Award No. 7391
Docket No. TE-7219

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

H. Raymond Cluster, Referee

PARTIES TO DISPUTE:

THE ORDER OF RAILROAD TELEGRAPHERS

ELGIN, JOLIET AND EASTERN RAILWAY COMPANY

STATEMENT OF CLAIM: Claim of the General Committee of The Order of Railroad Telegraphers on the Elgin, Joliet and Eastern Railway, that:

(a) The Carrier violated the provisions of the agreement between the parties when it failed and refused to compensate telegrapher R. A. Worthington on the basis of time and one-half, eight hours each day, for service performed June 27-28, 1952, account these two days being the rest days of the position which he had filled for the five days previous.

(b) The Carrier now be required to compensate R. A. Worthington for the difference between eight hours at straight time rate and eight hours at the time and one-half rate each day for the service performed on June 27 and June 28, 1952.

EMPLOYES' STATEMENT OF FACTS: R. A. Worthington was an extra employe on the dates involved in this claim. He performed relief or extra work on the third trick position at Van Loon commencing Sunday June 22, 1952, working five consecutive days, June 22 to June 26, inclusive. On Thursday, June 26, claimant was advised by the Chief Dispatcher that commencing Friday, June 27th, he would relieve on regular relief position No. 18 which also worked at Van Loon. Claimant worked Friday, June 27, continuing on position No. 18 through Tuesday, July 1st, a period of five days, making twelve days of continuous service without a rest day.

June 27 and 28 were the regular assigned rest days for the third trick position at Van Loon. Worthington was required to work these two rest days on position No. 18.

The rules of the agreement provide for payment on the basis of time and one-half rate for service performed on rest days.

POSITION OF EMPLOYES: There is an agreement between the parties with effective date of September 1, 1949, and Supplements thereto, which are on file with the Third Division:

The rules and agreements which concern this claim are as follows:

the circumstances and conditions of work on the third trick position at Van Loon no longer were applicable to Claimant's employment. Accordingly, the work performed on Friday, June 27 and Saturday, June 28, 1952, was not performed on rest days of the third trick position at Van Loon, but rather was performed on normal work days of the assignment of relief position No. 18. The question whether Claimant might be required to work the sixth and seventh consecutive days at the straight time rate under these circumastnces is answered by reference to the remaining language in the agreement of July 8, 1949, which provides that an extra employe will work on the regular work days of a temporary vacancy on a regular positon at the **straight time rate** for each day except the rest days of the assignment which he is working, as long as the vacancy continues to exist, **even** if this results in his working in excess of forty hours in a calendar week and **even** if there is another extra employe who has worked less than forty hours in that calendar week.

The language of this agreement could not be made to state more plainly the intention of the parties to provide that an extra employe might be used without penalty exactly as Claimant was in the situation which led to the claim in this dispute. The Carrier is of the opinion that the existence of the agreement of July 8, 1949, clearly warranted the procedure followed by the Chief Dispatcher and that there was neither a violation of the agreement nor an occasion for Claimant to consider himself abused.

In view of the foregoing, the Carrier submits that the Board should deny the claim in this case as being unwarranted when the applicable rules are applied to the facts and circumstances.

All material data appearing herein have been discussed with the Organization either in conference or in correspondence.

OPINION OF BOARD: The facts here are undisputed. Claimant was an extra employe. He was assigned to work as a vacation relief telegraph operator on the regular 12 midnight to 8 A. M. position with rest days of Friday and Saturday at Van Loon, Indiana, commencing Sunday, June 22, 1952. He worked this position on Sunday, the 22nd, Monday the 23rd, Tuesday the 24th, Wednesday the 25th and Thursday the 26th, while regular incumbent of the position was absent on vacation. On Thursday, June 26, Claimant was advised that commencing Friday, June 27, he would provide vacation relief on regularly assigned relief position No. 18, with rest days of Wednesday and Thursday, also at Van Loon. Claimant worked on relief position No. 18 for five consecutive days beginning on Friday the 27th, and was paid at the straight time rate for each of these days.

Claimant contends that June 27 and June 28 were the rest days for the regular midnight to 8 A. M. position and that he is entitled to be paid at time and one-half for work done on rest days under the applicable Agreement rules. The rules which are involved in the claim are as follows:

"ARTICLE 3

"Hours of Service

"* * *

"(c) Except as otherwise provided in this agreement, time worked in excess of eight (8) hours exclusive of meal period on any day shall be considered overtime and paid for on the actual minute basis at time and one-half rate.

"Work in excess of 40 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 paragraph (g) of Section 1 of Article 17.

"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 paragraph (g) of Section 1 of Article 17.

