Award No. 6524
Docket No. TE-6622

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

William M. Leiserson, Referee

PARTIES TO DISPUTE:

THE ORDER OF RAILROAD TELEGRAPHERS

BOSTON AND MAINE RAILROAD

STATEMENT OF CLAIM: Claim of the General Committee of The Order of Railroad Telegraphers on the Boston and Maine Railroad:

(1) That Carrier violated the terms of the agreement between the parties when it failed to use the regular occupant of the second shift train director position at Lowell Tower, Lowell, Massachusetts, J. M. Clough, to perform the service required on his position March 16 and 17, 1952, his rest days, instead of diverting the occupant of the second shift telegrapher-leverman position to perform such service.

(2) That J. M. Clough shall be compensated for March 16 and 17, 1952, on the basis of eight hours at time and one-half of the rate of his position.

EMPLOYES' STATEMENT OF FACTS: There is in full force and effect an agreement between The Order of Railroad Telegraphers, hereinafter referred to as Telegraphers or Employes, and Boston and Maine Railroad Company, hereinafter referred to as Carrier, governing pay and working conditions of employes in Station, Telegraph and Signal Tower Service. The last agreement became effective on the 1st day of August, 1950. The entire agreement is by reference included herewith, as though set out herein word for word.

J. M. Clough is second shift Train Director at Lowell Tower, Lowell, Massachusetts. His assigned work days are Tuesday, Wednesday, Thursday, Friday and Saturday. The second shift train director position has assigned hours of 3:00 P. M. to 11:00 P. M. It is a seven day a week position. Claimant's rest days are Sunday and Monday. All positions in Lowell Tower, are subject to and covered by the Agreement between Telegraphers and Carrier.

On the 16th and 17th days of March 1952, which were the regularly assigned rest days of Clough, the regular relief Train Director, was not available. Instead of calling Clough, the regular incumbent, Carrier used the regularly assigned second trick telegrapher-leverman to fill the position of Train Director and used an extra or spare employe to fill the position of second trick telegrapher-leverman for these two days.

Employes contend that Carrier violated the Agreement in failing to use Clough for the two days, for reasons set forth in the position.

tion with rest days of regular incumbent Sunday and Monday. There is a regular relief assignment which includes the second trick, Lowell Tower on Sundays and Mondays.

On Sunday and Monday, March 16 and 17, 1952, the regular relief employe was not available. There was no qualified spare employe available. Second trick Leverman E. Audibert was asked if he would like to move up and cover the train director's assignment. Audibert did so. Claim for two days at time and one-half rate was made in favor of J. M. Clough, regular five-day incumbent of the assignment, account not being permitted to work on his two rest days and declined by Carrier.

POSITION OF CARRIER: In accordance with an accepted practice of many years' staning, when a temporary vacancy occurs in an office or tower, employes in said office or tower are given the opportunity of moving up to fill preferable assignments. This practice is fully in accord with the provisions of Article 12(k) reading:

> "In offices and/or towers where two or more shifts are worked, when a temporary vacancy known to be for less than thirty (30) days, the regular employes in that office or tower will be notified thereof and if qualified will be permitted to advance to preferred shifts according to their seniority. The shift left vacant will be filled from the spare board. In the application of this rule the Railroad is not to be committed to any additional expense. Relief employes and temporarily assigned employes do not have move-up rights under this paragraph (k)".

Therefore, when it was known that the regular relief train director would be unable to cover his assignment on second trick at Lowell Tower on Sunday, March 16, 1952, Leverman Audibert was given the opportunity to move up to the second trick train director's assignment. Audibert accepted the move-up and covered the assignment on March 16 and 17, 1952.

There was no obligation, by agreement, rule or practice, to call in claimant and pay him time and one-half on these two days.

Petitioner can cite no rule to substantiate the claim in this docket, certainly none to support a claim for time and one-half, none was cited on the property, and the claim should be denied.

All data and arguments herein contained have been presented to the Employes in conference and/or correspondence.

(Exhibits not reproduced).

