# Award No. 4509
# Docket No. TE-4388

## NATIONAL RAILROAD ADJUSTMENT BOARD

## THIRD DIVISION

**Francis J. Robertson, Referee**

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## PARTIES TO DISPUTE:

## THE ORDER OF RAILROAD TELEGRAPHERS

## BOSTON AND MAINE RAILROAD

**STATEMENT OF CLAIM:** Claim TE-180 of the General Committee of The Order of Railroad Telegraphers on the Boston and Maine Railroad, that Stanley Coates, regularly assigned swing relief towerman at Mystic Junction and Tower "H" on the Terminal Division, who was required by the Carrier to suspend work during the regular hours of his assigned position on February 4, 8, 9, 10, 11, 15, 16, 17, 18, 22, 23, 24, 25 and March 1, 1947, and work the third trick towerman position at Tower "H", hours 11:00 P. M. to 7:00 A. M., outside of his regular assigned hours on each of these days, shall be paid for the number of hours he was thus required to suspend work during his regular hours at the pro rata rate (except on February 22, one of the seven specified holidays, time and one-half rate) and at the overtime rate for the number of hours he was required to work on the third trick towerman position at Tower "H" outside of the assigned hours of his regularly assigned swing relief position.

**EMPLOYES' STATEMENT OF FACTS:** An Agreement by and between the parties, referred to herein as the Telegraphers' Agreement, bearing effective date of August 9, 1944, is in evidence. Copies thereof are on file with the National Railroad Adjustment Board.

On the dates involved in this proceeding Stanley Coates regularly held a relief towerman position which constituted the following assignments:

| Day | Hours | Location | Hourly Rate |
|---|---|---|---|
| Saturdays | 7 A. M.- 3 P. M. | Tower "H" | $1.24½ |
| Sundays | 7 A. M.- 3 P. M. | Mystic Junction | 1.16½ |
| Mondays | 3 P. M.-11 P. M. | Mystic Junction | 1.16½ |
| Tuesdays | 3 P. M.-11 P. M. | Tower "H" | 1.24½ |
| Wednesdays | 11 P. M.- 7 A. M. | Mystic Junction | 1.16½ |
| Thursdays | 11 P. M.- 7 A. M. | Tower "H" | 1.24½ |
| Fridays | Rest Day | | |

On each date, February 4, 8, 9, 10, 11, 15, 16, 17, 18, 22, 23, 24, 25 and March 1, 1947, the Carrier suspended said Stanley Coates from his regular position and required him to work 11:00 P. M. to 7:00 A. M. (not continuous with his regular work period) at "H" Tower. For this suspended time no compensation was allowed. For the work performed not continuous with his regular work period Coates was allowed only the regular "H" Tower rate of pay. The Organization, on behalf of Stanley Coates, claimed the regular rate of his position for each hour he was suspended therefrom, plus time and one-half rate for each hour he was required to work outside of the hours of his regular

We think it is apparent that Rule 4 has no application to the situation presented. The second trick, which claimant worked, does, indeed, immediately precede the third trick to which he was regularly assigned. But, in working the second trick instead of the third, claimant was not in 'continuous service in advance of his working hours' in contemplation of the rule. Clearly the overtime is applicable only to cases where work is performed in advance or after **work performed by an employe on his regular assignment.** Claimant, not having worked his regular assignment, performed no overtime service in contemplation of the Rule 4.

We think that the employe's claim to a day's pay at straight time is also without substance. Perhaps, technically, there was a twenty-four hour period in which he did not receive a day's pay. But actually he did receive six days' pay at straight time for work performed on six different eight hour shifts. In any event to have worked his regular third trick assignment in addition to the second trick would have constituted a violation of the Hours of Service Law. The rules cannot be interpreted nor applied in a manner that would countenance a violation of any law enacted pursuant to the police powers of the Government.

Aside from all we have heretofore said we think the first and last paragraphs of Rule 13 are controlling of the situation presented in this dispute. Instead of working his regular assignment claimant was shifted to the second trick because of the emergency created by the illness of the telegrapher regularly assigned to that trick. In the face of the provision of Rule 13, the Call Rule (Rule 5) has no bearing upon the case. Under the rules and upon the record claimant was entitled to payment at straight time only for work performed on the second trick (Award 3444); and he was not entitled to a day's pay on account of his regular assignment which he did not work."

It would seem that the precise question involved in this case has been authoritatively settled adversely to the claim. Possibly the Committee hopes that a new Referee will over-rule his predecessors. There seems to be no other reason for progressing the case in the face of these adverse decisions.

One feature requires specific attention. The Committee, in its Statement of Facts says—

"Extra or spare employes were available."

No extra or spare employes **who were qualified** in Tower "H" were available after Kimball was taken sick. If any such extra or spare employes were available who were qualified, the Committee should be required to name them and submit proof of their qualifications. It is noticeable that the Committee does not claim that extra **qualified** men were available, but the statement quoted above is misleading and would tend to leave the impression that it was not necessary to use Coates.

Attached hereto as Carrier's Exhibit "A" is copy of a letter from Trainmaster G. W. Miller, Coates' immediate superior.

