

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Bruce Blake, Referee

PARTIES TO DISPUTE:

THE ORDER OF RAILROAD TELEGRAPHERS

THE NEW YORK CENTRAL RAILROAD COMPANY

STATEMENT OF CLAIM: Claim of the General Committee of the Order of Railroad Telegraphers on the New York Central Railroad, Lines West of Buffalo, that Patrick Horn, regularly assigned swing telegrapher, regularly assigned to work the 3rd trick position, on February 5, 1942, at Momence, Illinois, 11:55 P. M. to 7:55 A. M., who was required in an emergency to work 3:55 P. M. to 11:55 on the 2nd trick position in the same office on this day, shall be paid at the rate of time and one-half for the eight hours thus worked in advance of his regular working hours on this day, as provided by Article 4-(b) of the telegraphers' agreement; and, as he was not allowed to resume work for 24 hours after being relieved from emergency work at 11:55 P. M. on the previous day, he shall be paid a day's pay of eight hours for this period, as provided by Article 13-(a), second paragraph, of said agreement.

JOINT STATEMENT OF FACTS: An agreement bearing date of May 16, 1928, as to rates of pay and rules of working conditions, was in effect between the parties to this dispute at the time of this occurrence.

Patrick Horn, regularly assigned relief telegrapher, was regularly assigned to work during the week of February 1, 1942, as follows:

February 1—1st trick at Kankakee	7:55 A.M. to 3:55 P.M.
February 2—1st trick at C. & E. I. Jct. Tower, Momence	7:55 A.M. to 3:55 P.M.
February 3—2nd trick at Kankakee	3:55 P.M. to 11:55 P.M.
February 4—2nd trick at C. & E. I. Jct. Tower, Momence	3:55 P.M. to 11:55 P.M.
February 5—3rd trick at C. & E. I. Jct. Tower, Momence	11:55 P.M. to 7:55 A.M.
February 6—3rd trick at Kankakee	11:55 P.M. to 7:55 A.M.
February 7—Rest Day	

Telegrapher Horn worked this regularly assigned schedule on February 1, 2, 3 and 4.

On February 5, he was regularly assigned to work the 3rd trick at C. & E. I. Jct. Tower, Momence, 11:55 P. M. to 7:55 A. M., but was required in an emergency to work the 2nd trick at C. & E. I. Jct. Tower, Momence, 3:55 P. M. to 11:55 P. M., or eight hours in advance of his regular starting time for that day, and was paid eight hours at the pro rata rate for the service performed. He was relieved from duty at 11:55 P. M. on February 5, and was not used to perform service again until his regular assignment at 11:55 P. M. on February 6.

When a rule of long standing is perpetuated and incorporated in a new agreement in the same language, the parties must be considered as having intended that it be construed in the future in the same manner as construed in the past and that the past practices under the rule be continued.

The Carrier did not see any necessity for modifying Article 13 (a) and (b) as has hereinbefore been stated the committees have never heretofore contended or intimated that our practice of compensating diverted employees was improper or that relief operators and regularly assigned employees who have been diverted were entitled to pay on the basis of the present committee's contention.

In support of its position the Carrier directs attention to the opinion of National Railroad Adjustment Board, First Division, as expressed in the finding on Page 7 of Award No. 4232, Docket 3488, which read in part:

"There is a cardinal rule of interpretation of contracts to the effect that where an agreement is equally susceptible of two meanings, one of which would lead to a sensible result and the other to an absurd one, the former will be adopted. **Another important rule is that conduct of the parties under the agreement over a period of time is evidentiary of their intent.**" (Emphasis added.)

If there is any ambiguity in the language of Article 13 (a) and (b), which we deny, the meaning now contended for by the Organization is not only absurd, but would be a complete about face from the practices under the rule for a period of eighteen years.

CONCLUSION: The claim of the employees in this dispute should be denied for the following reasons:

1. There is no rule in the agreement restricting the Carrier's right to divert regularly assigned employees in emergencies, nor are there any provisions in the agreement which require the Carrier to pay time and one-half for the service performed and an additional day's pay for the trick not worked in these emergencies.
2. Operator Horn was used in an emergency and compensated in accordance with the rules of the agreement.
3. The guarantee provision is not applicable in connection with Horn's relief program and his use in emergency does not alter this situation in the circumstances herein involved.
4. Horn did not lose any time because of this emergency. He performed service on each of the six days during the week, the seventh day being his rest day.
5. The Carrier contends that when this case is reduced to its essential details only one fact stands out, namely, that Operator Horn was diverted and used in an emergency and compensated in accordance with the provisions of Article 13 and prior practices thereunder.
6. It is the Carrier's final contention that the claim in this case is entirely without merit and should be denied.

