Award No. 5048
Docket No. TE-4833

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Peter M. Kelliher, 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 & Western Railroad Company that J. J. Healy, regularly assigned Towerman East Secaucus Tower, who was required by the Carrier to vacate his regular position to perform service at Terminal Tower, Hoboken, New Jersey, July 19 through July 28, 1946, August 15 through September 3, 1946, and September 5 through September 15, 1946, shall be compensated at time and one-half rate of his regular position for each hour he performed service at Terminal Tower, Hoboken, outside of his regularly assigned hours at East Secaucus Tower, plus straight time rate for each hour he was suspended from his regular position, less compensation previously allowed, not including any allowances made pursuant to the provisions of Rule 15(a).

EMPLOYES' STATEMENT OF FACTS: An Agreement by and between the parties bearing effective date of May 1, 1940, and referred to herein as the Telegraphers' Agreement, is in evidence; copies are on file with the National Railroad Adjustment Board.

On the dates involved in this claim, J. J. Healy was regularly assigned as towerman at East Secaucus Tower. During July his assignment was 7:00 A.M. to 3:00 P.M. and during August and September his assignment was 4:00 A.M. to 12:00 Noon.

Between July 19, 1946 and September 15, 1946 Mr. Healy was required by the Carrier to vacate his regular position to perform relief work in the Terminal Tower, Hoboken, as follows:

July 19 to 24, inclusive, relieved Towerman Regan—6 days vacation—Hours 11:00 P.M. to 8:00 A.M.

July 25 to 28, inclusive, relieved Towerman Byrnes—2 days vacation and two additional days—hours 2:00 P.M. to 10:00 P.M. The two additional days Byrnes was relieving Towerman Brown.

August 15 to 28, inclusive, relieved Towerman May—9 days vacation and five additional days—hours 6:00 A.M. to 2:00 P.M. The five additional days May was relieving Towerman Murray.

August 29 to September 3, inclusive, relieved Towerman Byrnes—5 days vacation and one additional day—Hours 2:00 P.M. to 10:00 P.M.

(2) There was no violation of the agreement because the practice in 1946 was identical to that which had been permitted and acquiesced in since 1942 when the Vacation Agreement of 1941 was placed in effect.

OPINION OF BOARD: Towerman J. J. Healy was regularly assigned at East Secaucus Tower. He was required to vacate his regular position to perform services at Terminal Tower, Hoboken, New Jersey, July 19 through July 28, 1946, August 15 through September 3, 1946, and September 5 through September 15, 1946. The claim is that he be compensated at the time and one-half rate of his regular position for each hour he performed service at Terminal Tower, Hoboken, outside of his regularly assigned hours at East Secaucus Tower, plus straight time rate for each hour he was suspended from his regular position, less compensation previously allowed, not including any allowances made pursuant to the provisions of Rule 15(a).

The Board must find that the claimant was required to perform "relief work" under circumstances that did not constitute an "emergency" under Rule 15(a). The relief of other employes for vacations is not an emergency because the vacation period is from January 1 to December 31, and the Carrier should have been able to plan and properly schedule vacation relief. Adequate arrangements should have been made to qualify an employe to take over the work during vacations at this most important tower on its line.

The defense of the Carrier is that it acted under the terms of Article VI of the Vacation Agreement as interpreted by Referee Morse. It is clear, however, from an examination of the Vacation Agreement and the interpretation of Referee Morse, that it was understood that where there was a conflict between the existing Rules and the Vacation Agreement, the Rules were to be controlling and were to continue in effect until changed by negotiation. No evidence was adduced to show that the pertinent Rules were ever so modified. The Board has considered this problem in several Awards and has consistently upheld this interpretation. See Awards 2340, 2484, 2537, 3049, 3733, 4626, and 4690.

This dispute directly involves the interpretation of the Rules and Working Conditions of the May 1, 1940 Agreement and is properly before this Board. No controversy exists, therefore, which arises out of the interpretation and application of the Vacation Agreement, and the matter is now properly before the Board. See Awards 2340 and 2484.

With reference to the claim that J. J. Healy be paid the penalty rate for all hours worked outside his regular assignment for which he received the rate of the position which he filled, the Board has consistently upheld and must hold in this case that such claim for the penalty rate is denied. There being no emergency, he was properly paid the rate of the position which he filled and in addition the allowances required under Rule 15 (a). In Award 4883, the Board was required to construe similar language. The first sentence of Rule 13 in the Agreement, considered in Award 4883, contains the words "except in emergencies." Rule 15 (a), considered in this case, likewise in the first sentence, contains the words "except in case of emergency." Although no emergency existed, the Carrier assigned the claimant to perform work in a manner that should be required only in case of emeregency. The Carrier's violation in this respect cannot deprive the claimant of the allowance provided for under Rule 15 (a). The Board must find that although the language considered in the two Awards is not identical with reference particularly to the allowances for expenses and time lost in connection with the change, the purpose of both provisions are the same. In Award 4883, the Board stated:

> "There being no emergency, he was entitled to be paid the rate of the position filled, which he has received, and his actual necessary expenses as provided by Rule 13, current Agreement."

The claimant seeks and is entitled to receive the pro rata rate of pay for each hour that he was suspended from his regular position.

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

Claim sustained per Opinion and Findings.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: A. I. Tummon
Acting Secretary

Dated at Chicago, Illinois, this 17th day of October, 1950.

Dissent to Awards 5048 and 5049, Dockets TE-4833 and TE-4856

These awards err in allowing claimants the benefits provided for in Rule 15 (a) while at the same time holding no emergency (covered by Rule 15 (a)) was shown to have existed.

/s/ C. P. Dugan

/s/ A. H. Jones

/s/ R. H. Allison

/s/ C. C. Cook

/s/ J. E. Kemp