

NATIONAL RAILROAD **ADJUSTMENT** BOARD

THIRD DIVISION

Award Number 21662  
Docket Number CL-21462

Robert W. **Smedley**, Referee

(Brotherhood of Railway, Airline &  
( Steamship Clerks, Freight Handlers,  
( Express and Station **Employees**

PARTIES TO DISPUTE: (

(Chicago, Milwaukee, St. Paul and  
( Pacific Railroad Company

STATEMENT OF CLAIM: Claim of the System **Committee** of the Brotherhood,  
CL-7997, that:

1. Carrier violated the terms of an Agreement between the parties when it failed to call M. L. Lepinski, occupant of Telegrapher position at Wausau, Wisconsin to handle train orders No. 111, 113, 806, 842 and Clearance Forms on Monday, May 27, 1974, the Memorial Day Holiday.

2. Because of this violation, Carrier shall compensate M. L. Lepinski one "call", three hours at the penalty rate of his position.

OPINION OF BOARD: The issue before the Board is whether claimant Lepinski had the right to a holiday call on Decoration Day, Monday, May 27, 1974.

M. L. Lepinski is the regularly assigned telegrapher handling train orders at **Wausau, Wisconsin**, with hours 10:00 A.M. to 6:00 P.M., Monday through **Friday, and** rest days Saturday **and** Sunday. Monthly-rated agent R. L. Schmitt, also subject to the rules agreement, works six days, generally **7:30** or 8:00 A.M. to 4:00 or 5:00 P.M., rest day Sunday. Schmitt handles train orders on Saturday and during the week before claimant arrives.

On Memorial Day, Monday, May 27, 1974, Schmitt handled train orders for which Lepinski says he should have received a holiday overtime call of three hours. The argument is that this was an unassigned day **and, being** the regular occupant, Lepinski had the right to the call. Also, claimant points to past practice in giving him such calls, which stands **unrebutted**.

The **Union** cites contract provisions as follows:

**'Rule 11, Section 1 (m): Work on Unassigned Days**

"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**."

**'Rule 11, Section 2: Holiday Work**

Time worked within the hours of the regular week day assignment on the following holidays; namely, New Year's Day, Washington's Birthday, Decoration Day, Fourth of July, Labor Day, Thanksgiving Day and Christmas (provided when any of the above holidays falls on Sunday, the day observed by the State, Nation, or by proclamation shall be considered the holiday), shall be paid on the following bases:

\* \* \*

"On five and six-day positions: At the rate of time and one-half with a **minimum** of three hours for each tour of duty. Time worked before or after the regular weekday assignment shall be paid for in accordance with the overtime provisions of Rule 9(b) or the call provisions of Rule 9 (c)."

The Union also cites decision No. 2 of the 40-Hour Week Committee issued September 23, 1949, **inter alia**, stating:

"Where work is required **to be** performed on a holiday which is not part of any assignment, the regular employee shall be used."

The Union approves blanking claimant's position. Indeed, it was a paid holiday for him. **Employees** say that wade it an unassigned day and the foregoing rules, plus the authorities, reserve the assignment **to** claimant. The referee has examined all of the thirty-nine awards furnished by the labor member. These may be grouped into **catagories**, the first being where supervisors or other **employees** not covered by the Agreement performed the work. This was the situation in the root award (6689) by Dr. Leiserson, clearly distinguishing it from this case.

In a second group of cases, overtime was actually assigned **and** paid to others, thus being not supportive of the claim under these facts. A third group concerns different crafts, trades, work locations or work groups being assigned claimant's job. These cases are also distinguished because handling train orders was certainly part of Schmitt's job. A fourth group is where other **employees** did claimant's job on their regular shift. These cases come closest to supporting the claim, but in each instance there are distinguishing factors, the main one being that Schmitt frequently did this exact job at the location, albeit not during claimant's shifts.

This is not an exclusivity question as traditionally conceived under the rule. That says that carrier cannot violate the rule willy nilly just because claimant cannot prove the tasks were exclusively his. This is an "any assignment" case, the first test of Rule 11, Section 1 (m) requiring "a day **which is not part** of any assignment." 'That test is not met because the day was part of Schmitt's assignment and he was performing his own work. See Award 12957.

This is also a "regular **employee**" case, these being the final two words of the rule. We do not regard Lepinski any more regular on this job than Schmitt, a **union** member who does the job when claimant is not around, notably on Saturdays, which claimant has never grieved. The union makes quite a point that the train orders were during **claimant's** usual work **hours**, but **under these** particular facts we find no authority which inclines us to carve out claimant's would-be shift on the holiday in question. Past practice does not govern when the contract is clear.

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

The Agreement was not violated.

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Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD  
By Order of Third Division

ATTEST.:

  
Executive Secretary

Dated at Chicago, Illinois, this 18th day of August 1977.

