

Award No. 13678

Docket No. TE-12729

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION
(Supplemental)

Ross Hutchins, Referee

PARTIES TO DISPUTE:

TRANSPORTATION COMMUNICATION EMPLOYES UNION
(Formerly The Order of Railroad Telegraphers)

SOUTHERN PACIFIC LINES IN TEXAS AND LOUISIANA

TEXAS AND NEW ORLEANS RAILROAD COMPANY

STATEMENT OF CLAIM: Claim of the General Committee of The Order of Railroad Telegraphers on the Southern Pacific Lines in Texas and Louisiana (Texas and New Orleans Railroad Company), that:

1. Carrier violated the provisions of the Telegraphers' Agreement, when on Monday, December 26, 1960, it required Telegrapher J. E. Goode of Victoria, Texas, to perform service on his rest day but failed to properly compensate him.
2. Carrier shall now be required to compensate Telegrapher J. E. Goode for the difference between a day's pay at the time and one-half rate for December 26, 1960, and the amount he was paid.

EMPLOYEES' STATEMENT OF FACTS: Claimant J. E. Goode is the regular assigned first shift Telegrapher-Clerk at Victoria, Texas. His assigned hours are 7:30 A. M. to 3:30 P. M., Tuesday through Saturday, with rest days of Sunday and Monday. Monday is part of a regular relief assignment owned by J. E. Kubes. Therefore, the first shift Telegrapher-Clerk position at Victoria, Texas, is six day position.

Telegrapher J. E. Kubes owns a relief position which works as follows: Agent-Telegrapher at Wharon, Texas, on Saturday; Agent at Bay City, Texas, on Sunday; First Shift Telegrapher-Clerk, Victoria, Texas, on Monday; Second Shift Telegrapher-Clerk, Victoria, Texas, on Tuesday and Wednesday. His assigned rest days are Thursday and Friday. Telegrapher Kubes drives his personal automobile between these stations protecting his relief assignment.

On Monday, December 26, 1960, Telegrapher Kubes did not arrive at his assignment at first shift Telegrapher-Clerk position at Victoria, Texas, at 7:30 A. M. and the Carrier called Telegrapher J. E. Goode to protect the assignment and clear trains. Mr. Kubes had car trouble enroute to Victoria.

Telegrapher Goode claimed a day's pay at the time and one-half rate as provided in Rule 9(M) of the 40-Hour Week Agreement in effect on this property. The Carrier paid Claimant Goode 3 hours for the work performed on Monday, December 26, 1960. Claim is, therefore, for the difference between

tain holidays.

(Exhibits not reproduced).

OPINION OF BOARD: The claim is for a day's pay at the time and one-half rate for the Claimant, Mr. Goode. On this date, the Claimant was on his rest day. The Claimant was a regular telegrapher working on the first trick position with assigned hours 7:30 A. M. to 3:30 P. M., Tuesday through Saturday, with rest days of Sunday and Monday. Accordingly, the Claimant holds a six-day position. On Monday, the Claimant was regularly relieved by a Mr. Kubes. Monday is, therefore, part of the relief assignment. On December 26, 1960, Mr. Kubes was late in arriving and the Claimant was called and used from 7:30 A. M. to 8:30 A. M. Mr. Kubes then arrived and worked the balance of the trick. The Claimant was paid three hours at the rate of time and one-half for a call.

The Claimant claims a day's pay at the time and one-half rate as provided in Rule 9(M) of the 40-Hour Week Agreement:

"On Six-day positions:

"At the rate of time and one-half with a minimum of eight (8) hours for the day included in relief assignment; and at the rate of time and one-half with a minimum of three hours for each tour of duty on the Sunday designated as the other rest day."

The Carrier contends that it paid the Claimant the proper amount and cites Rule 5 of the Agreement between the parties of 1946:

"(A) Employees notified or called to perform work not continuous with the regular work period will be allowed a minimum of three (3) hours for two (2) hours' work or less, and if held on duty in excess of two (2) hours, time and one-half will be allowed on the minute basis.

(B) An employee notified or called to perform work in advance of and continuous with the regular work period shall be paid three (3) hours at the straight time rate for two (2) hours work or less, and at the overtime rate thereafter on the minute basis, for the time required to work in advance of the regular starting time."