"There shall be no overtime on overtime; neither shall overtime hours paid for, other than hours not in excess of eight paid for at overtime rates on holidays or for changing shifts, be utilized in computing the 40 hours per week, nor shall time paid for in the nature of arbitraries or special allowances such as attending court, deadheading, travel time, etc., be utilized for this purpose, except when such payments apply during assigned working hours in lieu of pay for such hours, or where such time is now included under existing rules in computations leading to overtime.

"ARTICLE 17

The 40-Hour Week—Rest Days—Sundays—Holidays

"Section 1. Establishment of Shorter Work Week.

"(a) General

"The Carrier will establish, effective September 1st, 1949, for all employes, subject to the exceptions contained in this Article 17, a work week of 40 hours, consisting of five days of eight hours each, with two consecutive days off in each seven; the work weeks may be staggered in accordance with the carrier's operational requirements; so far as practicable the days off shall be Saturday and Sunday. The foregoing work week rule is subject to the provisions of this Article 17 which follows:

"* * *

"(h) Rest Days of Extra Employes

"To the extent extra or furloughed men may be utilized under this agreement, their days off need not be consecutive; however, if they take the assignment of a regular employe they will have as their days off the regular days off of that assignment.

"MEMORANDUM OF AGREEMENT BY AND BETWEEN THE ELGIN, JOLIET AND EASTERN RAILWAY COMPANY AND THE ORDER OF RAILROAD TELEGRAPHERS.

"It is agreed by and between the Elgin, Joliet and Eastern Railway Company and the Order of Railroad Telegraphers that with respect to Article 17, Section 1, paragraph (h) of the Telegraphers' Agreement, effective September 1, 1949, it is understood and agreed that:

" 'Extra employes assigned to fill a temporary vacancy on a regular position will take the status as to work week, compensation, and rest days of the employe they are relieving, and will work on the regular work days of such vacancy at straight time rate for each day, other than the

rest days of the assignment, as long as said vacancy exists, even if same results in such extra employe working in excess of forty (40) hours in a calendar week and even if there may be another extra employe who works less than forty (40) hours in that calendar week.' "

It must be noted at the outset that the application of provisions similar to Articles 3 and 17 above to factual situations similar to the one in this case, has been the subject of a number of Awards of this Division. These Awards leave little doubt that under those rules "an extra employe who works all five days of the work week of a regular assigned employe is entitled to the two rest days incidental to that work week, and, if he is required to work on the rest days thereof, he is entitled to be paid for rest day work, namely, the time and one-half rate." Award No. 6970. Thus, in the absence of anything more, it would appear that the claim should be sustained.

However, the Memorandum of Agreement cited above is unique to these parties and was not present in the consideration of any previous Award. The question is whether the provisions of this Memorandum should lead us to a different result in this case. Carrier contends that the Memorandum deals explicitly with the situation in this case and authorizes the use of Claimant as he was used here without penalty pay. Essentially, Carrier's argument is that the Memorandum requires an extra employe assigned to fill a temporary vacancy on a regular position to take the status as to work week, compensation and rest days of the employe he relieved. Thus when Claimant relieved on the third trick position at Van Loon, his rest days were Friday and Saturday; and had he continued on that position after Thursday, Carrier would have had to let him off on those days or pay him time and one-half. But, says Carrier, he did not continue; he was transferred to another position on Friday, lost the rest days and other attributes of the former position at that time, and took on the rest days and other attributes of his new position. The work performed on Friday and Saturday therefore, was not performed on rest days but on normal working days of the newly assigned position.

The trouble with this argument is that it is precisely the same as has been previously rejected in a number of prior Awards including 6970, quoted above. The Memorandum, up to the clause beginning with the words "even if", merely restates in an amplified form the second clause of Article 17(h); and it was under clauses similar to 17(h) that this argument was made and rejected in other Awards. Just as the "assignment of a regular employe" has been held to include the rest days thereof under 17(h) where the extra employe has worked the full five work days of the assignment, so the "temporary vacancy on a regular position" under the Memorandum includes the rest days of the regular position where the extra employe has worked the full five work days of that position. The fact that the Memorandum uses the word "vacancy", whereas 17(h) uses the word "assignment", and previous Awards have discussed the problem in terms of what constitutes an assignment, cannot obscure the fact that the principle involved is precisely the same.

If there is any language in the Memorandum which might at first glance appear to change the result intended by 17(h), it is the last clause. But uopn close examination, it is seen that this deals with how many hours an extra employe may work in a **calendar** week, not in a work week. Under this clause, as under the prior Awards of this Division, it is possible for an extra employe to work more than forty hours in a calendar week without premium pay, if he works less than the full work week of one regular assignment and then begins another. But there is nothing in this clause which provides for an extra employe to work more than forty hours in a **work** week at straight time pay.

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.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: A. Ivan Tummon
Executive Secretary

Dated at Chicago, Illinois this 27th day of July, 1956.