

Award No. 13050
Docket No. TE-12270

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

John H. Dorsey, Referee

PARTIES TO DISPUTE:

**THE ORDER OF RAILROAD TELEGRAPHERS
GULF, COLORADO AND SANTA FE RAILWAY COMPANY**

STATEMENT OF CLAIM: Claim of the General Committee of The Order of Railroad Telegraphers on the Gulf, Colorado & Santa Fe Railway, that:

1. The Carrier violated the Agreement between the parties when it failed to permit L. G. Muncy, Jr., the regular occupant of the Night Telegrapher-Clerk Position No. 587, Comanche, Texas, to work his rest days, July 21 and 22, 1959, and required or permitted T. E. Bagby, an extra employe, who was assigned to a temporary vacancy on the agency position at Davis, Oklahoma, and not available, to perform the rest day relief service at Comanche, Texas; and

2. The Carrier shall be required to pay L. G. Muncy, Jr., for Tuesday and Wednesday, July 21 and 22, 1959, on the basis of eight (8) hours at the time and one-half rate.

EMPLOYES' STATEMENT OF FACTS: Agreement between the parties, bearing effective date of June 1, 1951, is in evidence.

This dispute concerns the Carrier's refusal to permit L. G. Muncy, Jr., the regular occupant of Night Telegrapher-Clerk Position No. 587, Comanche, Texas, to work his rest days, July 21 and 22, 1959, and required or permitted T. E. Bagby, an extra employe, who was assigned to a temporary vacancy on the agency position at Davis, Oklahoma, and was observing his accumulated rest days and not available to perform rest day relief service at Comanche, Texas.

Mr. P. E. Traylor was the regular occupant of the agency position at Davis, Oklahoma, a six-day position with Sundays off. Rest days were accumulated on the agency position at Davis and the occupant worked six days a week with Saturdays as accumulated rest days. After working six days a week for five weeks, accumulating five rest days, the occupant would observe the accumulated rest days, being relieved by a rest day relief employe.

Account Mr. Traylor off on vacation and illness, extra employe, T. E. Bagby was assigned to the agency at Davis beginning April 4, 1959.

of 40 hours in the same work week of Agent-Telegrapher Position No. 285 at Davis, Oklahoma. Moreover, Extra Telegrapher Bagby had not worked in excess of 40 hours in the work week prescribed for extra or unassigned employees, and which is defined in Article III, Section 13. It is abundantly clear that the Carrier properly utilized the services of Mr. Bagby on July 21 and 22, 1959, and neither violated any provision of the governing agreement nor gave preferential treatment to Mr. Bagby but, to the contrary, complied strictly with the agreement rules.

Without prejudice to its position that it properly used Extra Telegrapher T. E. Bagby to work on Position No. 587 at Comanche, Texas, on July 21 and 22, 1959, the Carrier emphatically asserts that should the Employees' claim be sustained for any reason, which is not apparent at the present time, the claim for penalties should, for the reasons expressed herein, be dismissed and if not dismissed should not be sustained at punitive rates in disregard of the principle that the right to work is not the equivalent of work performed. That principle was clearly enunciated by this Division in its Award 5271, as follows:

THIRD. The basis of these claims is improper denial of the right to work on a rest day. The Claimants would have been entitled to the overtime rate had they worked the rest days; but if relief or extra men had worked, they would have been entitled to the straight time rate. It is settled by a long line of awards listed in Award 4244 that the Claimants are entitled to no more than the straight time or pro rata rate. See also Award 4728."

See also Awards 5275, 5444, 6212 and a great many others.

In conclusion, the Carrier respectfully reasserts that the Employees' claim in the instant dispute is entirely without merit or support under the governing agreement rules and should be denied in its entirety for the reasons set forth herein.

OPINION OF BOARD: Claimant was the regular assigned occupant of Telegrapher-Clerk Position No. 587 at Comanche, Texas. It was a seven-day position with Tuesday and Wednesday as assigned rest days. The rest days were not included in a regularly assigned rest day relief position. The Agreement provides:

"WORK ON UNASSIGNED DAYS

***SECTION 14.**

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."