The claim should be denied.

(Exhibits not reproduced.)

**OPINION OF BOARD:** Claimant, a regularly assigned relief man, was taken off his regular relief assignment and required to work the third trick towerman position on Tower "H". Claim is filed on behalf of the Claimant for pro rata rate of his regular position and the overtime rate for number of hours, outside the hours of his regular assignment, he was required to work the third trick towerman position under the provisions of Article VII (a) (b) and Article IX, which rules read as follows:

**"Article VII, Call**

(a) For continuous service after regular working hours employes will be paid time and one-half on the actual minute basis. Employes shall not be required to work more than two (2) hours before or after the regularly established working hours without being permitted to take a second meal period of thirty (30) minutes. If this thirty (30) minute meal period cannot be afforded it will be paid for at time and one-half time rate.

(b) Employes 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."

**"Article IX, Suspension of Work**

Employes will not be required to suspend work during regular hours or to absorb overtime."

Carrier asserts that the Claimant was working under the provisions of Article XV which reads as follows:

"Regularly assigned employes will not be required to perform relief work except in case of emergency. When required to perform relief work and in consequence thereof suffer a reduction in the regular compensation, employes shall be paid an amount sufficient to reimburse them for such loss and in all cases they will be allowed the rate of the position they fill but not less than their regular rate and actual necessary expenses while away from their regular station. In addition, such employes will be paid at the rate of the higher paid position for waiting and travel time from home station to relief point and return from relief point to home station except that no waiting time will be paid at relief point when the railroad assumes lodging expenses."

Despite the lengthy record and the many contentions put forth by both parties the issues in this docket are simply these: (1) Did an emergency exist? (2) If no emergency existed is the Claimant entitled to compensation under both Article VII and IX? We shall devote ourselves to a consideration of the issues in the order mentioned.

Carrier asserts that an emergency existed by reason of the following facts. On January 21, 1947 Towerman Steeves, who held the first trick position at Tower "H", became ill. Spare Towerman Kimball was called to cover Steeves' position. On January 24, the regular third trick towerman at "H" elected to move up to the first trick position and Kimball moved onto the third trick. On January 31 Kimball reported off sick. February 1, 2, and 3 the first and second trick towerman worked four hours before and four hours after their regularly assigned hours respectively to cover the third trick. February 4, 1947, Claimant was assigned to the third trick, there being no qualified extra towerman available.

Did any emergency exist under the facts above stated? Clearly Carrier, having asserted the emergency, has the burden of establishing that one did in fact exist. Furthermore, it is patent that one cannot assert his own lack of foresight as constituting an emergency. In the instant case Employes assert that there were extra or spare employes available and that they could have been qualified by Carrier to handle the assignment at "H" Tower. Carrier denies that there were any spare employes available but relates its denial back to an Exhibit which says that at this time Kimball was the only man **qualified** in one man towers on the spare board. We believe that the record sustains the Employes' contention on the point that there were extra or spare employes available even though not qualified on "H" Tower. Now then, on January 21 when Steeves

became ill, if Kimball was the only man qualified in single towers on the spare board, in the event of any other illnesses or absence for other reasons in single man towers there would be no extra employe qualified to relieve. Steeves' illness was an extended one, he not having returned to work until March 2, 1947. It is reasonable to conclude that Carrier was acquainted or should have acquainted itself with the nature of his illness. Under these circumstances, it seems that some effort should have been made to qualify an extra man for the "H" Tower. That no such effort was made, it seems to us, is clearly a lack of foresight and the situation requiring Coates' removal from his assignment was brought about because of that and not because an emergency existed. We think support is lent to our conclusion that no emergency existed in that such a defense was not asserted on the property in the early stages of the discussion of the claim. We are fully cognizant of Awards of this Board which have held that the illness of a regularly assigned employe and the lack of availability of a qualified extra created an emergency justifying transfer of a regularly assigned employe under rules similar to Article XV of the instant Agreement. We have no quarrel with the holdings in those Awards but we believe this docket is clearly distinct from those in the factual situation present.

With respect to monetary reparation, we hold that the Claimant is entitled to be compensated at the pro rata of his position on the dates mentioned in the claim (except for February 22 when the time and one-half rate applies) because of having been required to suspend work on his regular assignment in violation of Article IX. We would not be justified in holding that Claimant is entitled to the payment of time and one-half for the asserted violation of Article VII. That is essentially a Call Rule and there is no call involved in this situation, nor is there any element of being held on in continuous service after working an assignment. Furthermore, to hold that Claimant is entitled to the time and one-half rate for hours worked in addition to the pro rata rate for time held off his regular assignment would involve the Carrier in a double penalty, something which this Board has frowned upon in previous Awards. See Awards 2823 and 2695.

**FINDINGS:** The Third Division of the Adjustment Board, upon the whole record and all the evidence, finds and holds:

That both parties to this dispute waived oral hearing thereon;

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 Carrier violated the Agreement.

AWARD

Claim sustained to extent indicated in the Opinion.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: A. I. Tummon,
Acting Secretary

Dated at Chicago, Illinois, this 5th day of August, 1949.