OPINION OF BOARD: Claimant is a regularly assigned Train Director at Lowell Tower, Mass., with rest days on Sunday and Monday. There is also a regular relief Train Director assignment, the accupant of which works on these two rest days, and apparently relieves at other towers on three additional days to make up the relief assignment of five work days. The record does not show this, however. All we know is that the occupant of the regular relief assignment "was not available" to work the Claimant's rest days on Sunday and Monday March 16 and 17.

There was no extra or furloughed employe qualified to do the Train Director's work on these two days. But there was an extra man available who was qualified as a Telegrapher-Leverman; so the Carrier "moved up" the Leverman on duty those days to work the Train Director's rest days, and then used the extra man in the Leverman's place. In doing this, the Carrier relied on Article 12(k) of the current contract between the parties, reading as follows:

> "In offices and/or towers where two or more shifts are worked, when a temporary vacancy known to be for less than thirty (30)

days, the regular employes in that office or tower will be notified thereof and if qualified will be permitted to advance to preferred shifts according to their seniority. The shift left vacant will be filled from the spare board. In the application of this rule the Railroad is not to be committed to any additional expense. Relief employes and temporarily assigned employes do not have move-up rights under this paragraph (k)."

The Employes contend that the Carrier violated Article 10, the Forty-Hour Week provisions of the Agreement, and that the above quoted Rule is not applicable to the present case for the reason that it gives no move-up rights to relief and temporarily assigned employes. As to the latter, we find no merit in the contention because the Leverman who was moved up was a regularly assigned employe, not temporary and not a relief employe. We do not understand that the Employes refer to the extra or spare man as "moving up" when he worked in the place of the Leverman.

But while the reason given by the Employes for inapplicability of the rule was wrong, it is nevertheless true that Rule 12 (k) is not applicable for other reasons. The fact is that the Leverman was not moved up to the Relief Train Director's "preferred shift" as the Rule provides. All he did so far as the record shows, was to relieve on two of the five work days of the relief Train Director's assignment. He did not fill the vacant assignment, included three other work days, and we do not know whether these were vacant or not. The plain intent of the Rule is to give the employes in an office or tower an opportunity to exercise their seniority to move up to a shift that they prefer, either because it pays more, or because they consider the working hours or some other condition more preferable.

Moreover, there is no evidence that the Carrier notified the regular employes of a temporarily vacant shift, as the Rule requires; instead, the following order is in evidence, dated March 15:

"ACCOUNT R. J. COUGHLIN NOT AVAILABLE NOTIFY WETHERBEE COVER SECOND LEVER SUNDAY AND MONDAY, AUDIBERT COVER THE DIRECTOR'S JOB."

Audibert was the man "moved up" and Wetherbee was apparently the extra man. There is nothing in the rule that indicates either that it was intended to be used to relieve absences on only a portion of an assignment, or to authorize the Carrier to order an employe to "move up" on such days. Nor does the fact that the employe may not have objected to the order change the Rule. In Award 5475 where a similar rule was involved, and where neither the regular occupant of the relief position nor an extra man was available, the Division sustained the claim, saying:

"The day involved was a rest day of Claimant's position even though it was part of the work of a regularly assigned relief man." (Emphasis added).

For these reasons we cannot accept the Carrier's contention that Rule 12(k) authorized moving up the Leverman to work the Claimant's rest days, which were also part of the regular relief assignment. The issue is, therefore, whether the rules governing the Forty-Hour Work Week were violated, as the Employes charge, or whether none of these rules require that the regular man shall be used on his assigned rest days when both the occupant of the relief assignment and an extra man are not available, as the Carrier holds. It argues: "There was no obligation, by agreement, rule or practice, to call in Claimant and pay him time and one-half on these two days."

The Employes are clearly wrong in citing paragraph (k) of Article 10 as one of the Rules violated. This Rule provides for work on days that are "not a part of any assignment", and here the two days claimed were a part of the regular relief assignment, as well as the assigned rest days

of Claimant's assignment. But the Employes are not wrong in contending that otherwise Article 10, in providing for the Forty-Hour Work Week, requires the regular rest days to be worked in the following order:

First: By the regularly assigned rest day relief employes, if any.

