Award No. 4279
Docket No. TE-4282

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Francis J. Robertson, Referee

PARTIES TO DISPUTE:

THE ORDER OF RAILROAD TELEGRAPHERS

THE CHICAGO, MILWAUKEE, ST. PAUL AND PACIFIC RAILROAD COMPANY

STATEMENT OF CLAIM: Claim of the General Committee of The Order of Railroad Telegraphers on The Chicago, Milwaukee, St. Paul and Pacific Railroad Company that H. C. Friend shall be paid, in accordance with Rule 3 (g), the difference between the amount earned by him on March 7, 8, 9, 10, 11, 12, 13, 14 and 15, 1946, while working as second trick telegrapher-towerman at Tower A-5, and the amount he would have earned on such dates if allowed by the Carrier to perform service, as provided in Rule 3 (g), as follows:

March 7	Third Trick	Director	Tower A-2
March 8	Third Trick	Director	Tower A-2
March 9	Third Trick	Director	Tower A-2
March 10	Third Trick	Director	Tower A-2
March 11	Third Trick	Director	Tower A-2
March 12	Third Trick	Director	Tower A-2
March 13	Third Trick	Director	Tower A-2
March 14	Third Trick	Director	Tower A-2
March 15	Third Trick	Director	Tower A-2

EMPLOYES' STATEMENT OF FACTS: Claimant Friend, on the dates covered by this claim, was an extra available, competent employe entitled to preference to extra work, as provided in Rule 3 (g), because the senior, extra, available, competent employe, Brumfield, had already exercised his preference as provided in the rule.

The assigned rest day for the position of third trick director, Tower A-2, is Thursday, March 7th and March 14th, 1946, were Thursdays.

Claimant Friend, extra telegrapher, occupied the position at Tower A-5, second trick leverman, February 28th to March 15th, inclusive, excepting March 6th, the rest day of the position of second trick leverman, Tower A-5, on which day he was required by the Carrier to perform service as second director at Tower A-2; and on March 13th, the rest day of the position of second leverman, Tower A-5, he did not work, however, the occupant of the position of third director, Tower A-2, to which he was entitled, did work.

No portion of this claim involves the date of March 6th; mention being made of that date only for the purpose of indicating the actual handling of the claimant by the Carrier.

third trick train director's position at Tower A-2 until after he had fulfilled his assignment on the second trick vacancy at Tower A-5 and, therefore, the claim is entirely without foundation and should be denied.

OPINION OF BOARD: Claimant was an extra telegrapher filling a temporary vacancy as second trick leverman on Tower A-5 from February 28 to March 15, 1946, except for the day of March 6, 1946, (the rest day of the position at Tower A-5) when he was required by the Carrier to perform service as second trick train director at Tower A-2. On March 4, 1946 the regularly assigned third trick train director at Tower A-2 had laid off sick. The senior extra telegrapher, not then filling a position was not competent to fill the third trick train director's position and therefore was used to relieve the regularly assigned third trick operator-leverman at Tower A-4, who in turn relieved the third trick train director at A-2, commencing March 4, 1946. Claimant, having completed the extra work at Tower A-5 on March 15, 1946, laid off one day and commenced work on March 17, 1946 on the third trick train director's position at Tower A-2. Employes, relying on the provisions of Rule 3 (g) of the Agreement, file claim for the difference between what Friend earned during the period March 7, 1946 to March 15, 1946 while working at A-5 and what he would have earned during the same period had he worked as director on Tower A-2.

The rule provides as follows:

> "The senior extra employe shall have preference to all extra work if available and competent. Under this rule extra employes must accept the work to which their seniority entitles them.
>
> Extra work will be assigned in accordance with this rule, and the extra employe, if qualified, will perform service on the position vacated.
>
> Temporary assignments will be considered as extra work except when filled by an employe assigned to a regular position."

The determination of this claim hinges upon the proper interpretation to be given the word "available", as used in the above-quoted rule. Carrier contends that the rule has always been interpreted as meaning that when an extra employe was filling a vacancy he was **not** available for other extra work. The Employes contend, on the other hand, that the availability of the employe in all instances is based upon the fact that the employe was at the disposal of the Carrier and subject to the Carrier's orders, and assert that if the Claimant had not been available he could not have been ordered by the Carrier to perform service on March 6th.

We cannot agree with the Employes' contention as to the effect of Rule 3 (g) in this case, for we believe that the Claimant was not available, within the meaning of the rule, to perform service at Tower A-2, because he was filling a position at the time the vacancy arose. We think this conclusion with respect to the meaning of the word "available" is supported by the history of the present wording of Rule 3 (g). It appears from the record that in agreements prior to the 1939 Agreement between the parties hereto a similar rule read as follows:

> "The senior extra employe shall have preference to all extra work, **if available and competent,** but if filling a vacancy at the time a junior employe is assigned, the junior employe may hold the position for a period of ten (10) days from the time he commenced work on the position, when he can be displaced by the senior employe. It is expected that under this rule extra employes will accept the extra work to which their seniority entitles them." (Emphasis supplied.)

Now then, it is to be noted that that rule contra distinguishes "available" and "filling a position", so that an extra employe was considered unavailable if filling a position at the time a vacancy arose. The ten day provision was eliminated from the 1939 Agreement for the reason that it caused obvious injustices to the senior extra telegraphers who might have been filling a

vacancy of less than 10 days at a time when a longer vacancy occurred at another place, but the availability provision remained. As a matter of fact, the Employes claim in effect supports the view that Claimant was not available within the meaning of the rule on March 4, 1946, for the reason that no claim is made for March 4th and March 5th, 1946. Now then, if Claimant was not available on March 4, 1946, was his status with respect to availability changed by the action of the Carrier having him work the second trick train director's position at Tower A-2 on March 6th? We do not believe that it did. That use was a one day expedient in what the Carrier contends was an emergency. Friend had not completed his assignment at A-5 merely because he was used on his rest day in that position.

It has been argued that in using the regular assigned employe from A-4 for relief work the Carrier violated Rule 14 (b), which provides that, "Employes regularly assigned to a position will not be required to perform relief work, except in an emergency." Having determined that the Claimant was not available for the extra work at Tower A-2 during the period in question, it is unnecessary to go into that question for in any event this Claimant would not have suffered a loss by reason of a violation of said rule even if the rule had in fact been violated.

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 the Carrier did not violate the Agreement.

AWARD

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: A. I. Tummon
Acting Secretary

Dated at Chicago, Illinois, this 18th day of January, 1949.