

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

Sidney St. F. Thaxter, Referee

PARTIES TO DISPUTE:

THE ORDER OF RAILROAD TELEGRAPHERS

THE NEW YORK CENTRAL RAILROAD COMPANY

(Line West of Buffalo)

STATEMENT OF CLAIM: Claim of the General Committee of The Order of Railroad Telegraphers on New York Central Railroad, Line West of Buffalo, that C. O. Wells, regularly assigned third trick wire chief in "SC" Office, Chicago, is entitled to eight hours at overtime rate because an employee in that office, junior to him in seniority, was used March 24, 1945, to protect second trick wire chief position, 4:00 p.m. to midnight, in the same office when the regular incumbent of that position became too ill to work and when Wells was available and desired the work.

EMPLOYES' STATEMENT OF FACTS: An agreement bearing date February 1, 1943, as to rules of working conditions, and December 27, 1943, as to rates of pay, is in effect between the parties to this dispute.

On March 24, 1945, C. O. Wells, the claimant, with seniority date of March 1, 1926, was regularly assigned to and working the third trick wire chief position in "SC" relay office, Chicago, Illinois, hours 12:00 midnight to 8:00 a.m. Prior to March 24, 1945, Wells had requested the Carrier to assign him to work all temporary vacancies in the office to which he was entitled under the rules of the telegraphers' agreement.

Telegraph Operator C. V. Markey with seniority date of September 19, 1941, was regularly assigned to telegraph position No. 33 in this same office with hours 5:00 p.m. to 1:00 a.m., but upon his own request was working a temporary vacancy on telegraph position No. 31 in this office with hours 8:00 a.m. to 4:00 p.m. on March 24, 1945.

On Saturday, March 24, 1945, the second trick wire chief in "SC" relay office, hours 4:00 p.m. to 12:00 midnight, reported off sick and the Manager of the office, without recourse to Claimant Wells, directed Telegraph Operator Markey to work all of the hours, 4:00 p.m. to 12:00 midnight, on the second trick wire chief position after completing his tour of duty on telegraph position No. 31, and was paid at the rate of time and one-half for this additional service.

The prevailing telegraphers' agreement contains the following rules:

"Article 13-(c). Temporary Vacancies. Regular assigned employees will be allowed to fill temporary vacancies of less than seven (7) calendar days in their own offices. Temporary vacancies of seven (7) calendar days or more and less than thirty (30) calendar days will be filled by the senior qualified employee applying for same within seven (7) calendar days."

OPINION OF BOARD: The claimant, regularly assigned to and working the third trick wire chief position in "SC" relay in Chicago with hours 12 midnight to 8:00 a.m., requested the carrier to assign him to any temporary vacancy to which he might be entitled. On March 24, 1945 the second trick wire chief with hours 4:00 p.m. to 12:00 midnight reported sick and the carrier directed Telegraph Operator Markey who was junior to the claimant in seniority to take the second trick position. The claimant contends that such assignment of a junior man was a violation of the agreement. Our attention is directed to Articles 13-(c) and 24-(b) of the agreement, which so far as relevant read as follows:

"Article 13-(c). Temporary Vacancies. Regular assigned employees will be allowed to fill temporary vacancies of less than seven (7) calendar days in their own offices. Temporary vacancies of seven (7) calendar days or more and less than thirty (30) calendar days will be filled by the senior qualified employee applying for same within seven (7) calendar days."

"Article 24-(b). Seniority. Seniority will be effective only when vacancies occur, new positions are created, or in case of reduction in force."

It seems to be conceded that there was a vacancy and that the claimant was available to fill it. The question is whether as a matter of right he was entitled to it. This particular problem has been before this Board on a number of occasions and the awards are not harmonious. Awards 1124, 1150 and 1177 hold that a carrier is not, in the absence of a specific rule so requiring, obligated to fill on the basis of seniority temporary vacancies not subject to the bulletining rule of the agreement. There is much to be said for not restricting the carrier's freedom of choice in filling a temporary vacancy. To cite just one consideration, the senior employee may not be readily available and it is argued that the carrier should not have to act at its peril in assigning a junior employee. The awards which hold that the carrier must recognize the seniority rule concede that there of necessity must be exceptions. Award 2931. And it is undoubtedly true that to place the burden on the carrier to determine in advance whether there is justification for calling a junior employee enlarges the area of controversy. But a number of well considered awards have held that it is within the spirit, even though not within the letter of an agreement, that seniority should be recognized in filling temporary vacancies as well as permanent ones. Awards 132, 2341, 2426, 2490, 2716, 2931, 2994. Such having been the consistent holding of the later opinions of this Board we do not feel that we should now attempt to lay down a different rule.

But even assuming that such is the correct principle, the carrier argues that Rule 13-(c) strongly implies that temporary vacancies of less than seven days may be filled without regard to seniority. Our attention is called to the fact that the second sentence of the rule provides that temporary vacancies of seven days or more and less than thirty days shall be filled "by the senior qualified employee applying for same within seven (7) calendar days." And then the carrier points out that nothing is said about seniority in the first sentence which applies to vacancies of less than seven days. The argument of the carrier is not without force. If, however, we are to adopt the general principle that seniority shall govern in the filling of temporary vacancies, it is better to have that rule stand except when the agreement specifically provides otherwise. As was said in Award 132, and affirmed in Award 2490, it should not be assumed that the parties would "by implication limit the seniority rights guaranteed to employees***".

We therefore hold that the carrier violated the agreement in not calling the claimant to fill the temporary vacancy here involved.

The claimant is not, however, entitled to pay at the overtime rate. The language which this Board used in Award 3193 applies here: "In the absence of Agreement to the contrary, the general rule is that the right to work is not the equivalent of work performed so far as the overtime rule is concerned."

Applying such principle to the facts of the case now before us we hold that the claimant was entitled to be paid for eight hours at the pro rata rate.

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 an affirmative award is required, the claimant to be paid for eight hours at the pro rata rate.

AWARD

Claim sustained subject to the qualification that payment shall be at the pro rata rate.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: H. A. Johnson,
Secretary

Dated at Chicago, Illinois, this 29th day of May, 1946.