

Award No. 4774
Docket No. TE-4499

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Mortimer Stone, Referee

PARTIES TO DISPUTE:

THE ORDER OF RAILROAD TELEGRAPHERS

**THE DELAWARE, LACKAWANNA AND WESTERN
RAILROAD COMPANY**

STATEMENT OF CLAIM: Claim of the General Committee of The Order of Railroad Telegraphers on the Delaware, Lackawanna and Western Railroad Company, that the Carrier violated the provisions of the Telegraphers' Agreement when and because:

1. (a) on May 21, 28 and 30 and June 4 and 11, 1947, only straight time rate was allowed to R. S. Swick who on these dates occupied the second trick clerk-operator position at Morristown ticket office;
- (b) on September 1 and 6, 1947, only straight time rate was allowed to C. Bauman who on these dates occupied the first trick towerman position at Denville;
- (c) on September 21 and 28 and October 8, 1947, only straight time rate was allowed to W. Delleria who, on these dates, occupied either the first trick towerman position or the second trick towerman position at Slateford Junction' and
2. the Carrier shall be required to pay Mr. Swick for four additional hours on each date listed in 1 (a) above; Mr. Bauman for four additional hours on each date listed in 1 (b); and Mr. Delleria for four additional hours on each date listed in 1 (c).

EMPLOYES' STATEMENT OF FACTS: Agreements bearing effective dates of May 1, 1940 and November 1, 1947 are in evidence; the November 1, 1947 Agreement supersedes the May 1, 1940 Agreement. An interim Agreement concerning rest days and holiday service, as is here involved, became effective March 1, 1945. Copies of these agreements are on file with the National Railroad Adjustment Board. The rest day and holiday agreement of March 1, 1945 is carried in the November 1, 1947 Agreement as Article 8: which rest day and holiday agreement will be referred to as Article 8 throughout this proceeding.

Mr. R. S. Swick, an extra employe, was instructed to occupy the second trick clerk-operator position at Morristown beginning May 21, 1947 and to continue thereon until further advised. Mr. Swick continued on the position as an extra employe continuously until June 17, 1947, at which time he was regularly assigned to it by virtue of an advertising bulletin and his application therefor. Wednesday was the rest day assigned to said second trick position. Mr. Swick worked the job May 30 (Decoration Day) which was his right, and in the absence of a regular relief employe or an extra employe, the Car-

the extra employee to a regular employee although the extra man may work the assigned hours of the regular employee and be paid the rate of the position. The extra employee's status is not changed because of the absence of the relief employee assigned to cover the Rest Day of the regularly assigned employee when the extra employee is required to work and be paid pro rata rate be it a Sunday or Holiday.

Under Article 1, Section 1(b) all the extra man is entitled to is the pro rata rate and there is no other provision under the Rest Day Rule.

The request made by the Organization to the Carrier to accord an extra employee the same status of a regular employee for the purpose of paying the extra employee time and one-half for Sunday and Holiday work is an acknowledgment that the Organization clearly understands that no contractual right presently obtains and the Organization is therefore attempting to have the Board rewrite the rule. Your Board is without authority to take such action, and has so ruled in numerous awards.

Claim should be denied for the following reasons:

- (1) Extra board employee W. Delleria was correctly compensated for service performed on September 21 and 28 and October 8, 1947.
- (2) Under Rule 18 of the Agreement of May 1, 1940, he was the senior qualified extra employee available and was entitled to the work at straight time rate.
- (3) Delleria was not the regular assigned incumbent of the positions at Slateford Tower on September 21, 28 and October 8, 1947. Delleria was working in the capacity of an extra employee entitled to work under specific rules which provide for straight time compensation for extra employees.
- (4) There is no provision in the agreement of November 20, 1946, that changes the status of an extra employee to that of a regular employee.
- (5) The National Railroad Adjustment Board is without authority to legislate a rule into the agreement which the Organization unsuccessfully attempted to secure by negotiation.

(Exhibits not reproduced.)

OPINION OF BOARD: These claims were filed in behalf of three extra employees covered by the Telegraphers' Agreement who seek punitive rate instead of the straight time rate paid them for working Sundays and holidays of the seven-day positions occupied by them.

Claimant Swick was assigned to and occupied a position from May 21 to June 17, 1947, including Decoration Day and four relief days of the position.

Claimant Bauman was assigned to and occupied a position from September 1 to September 14, 1947, including one holiday and one rest day, but was relieved on the other rest day by the regular relief man.