OPINION OF BOARD: Claimant Horn was a regularly assigned swing telegrapher. The first two days of the week of February 1, 1942, he was assigned to the first trick—7:55 A. M. to 3:55 P. M. The third and fourth days he was assigned to the second trick—3:55 P. M. to 11:55 P. M. The fifth and sixth days he was assigned to the third trick—11:55 P. M. to 7:55 A. M. On the fifth he worked the second trick—3:55 P. M. to 11:55 P. M.—taking the place of the telegrapher regularly assigned to that trick. Claimant's regular trick for that day (11:55 P. M. to 7:55 A. M.) was worked by

another telegrapher. This shifting of assignments was necessitated because of the illness of the telegrapher regularly assigned to the second trick. Claimant seeks compensation at time and one-half for the trick worked and a day's pay at straight time for his own trick which was worked by another man.

Decision of the dispute must turn upon a determination of what is the applicable rule in the situation presented. The claimant rests his case for overtime on Rule 4, which provides:

"Except as provided in Rule 3, time worked in excess of eight (8) hours, exclusive of meal period, on any day, will be considered overtime and paid on the actual minute basis at time and one-half rates.

"For continuous service after regular working hours, time and one-half will be paid on the actual minute basis. Where it can be arranged, employees will not be required to work more than two hours without being given an opportunity to eat with no deduction in pay.

"For continuous service in advance of the regular working hours, time and one-half will be paid on the actual minute basis."

He rests his case for straight time for his regular trick, worked by another telegrapher, on Rule 9 and Rule 12.

Rule 9 provides:

"Employees will not be required to suspend work during regular hours or to absorb overtime.

"This rule will not apply if an emergency makes it necessary to start an employee at a later time than his regular starting time in which event eight hours at the pro-rata rate will be allowed for eight hours continuous service."

Rule 12 provides:

"Except as provided in Rule No. 11, regularly assigned employees will receive one day's pay within each twenty-four (24) hours, according to location occupied or to which entitled, if ready for service and not used, or if required on duty less than the required minimum number of hours as per location, except on regular relief days and holidays.

"This rule shall not apply in cases of reduction of forces nor where traffic is interrupted or suspended by conditions not within the control of the carrier."

The carrier contends that the situation presented comes within the purview of Rule 13 which, so far as pertinent, provides:

"Regularly assigned employees will not be required to perform service on other than their regular positions except in emergencies. When they are required to perform service on other than their regular positions, they will be paid the rates of the positions they fill but not less than their regular rates and in all cases will be allowed actual necessary expenses while away from their regularly assigned stations.

"In no case will less than one day's pay be allowed for each twenty-four (24) hours held out of their regular positions or away from home stations.

.....
 "This rule shall not apply to regularly assigned relief men unless they are diverted from their regularly assigned program by orders of the Management."

We think it is apparent that Rule 4 has no application to the situation presented. The second trick, which claimant worked, does, indeed, immediately precede the third trick to which he was regularly assigned. But, in working the second trick instead of the third, claimant was not in "continuous service in advance of his working hours" in contemplation of the rule. Clearly the overtime rate is applicable only to cases where work is performed in advance or after **work performed by an employee on his regular assignment**. Claimant, not having worked his regular assignment, performed no overtime service in contemplation of the Rule 4.

We think that the employee's claim to a day's pay at straight time is also without substance. Perhaps, technically, there was a twenty-four hour period in which he did not receive a day's pay. But actually he did receive six days' pay at straight time for work performed on six different eight hour shifts. In any event to have worked his regular third trick assignment in addition to the second trick would have constituted a violation of the Hours of Service Law. The rules cannot be interpreted nor applied in a manner that would countenance a violation of any law enacted pursuant to the police powers of the Government.

Aside from all we have heretofore said we think the first and last paragraphs of Rule 13 are controlling of the situation presented in this dispute. Instead of working his regular assignment claimant was shifted to the second trick because of the emergency created by the illness of the telegrapher regularly assigned to that trick. In the face of the provision of Rule 13 the Call rule (Rule 5) has no bearing upon the case. Under the rules and upon the record claimant was entitled to payment at straight time only for work performed on the second trick (Award 2444); and he was not entitled to a day's pay on account of his regular assignment which he did not work.

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 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

That the carrier did not violate the agreement.

AWARD

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: H. A. Johnson
Secretary

Dated at Chicago, Illinois, this 24th day of March, 1944.