

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Charles S. Connell, Referee

PARTIES TO DISPUTE:

THE ORDER OF RAILROAD TELEGRAPHERS

THE NEW YORK CENTRAL RAILROAD, BUFFALO AND EAST

STATEMENT OF CLAIM: Claim of the General Committee of The Order of Railroad Telegraphers on the New York Central Railroad, Buffalo and East.

That the second and third trick telegrapher-leverman regularly assigned in Signal Station No. 15 at Lyons, New York, on February 8 and 9, 1948, shall each be paid four (4) hours overtime on each of these days under the rules of the Telegraphers' Agreement, because when the first trick telegrapher-leverman in this signal station was absent from duty on these days, due to illness, an employe not covered by said Agreement was substituted instead of using each of the claimants four (4) hours in addition to their regular assignments to perform the work of the first trick telegrapher-leverman position on these days.

EMPLOYEES' STATEMENT OF FACTS: An Agreement between the parties bearing effective date of January 1, 1940, is in evidence; copies thereof are on file with the National Railroad Adjustment Board.

Signal Station No. 15 at Lyons, New York is a continuously operated interlocking tower located on the four track main line of the Syracuse Division. Three shifts of eight hours each protect the 24-hour period. At the time of the occurrence there were two employes on duty during each eight hour period—one telegrapher-leverman and one leverman. The telegrapher-levermen were responsible for the desk work in keeping the train sheet, the "OS" of trains and all transportation communication work, as well as the general supervision of the operation of the interlocking tower. The levermen were required to operate the levers of the interlocking machine for the movement of trains.

On February 8 and 9, 1948, the incumbent of the first trick (day position) telegrapher-leverman position reported off duty account of illness, and his position was filled by orders of the Carrier on each of these days by the first trick leverman. The position of the first trick leverman which was made vacant, was filled by a local school boy (Mr. Crisci) instead of being filled by a bona fide employe.

The Organization filed claim in behalf of Mr. E. M. Campbell, the incumbent of the second trick telegrapher-leverman position and Mr. R. S. Jones, the incumbent of the third trick telegrapher-leverman position, for four additional hours each day at time and one-half rate on the basis that work to which they were entitled was denied them; such work having been assigned contrary to the rules. The Carrier agreed to pay the claim for February 9, 1948, but denied payment for February 8, 1948.

POSITION OF EMPLOYEES: As indicated in the Employees' Statement of Facts, Signal Station No. 15 is open and in operation around the clock; three shifts of eight hours each protect the service and on the dates of this claim two

Rule 13 reads as follows:

"Regularly assigned employees will not be required to perform service on other than their regular positions except in emergencies. When they are required to perform service on other than their regular positions, they will be paid the rates of the positions they fill but not less than their regular rates and in all cases will be allowed actual necessary expenses while away from their regularly assigned stations.

"In no case will less than one day's pay be allowed for each twenty-four (24) hours held out of their regular positions or away from home stations.

"Such employees will be paid at rate of fifty-five cents (55c) per hour 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 company assumes lodging expense.

"This rule shall not apply to regularly assigned relief men unless they are diverted from their regularly assigned program by orders of the Management."

This rule is applicable only to E. S. Cordon, regularly assigned leverman at Signal Station 15 from 7:15 A.M. to 3:15 P.M., who was used to perform service on position of telegrapher-leverman from 7:00 A.M. to 3:00 P.M. at the same location. Cordon is not a claimant in this case. He was paid strictly in accordance with the provisions of Rule 13 and there is no dispute in this connection. Obviously, there was no violation of this rule.

CONCLUSION: The Carrier has shown that—

1. An emergency existed when it became necessary on extremely short notice to cover the vacancy in position of telegrapher-leverman at Signal Station 15 due to illness of regularly assigned Telegrapher-leverman Maynard.
2. There were no extra men who could have covered the vacancy because of interruption in telephone communication facilities and disruption of train service, caused by severe weather conditions.
3. Violations of the Hours of Service Law would have resulted had Telegrapher-levermen Campbell and Jones been required to work 12 hours each to cover the vacancy.
4. A. Crisci had been called on previous occasions in the absence of an extra man to cover vacancies at Signal Station 15.

