Award No. 13363
Docket No. TE-12671

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

(Supplemental)

Preston J. Moore, Referee

PARTIES TO DISPUTE:

THE ORDER OF RAILROAD TELEGRAPHERS

BOSTON AND MAINE RAILROAD

STATEMENT OF CLAIM: Claim of the General Committee of The Order of Railroad Telegraphers on the Boston & Maine Railroad, that:

1. Carrier violated Agreement between the parties when it failed and refused to compensate C. L. Brewer for eight (8) hours at pro rata rate of his regular assignment (3:30 P.M. to 11:30 P.M.) train director, Fitchburg Tower, for March 17 and 24, 1960.

2. Carrier will be required to pay C. L. Brewer for eight (8) hours at pro rata rate ($2.695 per hour) for March 17, 1960 and a like sum for March 24, 1960.

EMPLOYES' STATEMENT OF FACTS:

1. There is in full force and effect collective bargaining agreement entered into by and between Boston & Maine Railroad, hereinafter referred to as Carrier or Management, and The Order of Railroad Telegraphers, hereinafter referred to as Telegraphers or Employes. The Agreement was effective August 1, 1950. The Agreement is on file with this Division and is by reference made a part of this submission as though set out herein word for word.

2. The dispute submitted herein was handled on the property in the usual manner through the highest officer designated by the Carrier and failed of adjustment. Under the provisions of the Railway Labor Act, as amended, this Division has jurisdiction of the parties and the subject matter.

3. Claimant C. L. Brewer was at all times involved herein owner of regular assignment on second shift train director position at Fitchburg Tower, Fitchburg, Massachusetts. He was assigned as follows:

Thurs.	3:30 P.M. to 11:30 P.M.	Train Director, Fitchburg Tower
Fri.	3:30 P.M. to 11:30 P.M.	Train Director, Fitchburg Tower
Sat.	3:30 P.M. to 11:30 P.M.	Train Director, Fitchburg Tower
Sun.	3:30 P.M. to 11:30 P.M.	Train Director, Fitchburg Tower

available for this extra work. Since the tower controls train movements through one of carrier's principal freight terminals, it was not practicable to leave the position vacant.

C. L. Brewer made claim that it was impossible for him to cover his regularly assigned position at BX Tower on March 17, 1960, and again on March 24, 1960, (the first day following his regular rest days), because in each instance he was used on his preceding rest days.

The claim was declined on the basis that the Hours of Service Law prohibited the Railroad from using Brewer on the days in question, and because he voluntarily accepted the work.

POSITION OF CARRIER: The claimant accepted the work without protest. Having so accepted, he is now precluded from making claim on the theory he should not have been used. In a letter to the General Chairman, dated October 13, 1960, relative to this dispute, Third Division Award 6734 was cited, reading in part:

> "However, we think a fair and literal construction of the rule is that in the existing situation Claimant was required to protest prior to filling the vacancy in order to invoke its terms."

Furthermore, had the Respondent used the claimant as the Petitioner now claims it should have, it would have resulted in the claimant's receiving four hours less each week, or a total of eight hours less. He actually received 56 hours in each week, rather than 52 hours in each week as he would have on the theory of the claim. See Carrier's Exhibit A attached, supporting this fact. There was no monetary loss to claimant.

In addition to the foregoing, Brewer has since the claim was decided on the property left the service of the Company.

As stated, having used the claimant on Wednesday, March 16, and on Wednesday, March 23 (second rest days of his work week), the Hours of Service Laws barred the Railroad from using him on his regular second trick position, after having used him the night before on third trick position relief work.

In view of the foregoing there is no support to the claim, and it should be denied.

(Exhibits not reproduced.)

OPINION OF BOARD: Claimant is the occupant of a regular assignment on second shift train director position at Fitchburg Tower. Tuesday and Wednesday were his rest days. On Tuesday, March 15, Wednesday, March 16, Tuesday, March 22 and Wednesday, March 23, the Carrier assigned the Claimant to perform service on a position other than his own. The Claimant was prevented from working his regular assignment on 17th and 24th of March. If used on those dates a violation of the hours of service law would have occurred.

We find this dispute to be in point with Award 10445. We concur with the findings expressed therein.

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 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 26th day of February 1965.