

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

H. Nathan Swaim, 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 Operator W. L. Nednein is entitled to and shall be paid at the rate of time and one-half for services performed on July 23, 1941, his assigned relief day, under Regulation 4-B-4 of the Telegraphers' Agreement.

EMPLOYES' STATEMENT OF FACTS: Extra Operator W. L. Nednein was ordered to perform service as a Block Operator at "RJ" Riverside Jct. beginning July 19, 1941, until further notice, to fill the position of the regular 2nd trick block Operator who was temporarily absent while engaged in qualifying to become a Train Dispatcher.

Nednein filled the 2nd trick position on July 19th, 20th, 21st and 22nd. July 23rd being the regular assigned relief day for the 2nd trick position at "RJ," the position was filled by the regular relief operator who holds the advertised position scheduled for 2nd trick "RJ" on that day.

On July 23rd there was a vacancy on the 2nd trick at "AD" Olean which Nednein was ordered to fill. He returned to "RJ" the following day and worked 2nd trick "RJ" on July 24th, 25th, 26th, 27th, and 28th. The regular incumbent returned to 2nd trick "RJ" on the 29th.

POSITION OF EMPLOYES: An Agreement bearing date of December 1, 1927 as to Rules and March 1, 1929 as to Rates of Pay (except as otherwise designated), is in effect between the parties to this dispute.

The Scope of said Agreement covers the following classifications:

Schedule of Regulations and Rates of Pay for the Government of

Part 1

Station Agents and Assistant Agents.

Part 2

Managers and Assistant Managers, Wire Chiefs and Assistant Wire Chiefs (who regularly work as Telegraphers),
Train Directors and Assistants,
Telegraphers,
Telephone Operators (except switchboard operators),
Block-Operators,
Operator-Clerks,
Levermen, and
Printer-Operators.

at "RJ" Office from September 1st to 16th, inclusive, and the third trick position at "AD" Office from September 11th to 27th, inclusive. He performed no service on September 3rd, 10th, 12th, 19th and 26th, by reason of the fact that these days constituted the relief days of the positions to which he was temporarily assigned as an extra man.

In the course of negotiations with the Local Chairman of the Order of Railroad Telegraphers as to the compensation to be allowed Operator Nednein, the Carrier suggested that Nednein was not available for service as an extra man on the relief days of the positions which he filled temporarily and that he was, therefore, not entitled to compensation on the specific days mentioned above by reason of not being called for service at the closed "HD" Office. The Local Chairman, however, took the position that an extra man has no relief day and is entitled to work every day in the month on which there is work for him to do and on which he is not otherwise assigned to work. This matter was finally settled on the basis of the contention of the Local Chairman and Operator Nednein was paid for time lost on the relief days of the positions he was filling in September, 1941, at "RJ" Office and at "AD" Office.

The history of the above dispute and the final settlement and disposition of the same serves to indicate beyond any doubt that an extra man who is temporarily performing the duties of the position during the absence of the regular incumbent reverts to his status as an unassigned extra man on the relief days established for such position. This settlement under the local agreement in turn indicates that it was never the intention of the parties that an extra man under these circumstances has such a relation to a position which he temporarily fills as to constitute it "his position" for the purposes of Regulation 4-B-4.

CONCLUSION

The Carrier has shown that under the applicable Agreement between the parties to this dispute, the Claimant is not entitled to compensation at the rate of time and one-half for the services performed by him on July 23, 1941.

It is, therefore, respectfully submitted that the claim of W. L. Nednein, being without foundation in the applicable Agreement, should be denied.

OPINION OF BOARD: The facts are undisputed. W. L. Nednein, as senior unassigned extra operator, was assigned to fill a temporary vacancy at "RJ" because of the absence of the regularly assigned operator from July 19 to July 28, 1941. Wednesday, July 23, was the regular relief day assigned to this position pursuant to Rule 4-B-4 of the Agreement. On that day the regular relief operator filled the position and Nednein for that day was assigned to fill a temporary vacancy at office "AD."

Nednein now claims pay for the day at the rate of time and one-half on the theory that he was required to work on the "relief day assigned to his position."

Nednein, under the same Agreement, presented a claim through the Local Chairman against the same Carrier for pay at the regular rate for certain days lost in the month of September 1941, because of the failure of the Carrier to assign him, as the senior available extra operator, to temporary vacancies on relief days of the position to which he was then temporarily assigned. The Carrier agreed to the claim and paid him for such relief days.

That claim on which Nednein was paid was entirely inconsistent with his present claim. If while on a temporary assignment to one position, he was, on the relief days of that position, entitled, as the senior available extra operator, to assignment to other temporary vacancies he could not claim time and one-half for working "on the relief day assigned to his position." If on such a temporary assignment the position was his position on the relief day, then on that day he could not be the senior unassigned extra operator.

Without deciding whether the contention of the petitioner in the other claim was sound or whether the contention he is making in this claim is sound, we must hold that having received the payment demanded on his first claim he is now estopped to present this claim on a theory directly opposed to the theory on which the first claim was predicated, and on which he received money. He cannot be permitted to take the money from the Carrier on the theory that one interpretation of the Agreement is correct and then be sustained on another claim predicated on the opposite interpretation.

FINDINGS: The Third Division of the Adjustment Board, after giving the parties to this dispute due notice of hearing thereon, and upon the whole record and all the evidence, finds and holds:

That the carrier and the employe involved in this dispute are respectively carrier and employe 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 petitioner having demanded and accepted payment on a prior claim for relief days on which he did not work, on the theory that he was an extra operator available for assignment on those days, is now estopped from claiming payment at the rate of time and one-half for work on an assignment on a relief day.

AWARD

The claim is denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: H. A. Johnson
Secretary

Dated at Chicago, Illinois, this 11th day of June, 1943.