Award No. 5586
Docket No. TE-5497

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Francis J. Robertson, Referee

PARTIES TO DISPUTE:

THE ORDER OF RAILROAD TELEGRAPHERS

THE CHESAPEAKE AND OHIO RAILWAY COMPANY
(Chesapeake District)

STATEMENT OF CLAIM: Claim of the General Committee of The Order of Railroad Telegraphers on the Chesapeake & Ohio Railway; that,

(1) the Carrier violated the provisions of the Agreement between the parties when, and because, it failed and refused to compensate Telegrapher Charlotte B. Maleck at the rate of time and one-half for work performed on November 19, 1949, on swing assignment No. 1 on the Chicago Division, after having been accorded but one rest day within the period of seven; and,

(2) Telegrapher Maleck shall now be paid the difference between the straight time rate which she was paid and the rate of time and one-half which she should have been paid under the terms of the Agreement.

EMPLOYES' STATEMENT OF FACTS: An agreement bearing effective date of October 16, 1947, revised effective September 1, 1949, to include provisions of the Chicago Agreement of March 19, 1949, is in effect between the parties to this dispute.

Prior to November 19, 1949, Telegrapher Charlotte B. Maleck was regularly assigned to swing position No. 1, embracing assignments at Merrillville and Beatrice, Indiana, with rest days of Friday and Saturday. On November 15, 1949, instructions were issued under Carrier's notice No. 54, effective 7:00 A.M., November 19, 1949, by which swing position No. 1 was changed so that thereafter the rest days were Wednesday and Thursday. Under the provisions of Rule 32, Section 1(e) of the Telegraphers' Agreement, Telegrapher Maleck elected to retain her assignment on swing position No. 1.

In protecting her regular assignment, Telegrapher Maleck worked Agent-operator's position Merrillville, Sunday and Monday, November 13 and 14; second trick Beatrice, Tuesday, November 15; and second trick Merrillville, Wednesday and Thursday, November 16 and 17; and instead of being relieved on Friday and Saturday, November 18 and 19—the assigned rest days of this position—she was relieved one day only, Friday, November 18, and was then required to work on the agent-operator's position at Merrillville on Saturday, November 19, on her seventh day for which work she was paid straight time only.

Telegrapher Maleck submitted time ticket for eight hours' pay at the time and one-half rate because "worked rest day" November 19, 1949, which was declined by the Carrier. The claim was handled in the usual and regular

ber 18. Therefore, Operator Maleck did not work "in excess of forty straight time hours in any work week" as contended by the employes.

Even if Operator Maleck had worked more than forty straight time hours in her work week beginning November 13, which was not done in this case, she would have been excepted from receiving time and one-half for such time in excess of forty straight time hours as she was moving from one assignment to another as contemplated by Rule 29 (b).

Taking the instant case as an illustration—beginning November 19, 1949, Operator Maleck worked Swing (Relief) Position No. 48 and continued thereon through November 22, a period of four days, taking November 23 and 24 as rest days. Following through with the employes' contention that Operator Maleck should observe the rest days of Swing (Relief) Position No. 1, Friday and Saturday, the employes must hold that Maleck should not have been required to rest on November 23 and 24, Wednesday and Thursday. No such claim was made. Thus, the employes admit that Wednesday and Thursday are the rest days of Operator Maleck one week, but contend they are not the rest days the previous week even though working the same position. There is nothing consistent in such a position.

This case is covered by clear, understandable and unambiguous rules. The circumstances surrounding this claim are clear-cut and there is no dispute as to what occurred.

The Carrier asks your Board to consider the rules applicable in deciding this case, and on the rules alone the Carrier bases its position. In short:

1. A regular relief position was changed which constituted a new position—clearly covered by Rule 32, Section 1 (e) Paragraph 5.

2. The employee holding the changed regular relief position took the new position—Rule 32, Section 1 (e), Paragraph 5.

3. The rest days of the changed position were Friday and Saturday. The rest days on the new position were Wednesday and Thursday. The incumbent took the rest days of the new position when she worked the new position November 19, and Saturday was not one of the rest days on such position.—Rule 32, Section 1 (i).

4. The work week on the changed relief position was Sunday-Thursday (incumbent worked 40 hours). The work week on the new position was Friday-Tuesday (incumbent worked 32 hours). Therefore, incumbent did not work in excess of forty straight time hours in any work week—Rules 29 (b) and 32, Section 1 (i).

