Award Number 17745

Docket Number TE-17536

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

David L. Kabaker, Referee

PARTIES TO DISPUTE:

TRANSPORTATION-COMMUNICATION EMPLOYEES UNION

THE NEW YORK, NEW HAVEN & HARTFORD RAILROAD COMPANY

STATEMENT OF CLAIM: Claim of the General Committee of the Transportation-Communication Employees Union on the New York, New Haven and Hartford Railroad, that:

1. Carrier violated the Agreement between the parties when it denied Signal Station Operator W. H. Reynolds the right to work on one of his rest days, October 1, 1966.

2. Carrier shall compensate S. S. Operator W. H. Reynolds for eight (8) hours at one and one-half times the pro rata rate of his position as first trick operator at Kingston, Rhode Island, for work denied him on October 1, 1966.

EMPLOYES' STATEMENT OF FACTS:

(a) STATEMENT OF THE CASE

The Agreement between the parties dated September 1, 1949, as amended and supplemented, is on file with your Honorable Board and by this reference is made a part hereof.

This claim was timely presented, progressed to the highest officer designated by the Carrier to receive appeals, including conference in accordance with the terms of the Agreement and has been declined. The Employees, therefore, appeal to your Honorable Board for adjudication.

This dispute arose when on Saturday, October 1, 1966, in the absence of the regularly assigned relief employee, Carrier used an extra (spare) employee who had otherwise had forty hours work in his work week, to work the hours of Claimant's assignment on one of his rest days.

(b) ISSUES

Are the hours for which Carrier pays an extra employee for posting to be counted as work when determining the number of hours worked in his work week?

(c) FACTS

Claimant, W. H. Reynolds, holds a regular assignment as first trick signal station operator at Kingston, Rhode Island. This is a seven day position.

whether or not such employe would normally be considered for further call under article 13 (d).

Copy of Agreement between the parties dated September 1, 1949, as amended, is on file with your Board and is, by reference, made a part of this submission.

(Exhibits Not Reproduced)

OPINION OF BOARD: Extra employee Wells spent three days in posting in the week prior to being called to fill a position in the absence of the regularly assigned relief employee. The issue therefore is as follows: "Are the hours spent in posting to be used in computing the weekly hours of the extra employee for the determination of the number of hours worked in that work week?"

Employees' position is that Extra Employee Wells had forty hours of work in his work week, by virtue of three day's posting and was therefore improperly assigned on the sixth day. It contends that the time spent in "posting" must be used in the computation of "forty hours in his work week" under Article 13(d) of the Agreement.

The Carrier's position is that "posting" cannot be considered "work" within the meaning of work as defined in Article 4, Section A of the Agreement.

The Board must, of necessity, determine the intent and meaning of Article 13(d) of the Agreement as it relates to the undisputed facts in this case. The Article deals specifically with extra work and extra employees.

Paragraph (a) of the Article deals with the assignment of extra employees according to seniority, the limitation to one shift each twenty-four hours and prohibition against displacement on an unfinished assignment of an extra employee by another. Paragraph (b) deals particularly with compensation. Paragraph (c) outlines the manner by which employee holding regular positions can go on the extra list. Paragraph (d), which is involved herein, provides for the assignment of an extra employee to work which is not part of any assignment provided he does not already have forty hours of work in that week.

Article 13 contains no provision that restricts or limits the meaning of work to that set forth in Article 4, Section A Note nor does it contain any provision that would remove or eliminate time spent in posting from the computation of forty hours of work.

The Article does not define what constitutes "work" as the word is used in that Article and we must employ its normal and usual meaning.

Carrier contends that the word "work" in Article 13 (d) must carry the meaning set forth Article 4, Section A Note. The arguments presented by Carrier in its Submission in support of the limited meaning of "work" expressed in the Note are not persuasive. There has been no showing that the note in Article 4 was intended to apply to any provision except those contained in Article 4, nor that it was intended to govern and control the totally unrelated provisions found in Article 13 (d).

The Board must conclude that the work of "posting" performed by Extra Employee Wells is "work" within the meaning of Article 13 (d). His activity in posting consisted of learning the various facets of the physical

operation of the job on which he posted. The development of a qualified and competent employee is essential to the Carrier's operation, and therefore the posting process is both beneficial and necessary to the Carrier. This Board has occasion to rule on the question of whether posting constituted work in Award 6380 (Kelliher). In sustaining the claim, the Board stated in its opinion: "The Board must find that posting, while for the benefit of the employee, also benefits the Carrier."

It is obvious that the intent of Article 13 (d) was to restrict the assignment of an extra employee where he had already enjoyed forty hours of work and to assign the work to the regular employee. In the instant case the Claimant was entitled to the assignment inasmuch as Extra Employee Wells had forty hours of work in his work week beginning September 25, 1966. The claim has merit and must be allowed.

The claim herein however requests compensation at the rate of time and one-half for eight hours. In Award 13191 this Board held that time and one-half should not be granted to Claimant for work which was performed by another employee on Claimant's rest day.

We are in accord with Award 13191 and find it and the following awards supportive of the holding herein. See Awards 4815, 4962, 5172, 6664, 6831, 7207, 9393, 10626, 10800, 10809, 11032, 11039, 12135, 13034, 13125, 13809, 14149, 14707 and 15008.

Based upon the record, we find that the claim must be sustained; however the compensation shall be for eight (8) hours at the pro-rate rate.

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.

A W A R D

Claim sustained to the extent set out in the Opinion.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 20th day of February 1970.

SPECIAL CONCURRING OPINION, AWARD 17745,

DOCKET TE-17536

This award correctly resolves the basic dispute with unassailable logic and sound reasoning. However, we cannot agree with its limitation of damages to an amount less than the claimant's wage loss.

The line of awards relied on for such limitation contains some that are palpably erroneous, such as Award 14149 where the limitation was imposed with respect to a holiday where the only contractual wage rate was time and one-half. The Labor Member handling that case wrote an exhaustive dissent in which was explored the history of the theory underlying the limitation in question. By reference we adopt that dissent as a part of this Opinion.

We are of the opinion that the line of Awards, including 3381, 3744, 4022, 5784, 9309, 9436, 10009, 10633, 11080, 11333, 11558, 11571, 11878, 12786, 13315, 13738, 15048, 16254, 16295, 16528, 16820, represents the only proper basis for compensating an employe who was, in violation of an agreement, deprived of an opportunity to work at the premium rate of pay.

The sound reasoning of this line of awards is exemplified by Award 16820, in which Referee Brown said:

> "In this case the Carrier admittedly violated Rule 40(a) of the Agreement when it assigned overtime work to an employe junior to Claimant. The sole issue is whether Claimant should receive straight time or time and one-half for the lost opportunity to work.
>
> "The precedent in cases of this nature are illustrated by Awards 7062 and 3277, both awards by Referee Edward F. Carter and reaching opposite results on comparable facts.
>
> "We endorse the reasoning of Referee John H. Dorsey in Award 13738: 'the loss suffered by an employe as a result of a violation of a collective bargaining contract by an employer . . . is the amount the employe would have earned absent the contract violation.' "

Such reasoning squares with both the law of damages and common sense. It should have been applied here so that the Claimant would have been "made whole" for his loss.

/s/ C. E. KIEF
C. E. Kief,
Labor Member

Central Publishing Co., Indianapolis, Ind. 46206 Printed in U.S.A.