

Award No. 3437

Docket No. TE-3317

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Robert G. Simmons, Referee

PARTIES TO DISPUTE:

THE ORDER OF RAILROAD TELEGRAPHERS

BOSTON AND MAINE RAILROAD

STATEMENT OF CLAIM: Claim of the General Committee of The Order of Railroad Telegraphers on the Boston and Maine Railroad:

1. That the Carrier violated Article IX of the Telegraphers' Agreement when it suspended R. W. Pine during the regular hours of his regular positions, namely, Agent and Operator at Edgeworth, Mass., March 26 and 27, 1945, and Director at Tower "C", Boston, Mass., April 27 through May 12, 1945; and

2. That the Carrier shall be required to compensate R. W. Pine for eight hours at his regular rate on March 26 and 27, 1945, and April 27 through May 12, 1945, on account of being denied the right to work his regular assignments on those days, and at time and one-half rate for the services performed outside of his regular assignments on those days in accordance with the provisions of Article VII (b) of said Agreement, less what he was paid for the days involved.

JOINT STATEMENT OF FACTS: An Agreement by and between the parties, bearing effective date of August 9, 1944, is in evidence. Copies thereof are on file with the National Railroad Adjustment Board.

Prior to and on January 23, 1945, R. W. Pine owned and occupied a regular position at Tower "A", Boston, assigned hours 11:00 P. M. to 7:00 A. M., hourly rate of pay \$1.0975.

Bulletin Notice No. 8 issued by the Carrier dated January 23, 1945, advertised for bids the Agent and Operator position at Edgeworth, Mass., assigned hours 8:00 A. M. to 5:00 P. M., one hour out for lunch, hourly rate of pay \$1.0225.

Mr. R. W. Pine was the successful applicant for the Edgeworth position, but was not notified thereof until February 23, 1945. The Carrier requested Mr. Pine to remain at Tower "A", Boston, beyond the time limit as specified in Article XII—which he agreed to do up to a certain date. However, on March 19, 1945, Mr. Pine notified the Carrier that unless he was placed on his regular position at Edgeworth Monday, March 26, 1945, he would file money claims in accordance with the provisions of Articles VII and IX of the Telegraphers' Agreement. Mr. Pine was transferred to the Edgeworth position effective March 28, 1945.

April 7, 1945, the Carrier issued Bulletin Notice No. 37, which advertised for bids on the third trick Director position at Tower "C", Boston,

POSITION OF CARRIER: The Committee cites two rules in support of the claim, namely, Article IX and Article VII (b).

Article IX reads—

“Employees will not be required to suspend work during regular hours to absorb overtime.”

It should be noted that this rule is in the alternative—“to suspend work or to absorb overtime”. This is not accidental. Rule 9 of the old rules, effective July 1, 1939, from which the present Article IX was copied was in the same wording. During negotiation of the present rules the Chief of Personnel of the Boston and Maine Railroad urged that the rule be changed to read—“suspend work during regular hours in order to absorb overtime”, but the Organization insisted on the wording as it now stands.

From the Joint Statement of Facts it is obvious that Mr. Pine worked every day and, therefore, was not “required to suspend work”.

Was he then “required * * * to absorb overtime”? Nowhere, either in the Statement of Claim or the Joint Statement of Facts, does it appear that Mr. Pine worked any overtime or that he earned any overtime that he could be required to absorb.

The language of the rule is clear and unambiguous and clearly provides for contingencies that every Railroad man must recognize. The words “absorb overtime” in their natural meaning indicate that overtime work must have been performed before a man can be required to “absorb overtime”. Until the overtime work has taken place there is nothing to absorb. One cannot absorb something that does not exist.

Therefore, since Mr. Pine was not required to suspend work or to absorb overtime, there is no claim under Article IX.

The Committee next claims payment in accordance with the provisions of Article VII (b). Article VII (b) reads as follows:

“Employees notified or called to perform work not continuous with the regular work period will be allowed a minimum of three (3) hours for two (2) hours’ work or less, and if held on duty in excess of two (2) hours, time and one-half time will be allowed on the minute basis.”

This is the familiar Call Rule known to all Railroad men and is applicable only to employees called to perform work “not continuous with the regular work period”. The words “regular work period” mean and always have meant the regular work period of the job the man is filling—not the work period of some other job that he might be filling.

Neither Article V (b) nor Article IX has any bearing on this claim, nor does the Statement of Facts disclose any violation of either of these rules.

