While Rule 21 (b) recognizes that temporary vacancies of less than thirty days will be assigned to the senior available **qualified** extra employe, it has to be interpreted in the light of other rules contained within the four corners of the Telegraphers' Agreement. It cannot be considered alone. In the instant case, Mr. Shelton was the senior available **qualified** extra employe, and was, therefore, utilized in performing the service required on the regular relief assignment. Thus, there was not any violation of Rule 21 (b) in moving Mr. Shelton from one temporary vacancy to another. Furthermore, the practice throughout all the years that the Telegraphers' Agreement has been in effect has been to do precisely what was done in the instant case. As evidence of this fact, there are attached hereto and made a part hereof affidavits made by various railroad officials attesting to this fact. As additional evidence the first paragraph of Rule 44 of the Telegraphers' Agreement recognizes that these practices are to be continued.

Article 10 (a) of the Vacation Agreement provides that an employe designated to fill an assignment of another employe on vacation will be paid the rate of such assignment or the rate of his own assignment, whichever is the greater. This rule recognizes the management's right to transfer employes from one assignment to another. Thus, there are at least five rules in evidence recognizing the management's unrestricted right to transfer employes from one assignment to another without penalty. The transfer of Mr. Shelton from the vacation vacancy at Leadvale to the regular relief assignment at Knoxville on July 18, 1957, did **not**, therefore, constitute violation of any provision of the Telegraphers' Agreement.

With respect to the monetary claim which the ORT here attempts to assert, Carrier concedes the referred to rules contemplate that when the management transfers employes from one assignment to another they be made whole for any monetary loss suffered, and if Mr. Shelton had suffered any monetary loss, the Carrier would have made him whole, but he did **not** suffer any monetary loss. During the period involved, he worked nine days. Had he remained at Leadvale, he would have worked but nine days. He, like extra Telegrapher J. N. Head, would have been displaced under the provisions of Rule 21 (e), effective Sunday, July 28, by extra Telegrapher J. F. Hodge, who is senior to Shelton and Head. Thus, if Mr. Shelton had remained on the vacation vacancy at Leadvale, he would have worked Thursday, July 18, Friday, July 19, Saturday, July 20, Sunday, July 21, Wednesday, July 24, Thursday, July 25, Friday, July 26, and Saturday, July 27, and would have observed the rest days of the assignment, Monday, July 22, and Tuesday, July 23.

By being transferred from the vacation vacancy at Leadvale to the temporary vacancy in the regular relief assignment at John Sevier and Knoxville, he worked Thursday, July 18, Sunday, July 21, Monday, July 22, Tuesday, July 23, Wednesday, July 24, Thursday, July 25, Friday, July 26, and observed as rest days Friday, July 19, Saturday, July 20, Saturday, July 27, and Sunday, July 28. Mr. Shelton was **not**, therefore, adversely affected and is **not** entitled to pay for the time here claimed. In these circumstances, the Board cannot do other than make a denial award.

(Exhibits not reproduced.)

OPINION OF BOARD: The question at issue here is whether the Carrier may properly displace an extra employe from an unfinished assignment in relief of an absent employe and require him to work another assign-

ment without being obligated to pay him for days not worked, but which would have been worked if he had not been disturbed.

Rule 21 (e) protects an extra employe from displacement by other extra employes for at least five days. It also serves to equalize work among extra employes consistent with the principle of the 40-hour work week. But, there is one exception: A change "necessitated by incompetency." The change made here by the Carrier was "necessitated by incompetency," not of the Claimant—he was the only extra employe who was competent to work the more complicated job to which he was transferred. A less competent employe was used to replace him.

The Employes understandably complain that the Claimant should not be penalized because of his superior qualifications. We agree with this position as a general proposition. But the language of the rule does not protect him from such a change as was made in this case. If the "incompetency" were intended to refer only to the extra employe being displaced, it would have been easy to draft language to that effect. This Board does not have the power to rewrite or modify a rule by interpretation. If the rule does not accomplish the purpose intended, the remedy lies not with this Board, but in the field of negotiation.

Since the rule permits the action taken, and since neither this rule, nor any other to which our attention has been directed, provides payment when such action is taken, the claim cannot be sustained.

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 31st day of July 1964.