Award No. 4102
Docket No. TE-3978

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Jay S. Parker, 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 and Western Railroad that:

1. (a) the Carrier violated Rule 15 (a) when on June 24 and 25, 1946, it required the agent at Linwood, New York, to vacate his position thereat to perform relief service on first trick operator (agent-operator) position at B&O Junction;

   (b) in consequence thereof, Second Trick Operator McConnell and third trick Operator Hart, regularly employed at B&O Junction and who were available for overtime service, shall each be allowed four hours overtime on each of these days.

2. (a) the Carrier violated Rules 11 and 23 and the wage scale wnen on August 8, 9 and one-half day August 10, 1946, it suspended the First Trick Operator Position (agent-operator) at B & O Junction.

   (b) in consequence thereof, Second Trick Operator McConnell regularly employed at B & O Junction and who was available for overtime service, shall be paid four hours overtime on each day, August 8 and 9, and Third Trick Operator Hart, regularly employed at B & O Junction and who was available for overtime service shall be paid four hours overtime on each day August 8, 9 and 10.

EMPLOYES' STATEMENT OF FACTS: An Agreement by and between the parties, hereinafter referred to as the Telegraphers' Agreement, bearing effective date of May 1, 1940, as to rules and May 22, 1946, as to rates of pay, is in evidence; copies thereof are on file with the National Railroad Adjustment Board.

B & O Junction, listed at page 26 of the Telegraphers' Agreement, prior to, on and subsequent to the dates involved, was a continuously operated facility with three 8-hour 7-day positions. The regular incumbents, assigned hours and rates of pay:

C. R. Morgan	8:00 A. M. to 4:00 P. M.	$264.40* per month
J. McConnell	4:00 P. M. to 12 Midnight	1.07 per hour
T. J. Hart	12 Midnight to 8:00 A. M.	1.07 per hour

* comprehends 243 1/3 hours per month, or 8 hours each calendar day.

There is no doubt that both Hart and McConnell each received a day's pay for the dates involved.

The Carrier **had a course open to it other than working these men excess hours.** Since, in the exercise of the Carrier's operating judgment, it would be possible to get along without such excess service, the use of these men would have constituted unlawful excess service under the Hours of Service Law.

Here again, Awards 2827 and 3488 have no application, since no man not covered by the Agreement was used on the job.

There is nothing in the Agreement that prescribes that the Carrier **must** work any clerk-operator beyond his normal hours. It must not be forgotten that the correct approach to the construction of these agreements is not what the agreement **permits** the carrier to do, but what it **forbids.** Anything that is not granted to the employes is expressly reserved to the Carrier. This Board has so held:

> "We can only interpret the contract as it is, and treat that as **reserved to the carrier** which is not granted to the employes by the agreement."
>
> **Award 2491—Third Division**

It must be remembered that all agreements, of necessity, leave the carrier a wide field in which it must be left free to exercise judgment, and **this is particularly true where the Hours of Service Law is involved.**

> "All agreements of necessity leave management a considerable zone of operation within which management has the right and duty to exercise judgment as to the best and most efficient way to run its business."
>
> **Award 311—Third Division**

Moreover, the elemental principle that damages are awarded by way of indemnity not **enrichment** is the guiding rule in contract law, and even without regard to the Hours of Service Law both claimants were compensated in accordance with the rules of the agreement.

SUMMARY

1. There was no violation of the Agreement.
2. Neither claimant was **lawfully** available on the dates in question.
3. Had the Carrier worked either claimant excess hours it would have violated the Hours of Service Act, since a course was open to it to avoid such excess service.
4. Both claimants were fully paid in accordance with the Agreement.
5. Awards 2827 and 3488 are erroneous, contrary to law and should be overruled. Compliance with these awards would subject every carrier relying upon them to immediate prosecution for violation of the Hours of Service Act.
6. In any event those awards were predicated upon alleged violation of the Scope rule in that an employe not covered by the Agreement was used to perform the work. They are not controlling here, where no such question is involved.

(Exhibits not reproduced.)

OPINION OF BOARD: At all times herein involved B & O Junction was a continuously operated facility with three 8 hour 7 day positions. Its regularly assigned incumbents were Agent-Operator C. K. Morgan, hours 8 A. M. to 4 P. M., Operator J McConnell, hours 4 P M to 12 midnight, and Operator T. J. Hart, hours 12 midnight to 8 A. M. The Agent-Operator

position carries a monthly rate and comprehends 243 1/3 hours per month or 8 hours each calendar day.