Second: By a qualified extra employe, if any.

Third: By the regular occupant.

In Award 5475, this Division stated:

> "The rule is firmly established by a long list of Awards that work on rest days should be assigned in the first instance to the regularly assigned relief man, if there be such; secondly, to an extra man; and if an extra man is not available, to the regular occupant of the position on an overtime basis. Awards 4728, 4815, 5333."

Thus, clearly, the Forty-Hour provisions in Article 10 as they relate to assigned days have been held by this Division to support the position of the Employes. Moreover, in the case which resulted in Award 5475, the Carrier there involved argued, as does the Carrier here, that there was no provision in the Forty-Hour Agreement that required the use of the regular employe when neither a regular relief man nor an extra man was available.

We conclude, therefore, that the use of a Leverman, under Article 12(k), to work the rest days of the Claimant when the regular relief man was not available and there was no qualified extra man, violated the provisions of Article 10, and the claim must therefore be sustained.

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 the Agreement was violated.

AWARD

Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: (Sgd.) A. Ivan Tummon
Secretary

Dated at Chicago, Illinois, this 24th day of March, 1954.

DISSENT TO AWARD 6524, DOCKET TE-6622

The Referee states that the "40-Hour Week Agreement" required the Carrier to use Claimant to work on his rest days when the occupant of the regular relief assignment was not available on those days. It is significant

to note that he is unable to cite any particular rule of that agreement which so provides. This is not surprising, however, since there is no rule of the 40-Hour Week Agreement which requires (or even deals with the subject of) the use of a regularly assigned employe on his rest days to fill a vacancy in another job assigned to work on those days. The method by which temporary vacancies in regular assignments shall be filled is covered—if dealt with at all—by rules of the basic agreement, not the 40-Hour Week Agreement. The Referee cites Award 5475 in the apparent hope that it will fill the gap, as authority for his conclusion, left by the absence of any rule in the 40-Hour Week Agreement governing this subject. Award 5475 is based upon awards made **prior** to the advent of the 40-hour week, and thus obviously is founded upon rules of the basic agreement in effect before the 40-Hour Week Agreement was adopted. The attempt of the Referee to support the award in this present case upon the 40-Hour Week Agreement ends, therefore, in failure.

There is a clear, unambiguous provision of the basic agreement which governs the filling of temporary vacancies in regular assignments—Article 12(k). That rule provides, in effect, that when a "temporary vacancy known to be for less than thirty (30) days" exists, regular employes in the same office or tower will be permitted to advance to fill the vacancy in accordance with their seniority. The Referee finds that this rule is not applicable here for a reason which is obviously manufactured for the occasion that, were it not so clearly stated, we would find it hard to believe that he had so intended. The Referee states his reason for holding Article 12(k) inapplicable in this way:

> "The fact is that the Leverman was not moved up to the Relief Train Director's 'preferred shift' as the Rule provides. All he did so far as the record shows, was to relieve on two of the five work days of the relief Train Director's assignment. He did not **fill** the vacant assignment, for as explained above the assignment included three other work days, and we do not know whether these were vacant or not."

In other words, the Referee says that since the vacancy in the Relief Train Director's job only existed for two days (as the record shows was the case) instead of a full five days, the rule does not apply. Stated differently, he says the rule only applies if a temporary vacancy lasts for at least five days. While the Referee is apparently unaware of any obligation on his part to give effect to the language of the agreement, this Board is required to apply that language—not change it. Article 12(k) applies to vacancies of less than "thirty days." The vacancy in this case was two days. It seems unnecessary to point out two is "less than thirty." To change this rule to read "temporary vacancies known to be for **five or more but** less than thirty days"—as the Referee has done—is not within the power of this Board.

We dissent.

/s/ C. P. Dugan

/s/ R. M. Butler

/s/ W. H. Castle

/s/ E. T. Horsley

/s/ J. E. Kemp