

**Award No. 13459**  
**Docket No. TE-12360**

**NATIONAL RAILROAD ADJUSTMENT BOARD**

**THIRD DIVISION**

**(Supplemental)**

**Daniel House, Referee**

---

**PARTIES TO DISPUTE:**

**THE ORDER OF RAILROAD TELEGRAPHERS**

**THE PENNSYLVANIA RAILROAD COMPANY**

**STATEMENT OF CLAIM:** Claim of the General Committee of The Order of Railroad Telegraphers on the Pennsylvania Railroad that:

Mr. G. T. Atherton, regularly assigned Relief Operator, at Norca Tower, shall be allowed an eight (8) hour day, pro rata rate, at the Norca rate, for February 8, 1959 account Operator W. H. Duncan, on this case, being incorrectly used on a Regulation 5-C-1 moveup, while not holding rights in Norca Tower.

**EMPLOYES' STATEMENT OF FACTS:** Norca Tower is located on the Carrier's Wilkes-Barre Branch which extends eastwardly from Sunbury, Pennsylvania to Wilkes-Barre, Pennsylvania for a distance of approximately 63 miles. Norca Tower is 21 miles up the line from Sunbury. Carrier maintains twenty-four hour service at Norca Tower manned by block operators seven days per week working eight hour shifts. The assigned hours of the shifts are as follows:

1st shift	7:00 A. M. - 3:00 P. M.
2nd shift	3:00 P. M. - 11:00 P. M.
3rd shift	11:00 P. M. - 7:00 A. M.

Each block operator works five days per week and is allowed two rest days. The rest days are worked by a relief block operator assigned as follows:

1st shift	Monday and Tuesday
2nd shift	Wednesday and Thursday
3rd shift	Friday

The Saturday rest day of the third shift is worked by a second relief block operator whose work assignment includes locations other than Norca.

The block operator positions at Norca, as well as the incumbents thereof, are subject to a working Agreement between the parties which we will design-

It is respectfully submitted that the National Railroad Adjustment Board, Third Division, is required by the Railway Labor Act to give effect to the said Agreements and to decide the present dispute in accordance therewith.

The Railway Labor Act in Section 3, First, subsection (i), confers upon the National Railroad Adjustment Board the power to hear and determine disputes growing out of "grievances or out of the interpretations or application of Agreements concerning rates of pay, rules or working conditions." The National Railroad Adjustment Board is empowered only to decide the said dispute in accordance with the Agreements between the parties thereto. To grant the claim of the Employees in this case would require the Board to disregard the Agreements between the parties and impose upon the Carrier conditions of employment and obligations with reference thereto not agreed upon by the parties to this dispute. The Board has no jurisdiction or authority to take such action.

#### CONCLUSION

The Carrier has established that there has been no violation of the applicable Agreements, and the Claimant is not entitled to the compensation requested in the claim.

Therefore, the Carrier respectfully submits that your Honorable Board should deny the claim of the Employees in this matter.

(Exhibits not reproduced.)

**OPINION OF BOARD:** This case turns on whether an employee may be considered as regularly assigned to an office under Regulation 5-C-1 when he has properly announced his intention to move into a position in that office, but before he has physically occupied such position. We will not repeat all of the facts which are clearly set forth above, and are not in dispute. Duncan, who on February 8, 1959, was permitted, improperly, according to the Organization, to fill a vacancy under 5-C-1, was notified on February 7 that the position to which he had been regularly assigned up to then would be abolished effective at 7:00 A. M., February 8. He sent the following message to the Supervising Operator on February 7:

"Acct RS 9 abolished 7 A. M. Feb 8 59 I hereby select second trick Norca as my permanent position and wish to continue to work first trick Norca under REG 5C1 Letter follows."

Carrier argues that under Regulation 2-N-1 and 2-O-1, when his regular position is abolished, an employee need not be physically occupying his regular assignment in order to become entitled to make an exercise of seniority under Rule 2-N-1; and that there is no reason he should not have the same status under 5-C-1. Regulation 2-N-1 deals with the obligation of an employee who is entitled to displace another by exercise of his seniority under any of the provisions of the Agreement to give timely written notice of his intention to exercise such rights; Regulation 2-O-1 (a) (1), cited by the Carrier, is one of the provisions of the Agreement under which an employee may choose to exercise his seniority to displace another employee. Regulation 5-C-1 involves some rules for the filling of temporary vacancies. Regulations 2-N-1 and 2-O-1 are not relevant to this case; Duncan asked for and was assigned the vacancy under 5-C-1.

We are of the opinion that the record supports the Organization's contention that the Agreement intends that an employee may not be considered

as regularly assigned to a position in an office for purposes of Regulation 5-C-1 until he first physically occupies such position. Duncan had ceased to occupy such a position at Norca Tower at 7:00 A. M., February 8, and did not again properly occupy such a position at Norca Tower until he started to work on his regularly assigned second shift assignment there. In the interim he had no rights to exercise at Norca Tower under Regulation 5-C-1, and the Carrier should not have granted that portion of the request in his message quoted above. The involved temporary vacancy should have been assigned to Claimant; we will sustain his claim.

