Award No. 2827
Docket No. TE-2664

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Jay S. Parker, Referee

PARTIES TO DISPUTE:

THE ORDER OF RAILROAD TELEGRAPHERS

THE DELAWARE, LACKAWANNA & WESTERN RAILROAD CO.

STATEMENT OF CLAIM: Claim of the General Committee of The Order of Railroad Telegraphers, Delaware, Lackawanna and Western Railroad, that the second and third trick telegraphers regularly assigned in Groveland, New York, Tower on April 25, 1943, be paid four hours' overtime each under the rules of the telegraphers' agreement because, when the first trick telegrapher in that tower was unable to protect his hours of service on April 25 due to illness, an employe not covered by said agreement was substituted instead of using each of the claimants four hours in addition to their regular assignments.

EMPLOYES' STATEMENT OF FACTS: An agreement between the parties, bearing effective date of May 1, 1940, is in evidence; copies thereof are on file with the National Railroad Adjustment Board.

Groveland Tower is a continuously operated office—three shifts of 8 hours each protect the 24-hour period.

On April 25, 1943, the incumbent of the first trick (day position) reported off duty account illness and his position was filled that day by a train service employe, who had no rights under the telegraphers' agreement, on instructions of the carrier.

POSITION OF EMPLOYES: As indicated in the Employes' Statement of Facts, Groveland Tower is open and in operation around the clock; three shifts of eight hours each protect the service. On April 25, 1943, the employe regularly assigned to the first trick (day position) reported off duty account illness and instead of protecting the vacancy with an extra employe, or if an extra employe was not available, protecting said vacancy with the two remaining employes regularly assigned thereat, the carrier chose to disregard the provisions of the telegraphers' agreement by protecting the vacancy with a person outside of the said telegraphers' agreement and who had no rights whatsoever to perform work thereunder.

The organization, acting on authority found in the telegraphers' agreement, filed claim in behalf of the two remaining employes regularly assigned at Groveland Tower for four (4) hours' overtime each. The claim was declined by carrier officers, hence the matter is now before your Board for decision. The organization is firmly convinced, regardless of carrier claims, that the whole of the improper action was because the outside person was paid eight hours at pro rata rate whereas under the proper application of the

bidden to permit one performing such service in 'towers, offices, places, and stations continuously operated night and day' to remain on duty therein longer than nine hours in twenty-four. * * *"

Other cases decided by the Federal Courts could be cited, but uniformly they contain the same holding. However, the Carrier does call attention to the cases of—

Oregon Short Line R. R. Co. v. United States, 234, Fed. 160; and
United States v. Atlantic Coast Line Co. 224 Fed. 160; and
United States v. Delane, 246 Fed. 107.

It will be noted from these cases that the Courts held that if the Carrier can hire a person competent to handle the position that it may not take advantage of the exception contained in the Act and work its men in violation of the Hours of Service Law.

It is interesting to note that the New York State Hours of Service Law provides that no telegrapher—

"shall be employed on any railroad for more than 8 hours in any day except in cases of extraordinary emergency caused by accident, fire, flood or danger to life or property."

The Employes in this case are seeking to compel the Carrier to violate the Hours of Service Law, which is as much a part of the contract as if expressly incorporated therein.

Northern Pacific Ry. v. Wall 241 U. S. 87 at Page 91

This Board, with Referee Carter, on December 18, 1943, held in Award 2433, Docket No. CL-2416, that a carrier could not be compelled to give overtime work to an employe where to do so would result in a violation of a statute promulgated for the benefit of the employes. The instant claim presents even a stronger case, from the Carrier's standpoint, for the Hours of Service Law was designed not only to protect the health and well-being of the employes, but also to protect persons and property transported by the Carrier.

The Carrier, therefore, contends, for the reasons hereinbefore stated, that this claim is without any merit for the following reasons:

(1) There was no violation of the agreement between the Carrier and the Employes, because no employe coming within the scope of the Telegraphers' Agreement was lawfully available;

(2) The emergency contemplated by the exception contained in the Hours of Service Law did not exist, since the Carrier was able to employ a person qualified and competent to work the trick;

(3) This Board has no jurisdiction to administer the Hours of Service Law, and to allow this claim would result in this Board determining what did or what did not constitute a violation of that law.

OPINION OF BOARD: A brief summary of the facts will be helpful. At Groveland, New York, is a three trick Tower operated continuously 24 hours a day. It is located on the Carrier's double track main line at the foot of a heavy grade where helper service is maintained 24 hours a day. Seven helper engines are regularly in operation at the location and through trains take coal, water and supplies at this station.

On April 25, 1943, the regular first trick Towerman-Operator, hours 8:00 A. M. to 4:00 P. M., laid off and as no extra Operator was on the Telegraphers' extra list, the Carrier used a train service employe to fill the first trick assignment. This man was familiar with the work at the point in question, having been employed several years before as an Operator there. The Petitioner states, and we must assume its correctness for our purposes since it is not

denied, that the first trick operator's absence was on account of illness. We must also infer from the facts of record he filled his regular trick the preceding day.

