

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Edward F. Carter, Referee

PARTIES TO DISPUTE:

THE ORDER OF RAILROAD TELEGRAPHERS

MISSOURI PACIFIC RAILROAD COMPANY

**STATEMENT OF CLAIM:** Claim of the General Committee of The Order of Railroad Telegraphers on the Missouri Pacific Railroad that,

- (1) The carrier violated the terms of an existing agreement between the carrier and the Organization when it failed to permit or require W. H. Hanks, regular assigned occupant of the second trick position as telegrapher at Russellville, Ark., assigned hours 4:00 P.M. to 12:00 midnight, to work these hours Tuesday, September 3, 1946, and
- (2) The carrier shall compensate W. H. Hanks for eight (8) hours at the time and one-half rate for Tuesday, September 3, 1946, which is the time he was entitled to work and the compensation he was entitled to receive had the Carrier not violated the agreement.

**EMPLOYES' STATEMENT OF FACTS:** Russellville, Arkansas, is a continuously operated station under the rules of the Agreement between the Carrier and the Organization.

Claimant W. H. Hanks is the regularly assigned occupant of the second trick telegrapher position at Russellville, Arkansas, hours 4:00 P.M. to 12:00 midnight. His assigned rest day is Tuesday. The occupant of the relief assignment who ordinarily works Tuesday in place of Claimant Hanks was ill and unable to work Tuesday, September 3, 1946.

The Carrier blanked the position on Tuesday, September 3, 1946, as far as communication service was concerned. An employe holding no rights under the Agreement between the Carrier and the Organization was required and permitted by the Carrier to perform other service on Tuesday, September 3, 1946, on a call basis that is ordinarily performed by Claimant Hanks.

**POSITION OF EMPLOYES:** There is an agreement in effect between the parties to this dispute effective June 1, 1942 as amended from time to time concerning both rules and rates of pay. One such amendment as pertains to rules is the Rest Day Agreement negotiated through mediation (Case A-2070), and is dated July 13, 1945.

This Agreement (Case A-2070) provides in Article 1, Section 1 (A) that:

"An employe occupying a position requiring a Sunday assignment of the regular week day hours shall be given one (1) rest day without pay in each consecutive period of seven (7) days. The rest day on such position shall be assigned and shall be the same day of each week, but may be changed to meet service requirements

The Carrier was entitled to have had this work performed by the regularly assigned occupant of the regular relief position, Mr. Rannals, at the straight time rate and that is the rate properly to be used in administering the penalty in this particular case. Further, it is the only penalty that can rightfully accrue against the Carrier under the circumstances in this case.

This principle has been repeatedly recognized by this Division in numerous awards. See Awards Nos. 2346, 2695, 2823, 2859, 3049, 3195 and more recently Award 3587. Each of the foregoing awards recognize the principle that the penalty rate does not apply where no work is performed by claimant.

**OPINION OF BOARD:** There is no dispute as to the facts in the present case. Claimant was improperly denied the right to work on his rest day, the work having been given to one not covered by the Telegraphers' Agreement. The only question is whether claimant should be compensated at the pro rata or time and one-half rate of the position.

The right to perform work is not the equivalent of work performed insofar as the overtime rule is concerned. Whether the overtime rate be construed as a penalty against the employer or as the rate to be paid an employee who works in excess of eight hours on any day, the fact is that the condition which brings either into operation is that work must have been actually performed in excess of eight hours. One who claims compensation for having been deprived of work that he was entitled to perform, has not done the thing that makes the higher rate applicable. One who has been deprived of work is not entitled to recover penalties accruing to the employee who actually performs the work where such penalties arise from the fact of his actually performing it. They are personal to such employee and are not a part of the loss sustained by the employee deprived of the work. The latter's loss is the rate the regularly assigned occupant of the position would have received if he had performed the work in the regular course of his employment. The reasoning contained in Award 3193 supports this holding and is reaffirmed. See Awards 2695, 3049, 3222, 3251, 3271, 4196. Awards by other referees to the same effect are: 2346 (Burque), 2823 (Shake), 2859 (Youngdahl), 3232 (Thaxter), 3371, 3375, 3376 (Tipton), 3504, 3505 (Douglas), 3609 (Rudolph), 3745, 3770, 3837 (Wenkle), 3876, 3910 (Yeager), 3890 (Swaim), and 4037 (Parker).

The position of the Carrier is correct. An affirmative award at the pro rata rate is in order.

**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

The Agreement was violated.

#### AWARD

Claim (1) sustained. Claim (2) sustained at the pro rata rate.

NATIONAL RAILROAD ADJUSTMENT BOARD  
By Order of Third Division

ATTEST: A. I. Tummon  
Acting Secretary

Dated at Chicago, Illinois, this 21st day of December, 1948.