**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 Employee involved in this dispute are respectively Carrier and Employee 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 Carrier violated the Agreement.

**AWARD**

Claim sustained.

**NATIONAL RAILROAD ADJUSTMENT BOARD  
By Order of THIRD DIVISION**

**ATTEST: S. H. Schulty  
Executive Secretary**

Dated at Chicago, Illinois, this 8th day of April 1965.

**CARRIER MEMBERS' DISSENT TO AWARD 13459,  
DOCKET TE-12360  
(Referee House)**

The Majority's reasonings and conclusions sustaining this claim are erroneous.

The sole question in this dispute is whether a Telegrapher is "regularly assigned" to a position when he does not physically displace on that position, although he does notify Carrier of his intention to take over the position pursuant to Regulation 2-N-1. If we conclude that he was regularly assigned to the permanent position, then under Regulation 5-C-1, he had a right to move up to the temporary position in the same office. In support of its contentions that Telegrapher Duncan was regularly assigned within the meaning of Regulation 5-C-1, the Carrier directed the Board's attention to Regulation 2-N-1 and to the agreed upon interpretation of that rule which was made a part of the record in this case.

The Majority erroneously held that Regulation 2-N-1 was not applicable to this dispute, and secondly, they accepted the Petitioner's unproven assertion

" \* \* \* that the Agreement intends that an employe may not be considered as regularly assigned to a position in an office for purposes of Regulation 5-C-1 until he first physically occupies such position. Duncan had ceased to occupy such a position at Norca Tower at 7:00 A. M., February 8, and did not again properly occupy such a position at Norca Tower until he started to work on his regularly assigned second shift assignment there. \* \* \* "

The foregoing statement is completely contrary to the joint interpretation of the Agreement which, in turn, resulted from a proposal submitted by the General Chairman in another case on the property. In that case, it was concluded that an employe did properly own a position and was considered regularly assigned thereto when he exercised displacement rights on a permanent position and a temporary position, although he only physically displaced on the temporary position. The General Chairman's proposal there read: (R., p. 46)

" \* \* \* are you willing to enter into a memorandum of understanding that will make clear beyond any possible doubt, that it is our mutual understanding that an employe has the right to displace a regular position by serving notice of his intent to do so under regulation 2-N-1 (a) and at the same time serve a similar notice of his intent to displace a temporary vacancy and elect to work the temporary vacancy until such time as it expires when he will be covered by rule 2-R-1 and can elect to return to the regular position he has selected at the time he became eligible to displace. \* \* \* "

The Carrier subsequently agreed to this proposal. In short, it was agreed that an employe did not have to physically displace on a permanent position in order to own that position.

Thus, contrary to the conclusions reached by the Majority, Telegrapher Duncan was regularly assigned to a position at Norca Tower within the meaning and contemplation of Regulation 5-C-1, when he notified Carrier, in writing, of his intention to displace on a permanent 2nd trick position.

Furthermore, the Petitioner admitted the provisions of Regulation 2-N-1 did apply to Telegrapher Duncan when he exercised seniority on the permanent position. That being so, the agreed upon interpretation also applied to him. In the Record, the Petitioner says:

" \* \* \* Duncan, to exercise his seniority, was obliged under Regulation 2-N-1 (a), to make his intention known in writing within ten (10) days. This he did by message to 'WP' office, notifying them of his intention to exercise seniority to the second trick position at Norca Tower, effective February 8, 1959. \* \* \* "

Moreover, the Petitioner conceded that the agreed upon interpretation would apply to Telegrapher Duncan, if Regulation 2-N-1 were applicable. For example, in replying to the Carrier's denial of the claim in the handling of the claim on the property, the General Chairman says:

"You also state in your letter of denial that:

'From the foregoing, it is evident an employe is not required to perform physical work on a regular assignment before selecting a temporary vacancy.'

The above would be correct if applied to Regulations 2-N-1 and 2-O-1 and interpretation placed thereon. But, that is not the issue. All that is involved is the correct application of 5-C-1 and you are attempting to confuse the issue by injecting Regulations 2-N-1 and 2-O-1 in a situation where it has no applicability. \* \* \*

It is apparent the Petitioner had already overlooked their admission that Regulation 2-N-1 did apply to Telegrapher Duncan.

Needless to say, the Majority was made fully aware of the Petitioner's admissions concerning the application of Regulation 2-N-1 and notwithstanding this, they concluded that Regulation 2-N-1 had no application to this dispute. For this reason alone, their conclusions cannot be sustained.

The Majority had a responsibility to accept the agreed upon facts and interpretation of the parties, and to refrain from imposing their arbitrary conclusions upon the Carrier without supportable evidence. For the reasons set forth above, among others, we dissent.

W. F. Euker  
R. A. DeRossett  
C. H. Manoogian  
G. L. Naylor  
W. M. Roberts