The Employees cite Awards 10679 (Moore); 10541 (Sheridan); 11454 (Miller); 11899 (Hall); 12453 (Sempliner); and United States vs. Bergh 352 US 40 (1956) and United States vs. Kelly, 342 US 193 (1952). All of these authorities support the proposition that where a rest day and Holiday occur on the same day and the payment for each is provided for in the Agreement, the employee is entitled to payment under both rules. Award 9485 (Rose) this Board said:

"The literal language of sub-paragraphs II, A (1) and IV, quoted above, cannot be ignored and is clearly applicable to the factual situation presented. Claimant was an employee 'required to perform service on' one of her 'rest days', Thursday, June 30, 1955. She was required to perform such service for one hour, 3:00 P. M. to 4:00 P. M., 'within the hours of' her 'regular week day assignment' of hours from 8:00 A. M. to 4:00 P. M. For such service, she was qualified for payment on the basis provided in sub-paragraph A (1), namely 'at the rate of time and one-half with a minimum of eight hours', because

she was one of the 'Employees occupying positions requiring a Sunday assignment of the regular week day hours'.

"The hours Claimant worked from 4:00 P. M. to 11:00 P. M. were plainly 'Time worked . . . after the hours of' her 'regular week day assignment' and considered overtime to be said at the time and one-half rate in accordance with the provisions for payment of overtime in Paragraph 6 of Article II."

In Award 13043 (Wolf) this Board said:

"On January 6, 1959 (Tuesday) an assigned rest day of Claimant, he was called to work on the 10:00 A. M. to 6:00 P. M. shift in Spokane Relay Office. He worked the eight hour shift and claimed pay for six hours at time and one-half rate for services outside his regular week day assigned hours (10:00 A. M. to 4:00 P. M.) and eight hours at time and one-half rate for services within the hours of his regular week day assignment (4:00 P. M. to 6:00 P. M.). The Carrier disagreed and allowed eight hours at time and one-half rate."

This Board sustained the claim in 13043. Award 12471 (Kane) is to the same effect.

These cases, of course, involve whether or not an employee can recover under two Rules. There is no claim here for recovery under two Rules. We do not here decide that this Claimant could or could not recover under both the Rules quoted above, nor whether or not the Claimant could have recovered under any two Rules.

The basic question that must be answered here is whether or not Rule 9(m) applies. The Carrier contends that Rule 5 applies, but whether or not Rule 5 applies is not the real issue unless we first decide that only Rule 5 or only Rule 9(m) applies but not both.

Clearly 9(m) does by its express provisions apply to this claim. The conditions prescribed in 9(m) are all met in this docket. This six day assignment and the hours were part of the Claimant's relief assignment.

If the Claimant can recover under both Rule 9(m) and 5, the Claimant can most certainly choose the one he prefers.

If the Claimant is not entitled to compensation under both Rules:

(1) The later Agreement would take preference over the prior Agreement and the Claimant's claim would be sustained because the Rule urged by the Claimant was effective on September 1, 1949, and the Rule urged by the Carrier was effective December 1, 1946.

(2) The specific rule of the 40-Hour Week Agreement would take preference over the general rule of the Agreement of 1946.

The Claimant may recover under Rule 9(m).

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 24th day of June 1965.

CARRIER MEMBERS' DISSENT TO AWARD 13678, DOCKET TE-12729

(Referee Hutchins)

This record presented a clearly drawn issue as to the meaning the parties attached to the expression "the day included in relief assignment," but presented no issue whatever regarding the possibility of recovery under two rules. In their submission to the Board the Employes neither argued nor hinted in any way that Claimant was or might have been entitled to payment under two rules.

The authors of the award have obviously strayed far from the basic issues presented and have failed to give due consideration to the facts submitted by Carrier.

For these and other reasons, we dissent.

**/s/ G. L. Naylor
G. L. NAYLOR**

**/s/ R. A. DeRossett
R. A. DeROSSETT**

**/s/ W. F. Euker
W. F. EUKER**

**/s/ C. H. Manoogian
C. H. MANOOGIAN**

**/s/ W. M. Roberts
W. M. ROBERTS**