Claimant Delleria was assigned to two positions successively and occupied those positions from September 17 to October 14, 1947, including two rest days while occupying the first position and one rest day while occupying the second.

The Organization contends that the provisions of the Rest Day Rule (now Article 8 of the Agreement) apply to extra employees, who are, therefore, entitled to the same rate as the regular employee assigned to the position. The Carrier contends (1) that the Rest Day Rule applies only to regularly assigned employees and (2) that in each case where these Claimants worked on the rest day of the position or a holiday, the Claimant was the senior extra qualified employee available and as such was entitled to the work at straight time rate.

As to the Carrier's second contention, relief positions had been created covering the rest days of each of the positions occupied by Claimants here.

On each of the rest days worked by them either the regular relief employe was not available or the relief position was unfilled. If Claimants were in fact assigned as senior qualified extra employes to protect the relief position rather than the regular position, then they were entitled only to the straight time rate. Where an extra employe is assigned to work a position for a period beginning on its rest day, in the absence of the relief man, he might well be considered as relieving the relief position rather than the regular position on that day, and it has been so held in Award 4709. But when assigned for a period beginning on any day other than the relief day, he relieves the regular occupant and takes the position subject to the assigned rest day, which normally he does not work and has no right to work. It belongs to the relief man. When the relief man is not available, the extra employe assigned to the position has only the rights of the regular employe whose position he occupies. We think these Claimants on the relief days did not relieve the relief men but the regular employes of the positions.

In determining whether the provisions of the Rest Day Rule apply to extra employes, a more difficult question is involved. We have had submitted for our guidance Award 4257 holding that under similar rule and situation an extra employe was entitled to the punitive rate for working the rest day of the position, and Award 4304, made on the property of the Carrier here contesting, holding that under like situation and the same rules, an extra employe was not entitled to the punitive rate for working a holiday. Claim to such rate for work on a holiday is based on Section 1(j) of the Rest Day Rule reading:

"Any employe occupying a position requiring a Sunday assignment of the regular week day hours required to work on any of the seven (7) holidays specified in this agreement within the hours of his regular week day assignment shall be compensated for such service at the rate of time and one-half with a minimum of eight (8) hours."

In Award 4304, the claim was denied on the ground that "extra employes do not have regular week day assignments." Claim to the punitive rate for work on a relief day is based on a part of Section 1(a) of the same Rule and interpretation of a like phrase. It seems unlikely that the scope and coverage of the entire Rest Day and Holiday Agreement was intended to be hidden in such an incidental phrase, and even if so, we cannot escape the conclusion that when an employe occupies a position, whether as a regular employe or as an extra, the regularly assigned hours of the position become the hours of his "regular week day assignment" so long as he continues on the position.

Prior to the adoption of the Rest Day Rule, former Rule 8, then governing Sunday and holiday work, applied to extra employes as well as regular. Article 1 of the present Rest Day Rule as adopted recites that "Rules governing overtime, rest days and Sunday and holiday work applicable to employes subject to the scope of Agreement * * * are hereby amended * * *." That does not indicate exclusion of extra employes. Section 1(a) reads:

"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 by giving not less than seventy-two (72) hours written notice to the employe affected. If such employe is required to work on his assigned rest day within the hours of his regular week day assignment, he shall be compensated for such service at the rate of time and one-half with a minimum of eight (8) hours. When the rest day is not Sunday, work on Sunday will be paid for at straight time rates."

Extra employes are not there excluded as such. "An employe" must include an extra employe as much as a regular employe. We think the intended limitation and exclusion of application of the Rule is expressed in that first sentence of the Section, by the phrase "one (1) rest day without pay in each consecutive period of seven (7) days." Where an employe does not occupy

a position for a "consecutive period of seven (7) days", Section 1(a) does not apply to him. Where he does so occupy it, we think Section 1(a) does apply, and the term "such employe" in the second sentence following must include any employe who has occupied the described type of position for a consecutive period of seven (7) days" whether regularly assigned or an extra. Since each of the three Claimants now before us occupied such positions for more than seven consecutive days, we think they were entitled to the time and one-half rate as provided in the Rule.

Claim for time and one-half rate for work on holidays must depend on Section 1(j) already quoted and by the same reasoning we think the claims here involving holiday work to be supported by the 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.

AWARD

Claims 1 (a), (b) and (c) and Claim 2 sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: A. I. Tummon
Acting Secretary

Dated at Chicago, Illinois, this 21st day of March, 1950.