The Carrier has an obligation to avoid violations of the Hours of Service Law where an emergency can be met without causing such violations and with due regard to contractual relations with its employees. Under the circumstances as hereinbefore set forth, the emergency in this case was properly met with no violations of the Hours of Service Law and with no violation of any of the rules of the Telegraphers' Agreement. The claim is, therefore, without merit and should be denied.

OPINION OF BOARD: The Carrier maintains Signal Station 15, which controls movement of trains on four tracks, at Lyons, New York. The force consists of one telegrapher-leverman and one leverman on each of three eight hour tricks. On Sunday, February 8, 1948 Telegrapher-leverman Maynard, assigned 7:00 A.M. to 3:00 P.M., reported ill at 7:00 A.M. Leverman Cordon, a qualified telegrapher-leverman, assigned 7:15 A.M. to 3:15 P.M., was instructed to work Maynard's trick. Crisci, a student and qualified leverman, however not on Telegraphers' Seniority Roster, worked Cordon's assignment as leverman, and this arrangement continued for two days, February 8 and 9, 1948. The Employees made claim for the second and third trick telegrapher-levermen regularly assigned Station 15 at Lyons, New York, each for four hours' overtime on February 8 and 9, 1948.

The parties agree that an emergency existed due to telegrapher-leverman Maynard becoming ill and reporting off work on short notice. They also agree that no extra list man could be reached to cover the position on February 8, 1948. The Carrier states, that since it was not satisfied that an extra list man could not have been called to fill this vacancy on February 9, 1948, the Carrier allowed the Employees' claim for that date. The only claim before this Board is for February 8, 1948.

The Carrier states it would have been in violation of the Hours of Service Act if it used claimants for an additional four hours on each of the two days in question. Sec. 2 of the Federal Wage and Hours Act provides: "That * * * except in case of emergency, when the employes 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 one week." The Carrier cites Award No. 3609 as interpreting the Act and quotes from said award the following: "This Board has held 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." The above award can be distinguished, for in the instant case these claimants were available on call. They argue further that since Crisci, another telegrapher, was available, it would not have been within the letter of the law to require claimants to work an additional four hours. We fail to see the merit in this argument for although Crisci had worked as a telegrapher, he was not recognized as such by the Organization and his name did not appear on the Seniority Roster of the Telegraphers.

There is no question that Crisci was used as a telegrapher at Station 15 some 200 days during the years 1945, 1946, 1947, and his use was not objected to by either party. The continuing violation of existing rules does not change or diminish the binding effect of such rules. See Award No. 561. However, on January 19, 1948, General Chairman Woodman wrote to E. H. Mulligan, Chief Signalman, N.Y.C. R.R. at Syracuse, stating that only employes whose names appear on the Telegraphers' Seniority Roster have the right to work any position on the Syracuse Division, and their use was in violation of the Agreement. Crisci was not on the Telegraphers' Seniority Roster on February 8, and said letter should have put the Carrier on notice that to use Crisci was a violation of the Agreement. The fact that the Employes had agreed to the use of Crisci in the past has no bearing, especially where the Carrier was given notice that his use in the future would be considered a violation.

It is the opinion of this Board that the use of Crisci allowed Cordon to fill Maynard's vacancy, and his use was in violation of the Scope Rule of the Agreement; that the Carrier could have called the claimants to fill Maynard's vacancy; and that their use would not have been in violation of the Hours of Service Law.

The Organization claims pay at the premium rate. The Board has consistently held that penalty awards, such as in this case, shall be at pro rata rate. Awards Nos. 3193, 4244, 4571. We can see no reason in the instant case to vary from this well settled rule.

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 Agreement was violated as indicated in the Opinion.

AWARD

Claim sustained for February 8, 1948 at pro rata rate.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: A. I. Tummon
Acting Secretary

Dated at Chicago, Illinois, this 23rd day of November, 1949.