The second and third trick Telegraphers assigned at Groveland claim four hours overtime each on April 25th because a person not covered by the Telegraphers' Agreement, but an employe of the Company and belonging to another craft or group, was used to fill such first trick vacancy instead of working each of them four hours in addition to their regular assignment. The Carrier claims the extra man was used from 8:00 A. M. to 4:00 P. M. on the day in question to avoid working the second and third trick operators twelve hours each in violation of the Federal Hours of Service Law.

On the property Petitioner relied on Rule 1, the Scope Rule, and Rule 12 (a) of the current Agreement. On presentation of its claim to this Division it based its right to a sustaining award on those rules and, in addition, on Rule 4 providing for overtime and pay therefor, and on Rule 5 commonly referred to as the Call Rule.

All rules mentioned are set forth in the submissions but we quote from Rule 12 (a) for purposes of emphasis:

> "(a) Where existing payroll classification does not conform to Rule 1, employes performing service in the classes specified therein shall be classified in accordance therewith."

It is first argued that aside from another question to which we shall presently refer the Carrier violated none of the terms of the Contract in permitting the train service employe to fill the first trick operation. We do not believe this position is well taken. In the first place, the rule just quoted clearly contemplates employes performing service specified in Rule 1, and it is not suggested the work was not within its scope, must be classified in accordance therewith. The record does not disclose and it was not even suggested the individual used by the Carrier was so classified. For that reason we believe the rule was violated unless, of course, failure to observe its terms can be justified on other grounds. Secondly, it is our opinion the question has been definitely established by preceding awards. In Award 2706, which involved a somewhat similar situation, we held:

> "The work in question belonged to the Clerks. There were no furloughed or extra men available. The claimants were not entitled to the work as a matter of right. Award 2618. If Campbell was entitled to work as a clerk, he could properly do the work in preference to Smith and Newman. If Campbell had no rights as a clerk, then Smith and Newman should have been called. The question resolves itself into one as to whether Campbell was entitled to perform clerk's work on the days in question."

> "* * * We do not think Campbell is shown to be a bonafide new employe within the meaning of and as contemplated by Rule 3. This Board is committed to the view that an employe in some other service may not be used to relieve a clerk on his assigned day of rest. Award 2052. See also United States Railroad Labor Board Decision No. 3341. If this be true, a carrier cannot be permitted to violate the spirit of the rule by the expedient of giving such other employe seniority as a clerk as of the date his pay started on such relief job. This does not constitute him as a new employe within the meaning of the rule. We think all the evidence and circumstances show an intent on the part of the Carrier to circumvent the rule which prevents the use of employes in one class of service from performing relief work in another. Such action constitutes a violation of the current agreement."

By analogy, although a Clerks' Agreement was there under consideration we conclude, that an employe in some other service of the Carrier may not, under existing provisions of the Telegraphers' Agreement, be used to relieve an

employe within the purview of its scope in the event of his absence from duty on account of illness. Also indicative of this view, although we concede there is room for differentiation on facts and principles involved, are Awards Nos. 602, 1082, 2418 and 1273. Particular attention is directed to the award last cited. There it was said:

> "It has been repeatedly held by this Board that work embraced by the scope rule of an agreement may not properly be removed from such agreement and assigned to employes not subject to its terms."

It is next urged that a claim for additional compensation for the two men holding regular assignments is wholly unsupported because they filled their regular assignments, they did not work overtime and were not notified or called. A careful examination of all the awards just cited will reveal this argument cannot be upheld.

Finally it is suggested that Petitioner cannot now rely on Rules 4 or 5 because not urged when presented on the property. This suggestion requires but brief comment. This Board has authority to apply all existing rules of the Contract if determinative of the issues involved and is not limited to the particular ones urged on the property unless perhaps, their application results in a substantial change in the substance of the claim. Here, they become important only in the event, as we have found, that the other rules to which we have referred were violated. In a sense they are of secondary importance. The Carrier knew, or should have known, favorable action on the Petitioner's claim would have required their application. Under such circumstances we believe it would be too technical to preclude their consideration.

With preliminary objections disposed of, we now come to the all-important issue. Was the Carrier relieved from the obligations imposed by the terms of the current Contract and justified in its action heretofore related because of existing provisions of the Hours of Service Law, enacted for promoting the safety of employes and travelers upon railroads by limiting hours of service of employes thereon? This Act makes failure to comply with its requirements unlawful. The initial duty of enforcing its provisions rests on the Interstate Commerce Commission. So far as pertinent to this dispute it reads: Section 2: . . . .

> "That no operator, train dispatcher, or other employe who by use of the telegraph or telephone dispatches, reports, transmits receives, or delivers orders pertaining to or affecting train movements shall be required or permitted to be or remain on duty for a longer period than nine hours in any twenty-four hour period in all towers, offices, places, and stations continuously operated night and day, nor for a longer period than thirteen hours in all towers, offices, places and stations operated during the daytime, **except in case of emergency,** when the employes named in this proviso may be permitted to be and remain on duty for four additional hours in a twenty-four hour period of not exceeding three days in any week; Provided further, The Interstate Commerce Commission may after full hearing in a particular case and for good cause shown extend the period within which a common carrier shall comply with the provisions of this proviso as to such case." (Emphasis supplied.)