June 24 and 25, 1946, and August 8, 9 and until noon on the 10th, 1946, Morgan was off duty on account of illness. June 24 and 25 the Carrier blanked the Agent-Operator position at Linwood and required Pfister, the Agent at that point, to protect Morgan's vacancy. August 8, 9 and up to 12 o'clock noon on the 10th it blanked Morgan's position. At B & O Junction, thereafter, and until Morgan's recovery it filled his position by an extra employe.

Claim 1 (a) and (b) is that use of the Linwood Operator was in violation of the Agreement, that Operators Hart and McConnell, regularly assigned to the second and third tricks at B & O Junction, were available and willing to protect Morgan's vacancy, and that they are each entitled to 4 hours overtime for June 24 and 25 because they were not permitted to fill Morgan's position on those dates.

The basis of Claim 2(a) and (b) is that the Carrier violated the Agreement by blanking Morgan's position on August 8, 9 and until noon on the 10th, that Operators McConnell and Hart should have been permitted to fill the vacancy, and that such Operators are therefore entitled to pay for that period, Hart for 4 hours August 8, 9 and 10, and McConnell for 4 hours August 8 and 9.

Except for the fact, which has no effect on its ultimate disposition, that the Agent-Operator position at Linwood was blanked while its regular incumbent was required to protect Morgan's vacancy on June 24 and 25, the facts and issues on which a decision of Claim 1 (a) and (b) depend are to all intents and purposes the same as those presented by the record in, and are determined by, Award 4101, this day rendered. No useful purpose would be served by here restating what was there said and held in disposing of a claim identical in principle. Therefore, based on such Award, we hold that Claim 1 (a) and (b) must be denied.

Claim 2 (a) and (b) presents entirely different questions which are not so easily determined.

Turning first to consideration of 2 (a) we have little difficulty in concluding the Carrier violated the Agreement in blanking Morgan's position on August 8, 9 and until noon on the 10th. As a result of the Carrier's action a position essential to continuous operation was blanked and work covored by the scope rule of the Agreement was not only temporarily removed therefrom but employes to whom it belonged and had been contracted were deprived of an opportunity to perform it. Aside from another reason to be presently mentioned the Carrier's suggestion its action was justifiable because of the emergencies of the situation confronting it is belied by the fact that when it desired to fulfill its contractual obligations it apparently had no difficulty in finding relief or extra operators to fill the vacancies in the first trick position at B & O Junction.

The only vital issue remaining is whether, under the Hours of Service Law, Operators McConnell and Hart had the right to perform the relief work in question and are therefore entitled to compensation as claimed in 2 (b) of the Claim. That such Operators were entitled to the work under the conditions and circumstances disclosed by the record, i. e., sickness in a regularly assigned position followed by a temporary vacancy with no extra Operators available, has been answered by this Division in the affirmative in Awards 2827, 3488, 3609 and 3631. The Carrier insists such Awards should be overruled as erroneous. However, in support of its position it offers nothing new or constructive and presents no argument that has not already been considered and rejected by this Division in their rendition. We therefore adhere to and reaffirm the conclusions announced in Awards 2827, 3488, 3609 and 3631 and rely upon them as sustaining precedents for our instant decision the claimants are entitled to the work in question. In our opinion the fact the work here was not performed because of the blanking

of the position to which it belonged whereas the work involved in such Awards was performed by outsiders has no bearing on the result and affords no basis for a different conclusion.

While Claim 2 (a) and (b) is sustained as heretofore indicated compensation, following what are now the established precedents of this Division (Awards 4037, 3890, 3876, 3814, 3609 and 3488), will be limited to the straight time 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 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 Claim 1 (a) and (b) should be denied and Claim 2 (a) and (b) should be sustained as indicated in the Opinion.

AWARD

Claim 1 (a) and (b) denied. Claim 2 (a) and (b) sustained subject to the quailfication that payment shall be at the pro rata rate instead of the overtime rate.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: A. I. Tummon
Acting Secretary

Dated at Chicago, Illinois, this 10th day of September, 1948.