It follows that Operator Maleck did not work her rest day when she worked November 19, and that her claim should be denied.

(Exhibits not reproduced).

OPINION OF BOARD: Claimant held a relief position which was assigned to work one day at Beatrice and four days at Merrillville, Indiana, Sunday through Thursday, rest days Friday and Saturday. Effective Saturday, November 19, 1949, the hours, work days and location of that position were changed so that the assigned working days were Friday through Tuesday with Wednesday and Thursday as rest days, all at Merrillville. After working Monday through Thursday on the old assignment, Claimant worked Saturday, November 19, 1949, in accordance with the changed work days of the position and the following calendar week was given Wednesday and Thursday as rest days. Claim is made for the time and one-half rate for her work on Saturday, Carrier having allowed the pro rata rate for that day.

The Employes contend that Claimant is entitled to the penalty rate for service on Saturday, Nov. 19, under the provisions of Rule 29 (b), (c) and 32 (n) which read as follows:

Rule 29—Overtime—

"(b) Work in excess of forty straight time hours in any work week shall be paid for at one and one-half times the basic straight time rate except where such work is performed by an employe due to moving from one assignment to another or to or from an extra or furloughed list, or where days off are being accumulated under Rule 32.

"(c) Employes worked more than five days in a work week shall be paid one and one-half times the basic straight time rate for work on the sixth and seventh days of their work weeks, except where such work is performed by an employe due to moving from one assignment to another or to or from an extra or furloughed list, or where days off are being accumulated under Rule 32."

Rule 32—

"(n)—Service on Rest Days—

* * *

II Employes required to perform service on their assigned rest days within the hours of their regular week day assignment shall be paid on the following basis:

A(1) Employes occupying positions requiring a Sunday assignment of the regular week day hours shall be paid at the rate of time and one-half with a minimum of eight hours, whether the required service is on their regular positions or on other work."

The Carrier contends that under Rule 32 it gave the required 72 hours' notice for changing rest days of Claimant's position and that effective Nov. 19 she was filling a new position, consequently she was then working a regular work-day and not a rest day. Carrier cites Rule 32, Section 1 (e), Paragraph 5, in support of its position:

"Rule 32—THE FORTY-HOUR WEEK—REST DAYS—HOLIDAYS

Section 1

(e) **Regular Relief Assignments.** (paragraph 5)

Changes in the assignment of regular relief positions from those advertised will constitute a new position but the employe holding the regular relief position at time of change will have the option of retaining it or exercising displacement privileges. In the latter event, the relief position so vacated will be rebulletined. A change in the starting time of a position on which they relieve does not grant regular relief employes displacement privileges under this rule. (This sub-paragraph shall become effective after regular relief positions have been established on September 1, 1949.)"

The determination of the issue presented in this docket devolves upon the effect to be given to the quoted paragraph of Rule 32, Sec. 1(e). Obviously when an employe moves from one assignment to another in the exercise of seniority and works on the new assignment after having performed forty hours of work in the work-week on the old assignment or works a day which would have been a rest day on the old assignment, he would not be entitled to penalty pay for such work under the exception provided for in Rule 29(b) (c). However, electing to remain on a relief position when it is changed from the bulletined assignment in accordance with the right given the incumbent in Paragraph 5 of Rule 32 is not the exercise of seniority. That right of election is given because of incumbency in a given position and not because of seniority. Although Paragraph 5 of Rule 32, Sec. 1(e), initially provides that a change in the assignment of regular relief positions will constitute

a new position, the nature of that change is qualified with respect to the incumbent. The effect of the qualifying language is to permit the incumbent to elect to treat the position as a new one or as the old one as changed by the Carrier. That is evident from the language of the rule. The rule does not give the incumbent preference in bidding for the "new" position but provides that she shall retain it. Thus, some vestige of the old position must remain when the incumbent elects to remain, otherwise there would have been nothing to retain. One cannot retain that which is no longer in existence nor retain something which is newly created. We conclude, therefore, that with respect to Claimant when she elected to remain on the old position, as changed, she has not moved to a "new" assignment and hence the exception in Rule 29(b) and (c) does not apply. (See Award 5113.)

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 Carrier violated the Agreement.

AWARD

Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: A. I. Tummon
Acting Secretary

Dated at Chicago, Illinois, this 14th day of December, 1951.