Section 3:

> "That the provisions of this act shall not apply in any case of casualty or unavoidable accident or the Act of God; nor where the delay was the result of a cause not known to the carrier or its officers or agent in charge of such employe at the time said employe left a terminal and which could not have been foreseen; Provided further, That the provisions of this act shall not apply to the crews of wrecking or relief trains."

Preceding our discussion with respect to the question as stated, we are in entire accord with several fundamental propositions pointed out by the Car-

rier. We agree the Act imposes limitations upon the hours of service of operators as well as other employes. We adhere to our decisions holding that the rules of a current agreement can neither be interpreted or applied in a manner that would countenance a violation of any law enacted pursuant to the police powers of the Government, and we approve of the principle the Carrier is entitled to exercise reasonable discretion in deciding whether the Hours of Service Law would be violated by the course of conduct it is to follow under facts confronting it in a particular case.

Nevertheless, and notwithstanding the existence of such law, we still have the duty of interpreting and applying negotiated agreements if that can be done within the limitations to which we have referred and by which we are bound.

The Federal Act from which we have quoted was first approved on March 4, 1907. Therefore, it must be assumed the parties had in mind its provisions when their Agreement became effective on March 1, 1940. They knew, or were bound to know, of the exception permitting the individual occupying the positions referred to therein to remain on duty for four additional hours. With that knowledge they entered into a Contract, which as we have seen, required the Carrier to permit the Telegraphers to perform all work coming within its scope. While it is true that an Agreement cannot be applied insofar as it provides for action resulting in a violation of the Federal or State Law, it is likewise true that where—as here—a statute permits the same action if an emergency exists the parties have a perfect right to contract for its performance and are bound by provisions of the Contract with respect thereto. Under such circumstances when a controversy arises over the question of whether work lawfully contracted for has been wrongfully taken from the terms of an Agreement and given to another, the burden of establishing that such action was proper and that the confronting situation made the Contract inapplicable falls upon the party making that assertion.

In the instant case the Carrier claims there was no emergency as contemplated by the Act and it must establish its position by facts of record, for, as we have seen it had contracted the work in question belonged to the Telegraphers. We realize our province is to deal with contractual relations between employe and carrier and that there are certain limits beyond which we cannot go in prejudging the effect of provisions of a Federal statute. Nevertheless, in the exercise of our prerogatives it often times becomes necessary to point out how, in view of the plain import of language appearing in such a statute, it affects the operation of the contract we have under consideration. This is especially true when, as in this case, one party to an agreement has essayed to unilaterally determine for itself the force and effect of such language and relies upon its construction thereof as justification for its conduct and action. With this in mind we call attention to the fact the Act expressly provides it does not apply in cases of casualty, unavoidable accident or act of God. Clearly, therefore, the phrase "except in case of emergency" must have been placed in the Act to allow some latitude to parties subject to its provisions. What else could it contemplate except cases of sudden death, illness or similar situations? That this must be so is evidenced by the well recognized definition that an emergency is "a sudden condition calling for immediate action."

If we are correct in our deductions what is to be said for the Carrier's position in the light of facts appearing in the record? For all it shows the Carrier may not have been advised the First Trick Operator was ill until a few moments before he was due to go to work. In that situation from facts which are fairly inferable, there being no Telegrapher on the extra list, it called a train service employe under some prearranged scheme whereby it had made arrangements for him to fill not this emergency, but any other one with which the Carrier might be confronted at the Tower in question. We find nothing in the Act which required the Carrier to speculate upon emergencies which might arise and take action of that character. Even so, proper regard for the contract would have required the filing of an extra list, not

the making of an arrangement whereby the current Agreement was to be violated. But this is not all. The Petitioner claims, and it is not denied, that in October, 1944, the Interstate Commerce Commission, which, as we have noted, is charged with its enforcement, held that illness is such an emergency as is contemplated by the Act, although the Carrier must exercise a high degree of diligence to overcome its effects. In addition, Petitioner avers, which is not refuted, the question of using employes in the manner for which they are contending is one of continual practice and that the Carrier reported 31 such instances for the year 1942, 56 for 1943 and 244 for 1944.

Under all the facts and circumstances heretofore related we are convinced the purpose of the Carrier in assigning the train service employe to the First Trick Operation at Groveland on the date in question was to avoid the requirements of the current Agreement which prevents the use of employes in one class of service from performing relief work in another rather than a bona fide attempt to comply with the Hours of Service Law in cases of emergency. We, therefore, hold it failed to produce facts sufficient to justify non-observance of the terms of the current Agreement, and that the Petitioner's claim should be sustained.

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 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 Carrier violated the Agreement as claimed.

AWARD

Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: H. A. Johnson
Secretary

Dated at Chicago, Illinois, this 2nd day of March, 1945.