On Tuesday, July 21, 1959 and Wednesday, July 22, 1959, Extra Telegrapher T. E. Bagby was used to protect the rest days of Position No. 587.

From April 4 to July 18, 1959, Bagby worked Position No. 285 at Davis, Oklahoma, during which time the regular incumbent was on vacation and sick leave. Position No. 285 was a six day position with assigned workdays Tuesday through Saturday and rest days Sunday and Monday. By agreement of the parties the occupant of Position No. 285 works six days each week Monday through Saturday for five weeks, following which he is: (1) relieved for his five accumulated (Monday) rest days by the occupant of Rest Day Relief Position No. 16; and (2) returns to service on Monday of the seventh week. Bagby when he was released from Position No. 285 on Saturday, July 18, 1959, had earned and was due five accumulated rest days which extended during and beyond the dates on which he was assigned as rest days relief on Claimant's position (July 21 and 22).

POSITIONS OF PARTIES

Carrier contends that Bagby, following the last day he worked Position No. 285, was returned to the extra list and was the senior qualified employe thereon and was thereafter "available" for assignment as rest days relief on Claimant's position. Further, that if Bagby was not so assigned another extra employe, Pickett, was available and could have been assigned; therefore, Claimant has no standing as an employe aggrieved.

Telegraphers contend that: (1) Bagby was on his earned rest days at the time he was assigned to Claimant's position and therefore not "available" for the assignment within the meaning of that word as employed in Section 14 of the Agreement; and (2) since Claimant's position was not work "by an available extra or unassigned employe" the work on the rest days should have been assigned to the "regular employe", Claimant herein.

RESOLUTION

It is established by prior Awards of this Board that an extra employe on an unfinished assignment is not "available" for assignment to other work. Also, that when an extra employe works a regular position he earns the rest days of the position and is not, on those days, "available" for other assignments within the contemplation of rules identical to Section 14, *supra*, of the Agreement before us. See and compare, Award No. 5049 which was issued before the Forty-Hour Week Agreement; Awards Nos. 6970, 6971, 6972, 6976, 6977, 6978, 7391, 7827, 10575, 11763; also, Decision No. 2 of the Forty-Hour Week Committee, issued September 23, 1949.

Simply stated, the issue before us is when did Bagby complete his assignment on Position No. 285. Was it the last day he worked that position, July 18, 1959; or, was it the last day he worked the position plus the five accumulated rest days earned and to be enjoyed as agreed by the parties?

We see no difference between rest days earned and taken during a workweek or rest days earned and accumulated in a manner agreed upon by the parties to the Agreement. We hold, therefore, that assignment of an extra man to a position does not necessarily terminate on the last day he worked the position. If he has earned rest days while occupying the position, the assignment to the position does not terminate until he has enjoyed those rest days. Accordingly, we find that Bagby was not "available", within the meaning of Section 14 of the Agreement, for assignment to Claimant's position on the unassigned rest days of July 21 and 22, 1959.

We now dispose of Carrier's contention that Claimant is not a proper claimant because Carrier could have assigned the rest days to Pickett, who was

eligible for such assignment. We see no reason to belabor this argument. We agree that Carrier could have assigned Pickett and thereby comply with Section 14 of the Agreement. But, it did not. When it failed to assign the work to "an available extra or unassigned employe" it failed to comply with the requirements of Section 14 that absent such an assignment the right to the work was vested in the "regular employe".

The Claim prays that Claimant be paid "on the basis of eight (8) hours at the time and one-half rate" for July 21 and 22, 1959. Under the circumstances that here prevail we have usually held that the Claimant will be made whole by awarding pro rata rate of pay. We will so do in this case.

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 Carrier violated the Agreement.

AWARD

Claim sustained with payment to Claimant computed as prescribed in Resolution, above.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 13th day of November 1964.