Award No. 3609
Docket No. TE-3507

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Herbert B. Rudolph, Referee

PARTIES TO DISPUTE:

THE ORDER OF RAILROAD TELEGRAPHERS

THE DELAWARE, LACKAWANNA & WESTERN RAILROAD COMPANY

STATEMENT OF CLAIM: Claim of the General Committee of the Order of Railroad Telegraphers on the Delaware, Lackawanna & Western Railroad that:

1. Martin Burke, the regularly assigned first trick towerman at the Michigan Avenue Tower, Buffalo, N. Y., be paid four hours' overtime on each of the ten days September 5 through 14, 1944, under the rules of the telegraphers' agreement, because when the second trick towerman position in this tower became temporarily vacant on these days the regularly assigned third trick towerman in this tower was suspended during his regular hours and required to work the hours of the second trick position and an employe not under the telegraphers' agreement was substituted in the place of the third trick towerman instead of using the first and third trick towermen four hours in addition to their regular assignments.

2. Thomas Cornell, the regularly assigned third trick towerman in this tower, who was suspended by the Carrier during his regular hours and required to work the hours of the second trick position outside of his regular hours on each of these ten days, shall be paid at the pro rata rate for the eight hours he was suspended during his regular hours on each of these ten days, and be also paid at the time and one-half rate for the eight hours he was required to work outside of his regular hours on each of these ten days.

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

Prior to, during the period September 5 through 11, 1944, and subsequently, three towerman positions, listed in the telegraphers' agreement at 81 cents an hour, but during the period here involved rated at $1.00 an hour, were operative at Michigan Avenue Tower, Buffalo, New York, constituting three eight-hour tricks, namely, 7:00 A.M. to 3:00 P.M. (Burke), 3:00 P.M. to 11:00 P.M. (Newton), and 11:00 P.M. to 7:00 A.M. (Cornell).

For the period September 5th through September 14th, 1944, Newton was absent from his second trick position, 3:00 P.M. to 11:00 P.M. Cornell was instructed to and did vacate his 11:00 P.M. to 7:00 A.M. trick and protected the Newton vacancy, 3:00 P.M. to 11:00 P.M. Switchtender Heck, not under the telegraphers' agreement and holding a regular switchtender position at Abbott Yard, was instructed to and did fill Cornell's regular position 11:00 P.M. to 7:00 A.M.

train which passed after the first operator's tour was over and before the second operator's tour commenced, the Carrier required the first operator to work beyond his normal tour of duty. The court held that since the railroad had a clerk available at the station no emergency existed that would justify the railroad in working the telegraph operator overtime and the Carrier could not excuse itself because it failed to use the clerk on the plea that he was not bonded to handle mail.

> "There was **another employe at the station who was under no restriction as to hours of service** but he was not bonded and the railroad made no effort to have **him** care for the mails."

The Court held, notwithstanding that the operator worked only two hours beyond the normal permitted time:

> "The railroad company was guilty of violation of the Hours of Service Act in requiring the operator to remain on duty more than nine hours. * * *"

The District Court's judgment against the Carrier for the penalties imposed by the Act was affirmed by the Circuit Court of Appeals.

With such law in the books the Carrier ought to be permitted to exercise the discretion that even Award 2827 said it may exercise "under the facts confronting it in a particular case," it is common knowledge that the Carrier draws a higher penalty when it violates the law as already declared by the courts.

> "We are in entire accord with several fundamental propositions pointed out by the Carrier * * * and we approve of the principle that 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 the facts confronting it in a particular case."

Award 2827

A carrier can not lawfully exercise discretion in giving overtime work to an employe where to do so would violate the Hours of Service Act.

N. P. vs. Wall, 241 US 87, 91
Award 2433, Third Division

The Carrier, under the unusual conditions (manpower shortage) during a World War period did its utmost to protect efficient and safe operation, a duty that both carriers and employes owe the public (Award 9954),—the refere claim before your Board is unreasonable, unjustified, without merit, and should be denied.

OPINION OF BOARD: Michigan Avenue Tower at Buffalo is a three trick office. Second trick towerman, Newton, was off duty September 2, 1944 through September 14, 1944, due to injuries suffered when struck by an automobile. On September 2, 3 and 4 the first and third trick towermen each worked 12 hours per day because no qualified man was available to work Newton's second trick. Continuing from September 5 through September 14 the third trick towerman worked Newton's second trick, and Heck, a switchtender, not covered by the telegraphers' agreement, worked the third trick.

Cornell, the third trirk man, claims that he shohld be paid the pro rata rate of his regular third trick and also time and one-half for the eight hours he was required to work on the second trick. Burke, the first trick towerman, claims that he should have been used four hours in addition to his regular assignment on the second trick, and paid therefor at the rate of time and one-half.

Carrier contends that it was justified in the method used to fill the second trick vacancy by the Hours of Service Law. This law provides so far as here applicable: "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 employe 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;"

The present agreement was made long subsequent to the effective date of the federal act and it must be assumed that the parties contracted with reference thereto.

This Board has hedl that sickness constitutes an emergency within the meaning of the federal act, and that in case of sickness it is permissible, where no other telegraphers are available, to require other employes to remain on duty the four additional hours as permitted by the Act. Awards 2827 and 3461. However, neither of those Awards present a situation where the emergency (sickness) extends over the three days per week period, the limitation provided by the Act, during which the employes might work four additional hours. Here the second trick towerman was unable to perform his work due to injury for a period of 13 days. While absence due to illness or injury should not constitute a nemergency for a long and indefinite period of time, we think it not unreasonable to hold, under the facts here presented, that an emergency existed within the meaning of the federal law during the 13 day absence. The Act itself, by providing that for three days a week an employe might be worked four additional hours, contemplates that an emergency, within its meaning, might extend over a period of time.

Under the terms of the Act we think it clear that it was not permissible to work the first and third trick towermen in excess of nine hours exceeding three days per week. Also, applying the rule announced in Awards 2837 and 3461, we are of the opinion that it was a violation of the agreement to work an employe not covered by the agreement the three days each week that Carrier, because of emergency and without violating the Act, could work the first and third trick towermen four additional hours. We, therefore, are of the opinion that the claim should be sustained for four additional hours each day to the extent only of three days each calendar week. The calendar discloses that September 3, 1944, was the first day of the week. Claimants worked twelve hours on the 3rd and 4th so they should have been worked twelve hours one additional day that week. For the week commencing September 10, 1944, they should have been worked three days on the second trick job. The federal law permits employes to work nine hours under all conditions, and claimants' assignments were for eight hours. It follows that on the four days per week when claimants were not priviledged under the law to work the four additional hours, they were priviledged to work nine hours. We are of the opinion that each is entitled to be paid one additional hour for each day of the week that it was not permissible to work the additional four hours.

It is contended that the agreement was violated by requiring Cornell, the third trick towerman, to work the second trick. However, an emergency existed, and Rule 15(a) contemplates that regular assigned employes may be required to do relief work in case of emergency. See Awards 815, 2444, 2511, 3132 and 3528.

As ruled in Award 3488 and claim here made, to the extent that it has been sustained, should be paid at the pro rata rate. Specifically, Claimants Burke and Cornell should be paid at the pro rata rate as follows: For the week of September 3, 1944, four hours for one day and one hour for four days. For the week of September 10, 1944, four hours for three days and one hour for two days.

FINDINGS: The Third Division of the Adjdstment 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 agreement was violated.

AWARD

Claims (1) and (2) sustained to the extent indicated in the Opinion.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: H. A. Johnson,
Secretary

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