It is submitted that by this submission to the Third Division the Committee is attempting to write into the rules something that is not there and that an affirmative award cannot be granted unless the Third Division writes a new rule without negotiation. The Carrier respectfully urges that the National Railroad Adjustment Board is without authority under the Railway Labor Act to write such a new rule.

OPINION OF BOARD: Claim is made on behalf of R. W. Pine. On January 23, 1945, Pine occupied a position at Tower “A”, assigned hours 11:00 p. m. to 7:00 a. m. On that date the Carrier advertised for bids on a position at Edgeworth, assigned hours 8:00 a. m. to 5:00 p. m. Pine was the successful bidder and was so advised on February 23, 1945. On March 19th, Pine notified the Carrier that unless placed on the Edgeworth position by March 26th, he would file claims under Articles VII and IX of the Agreement. He was placed on the Edgeworth position on March 28, 1945. He claims compensation for March 26th and 27th.

On April 7, 1945, the Carrier advertised a position at Tower "C", hours 11:00 p. m. to 7:00 a. m. Mr. Pine was the successful applicant. He was placed on that position May 13, 1945. He claims compensation for the time from April 27th to May 12th, inclusive. He claims also the relief day position for the calendar weeks beginning April 29th and May 6th, because those days were worked by the employee who occupied the position.

The Organization bases its claim in part upon the provisions of the following rule. The sentence in Article XII: "The successful applicant will be placed on the position within twenty (20) days after vacancy occurs." The Carrier admits that this rule was not complied with, but insists that it carries no penalty. The purpose of the rule is obvious, and that is to assure to the successful bidder that he will be placed in the new position within the time stated in the rule. The rule is for the benefit of the employee. To give him that benefit he must either be transferred to the new position within the time stated in the rule, or be treated as having been so transferred as of the last day of the 20-day period, insofar as the applicability of the other rules of the Agreement is concerned.

For reasons stated in the submission, the employee does not claim the benefits of the rule as to the Edgeworth position prior to March 26th. He claims it for March 26th and 27th. For the purpose of the rule, he must be treated as having been actually transferred to the Edgeworth position on March 26th as his regular position, although working at Tower "A" on those days. Likewise, he must be treated as having been actually transferred to the Tower "C" job on April 27th, although working at Edgeworth up to and including May 12th. So we have this situation: For the times involved in this claim, the employee was not working at his regularly assigned positions.

The Organization submits that this claim was progressed on the property along with the claims of employees Dillon, Carter, and Kelley, involving similar situations and the same rules, and those three claims paid, and Pine's claim denied. The Carrier states in its Rebuttal, dated May 1, 1946, that in the Dillon, Carter, and Kelley claims, the Claimants were removed from a location which they occupied, and that Pine was not removed from the position which he occupied. Again in its statement, filed June 10, 1946, the Carrier states that those three employees were required to leave their positions while Pine was not required to leave his position. On that basis it justifies the payment of the three claims and seeks to justify the denial of the claim of Mr. Pine. As we have pointed out, that distinction is of no merit, for Mr. Pine must be treated as having been removed from the positions to which he was entitled under Rule XII. From the standpoint of the parties, the situations are identical and the employees involved should be accorded equal treatment. On that basis, we conclude that the claim should be sustained.

This is a joint submission and this disposes of the questions submitted in the joint submission.

However, in its Rebuttal, dated May 1, 1946, the Carrier presents the contention that an emergency existed and that Article XV applies and submits facts to sustain its contention in that regard. On behalf of the Carrier an emergency is argued to the referee. It is not contended that the emergency issue was raised on the property. Section 3 First (i) of the Railway Labor Act provides that where an attempt to settle a dispute fails on the property "the disputes may be referred by petition of the parties or by either party to the appropriate division of the Adjustment Board with a full statement of facts and all supporting data bearing upon the disputes." As this record stands, this dispute was progressed on the property and submitted here by joint submission without any reference to an emergency as a defense. That issue was not an unsettled one on the property. It was not submitted here as an unsettled issue. The Organization contends that the issue cannot be raised here at this stage of the proceedings. We pass the question as to whether or not it may properly be raised at this time and hold that an emergency is not shown to have existed.

The Carrier makes no particular issue of the right of the employe to be paid for the two days of the calendar weeks beginning April 29th and May 6th. The claim is sustained also as to those days.

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 parties waived oral hearing thereon;

That the Carrrier 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 employe is entitled to the payment claimed.

AWARD

Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: H. A. Johnson
Secretary

Dated at Chicago, Illinois, this 17th day of February, 1947.