Award No. 7716
Docket No. TE-7183

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

H. Raymond Cluster, Referee

PARTIES TO DISPUTE:

THE ORDER OF RAILROAD TELEGRAPHERS

MISSOURI PACIFIC RAILROAD COMPANY—GULF DISTRICT
(Formerly Missouri Pacific Lines in Texas and Louisiana)

STATEMENT OF CLAIM: Claim of the General Committee of The Order of Railroad Telegraphers on the Missouri Pacific Lines (In Texas and Louisiana), Guy A. Thompson, Trustee:

(1) That Carrier violated the Agreement between the parties hereto, when commencing on the 3rd day of January and continuing through the 27th day of April, 1953, it failed and refused to place G. E. McCord on the position of First Shift Telegrapher-Clerk, San Benito, Texas, to which he was regularly assigned.

(2) That Carrier shall be required to compensate G. E. McCord in the sum of $730.70, the difference between amount earned as First Shift Telegrapher, Harlingen Yard, and what he would have earned had he been placed on position to which entitled.

EMPLOYES' STATEMENT OF FACTS: There is in full force and effect an agreement between Missouri Pacific Lines (In Texas and Louisiana), hereinafter called Company or Carrier and The Order of Railroad Telegraphers, hereinafter referred to as Employes or Telegraphers. The agreement became effective on March 1, 1952. A copy of said agreement is on file with the Third Division, National Railroad Adjustment Board and is, by reference, included herewith as though set out herein word for word.

The dispute involves failure of Carrier to place G. E. McCord, an employe covered by said agreement and entitled to all the rights and benefits provided therein, on a position to which he was duly assigned, at the time and in the manner provided in said agreement. The dispute was handled on the property in the usual manner, and in conformity with the Railway Labor Act, as amended and including the highest official designated by Carrier to handle such disputes and although sincere effort was made by the Employes to effect amicable settlement, the claim was denied. The dispute, having been handled in conformity with law, made and provided in such cases, is properly submitted to this Division for decision.

Prior to December 26, 1952, A. J. Hill, the regularly assigned occupant of the first shift telegrapher-clerk position at San Benito, Texas, became ill. Since his absence, due to such illness, was indefinite (expected to be for

Should your Board find itself persuaded that claimant is entitled to payment for the rest days not worked we direct attention to the previous rulings of the Board to the effect that overtime (time and one-half) rate is not applicable where service is not in fact performed; that in such instances the straight-time rate only is applicable. For just a few of the numerous Awards adhering to and applying to that rule we cite the following Awards: 6730, 6019, 5939, 5929, 5419, 4962, (Parker); 6158 (Jasper); 5049 (Kelliher); 3955, 4244, 5176 (Carter); 5261, 5267, 5333 (Robertson); 5967 (Douglas); 5831, 5898 (Daugherty); 5142 (Coffey); 5950 (Guthrie); 6262 (Wenke).

The substance of matters contained herein has previously been discussed in correspondence and/or conference by the parties.

(Exhibits not reproduced.)

OPINION OF BOARD: This case involves the interpretation of that part of Rule 20 (g) of the Agreement which reads as follows:

> "Temporary positions or vacancies of thirty (30) day or more, shall be bulletined five (5) days and filled within ten (10) days from the date of bulletin, employes not placed within the ten day limit shall thereafter be compensated at the regular rate of the position to which entitled, plus necessary expenses."

On December 26, 1952, Carrier bulletined a temporary vacancy in position of telegrapher-clerk at San Benito, Texas. Claimant, who lived at San Benito, was regularly assigned to a telegrapher position at Harlingen Yard, 6.6 miles from San Benito, which paid 9½¢ per hour more than the advertised position. He bid on the telegrapher-clerk position and it was awarded to him on December 31, 1952; however, he was not placed on his new position until April 28, 1953. During this period, he continued to work at Harlingen Yard and was paid the rate of his position there, in addition to automobile mileage for the distance from San Benito to Harlingen Yard and the cost of his daily lunch.

Claimant contends that under Rule 20 (g), he is entitled to be paid the difference between the amount he actually earned at Harlingen Yard between January 3, 1953 and April 28, 1953, and the amount he would have earned during that same period if he had been placed on the telegrapher-clerk position at San Benito. The incumbent of that position worked and received pay at time and one-half for all Saturdays and Sundays during that period and it is this rest day pay which is the actual subject of dispute in the claim.

Carrier contends that under Rule 20 (g), the correct payment to which Claimant was entitled for the period in question was the regular rate for assigned work days of the position at San Benito, exclusive of any payment for work on rest days. However, since the San Benito rate was less than the rate of the Harlingen Yard position which Claimant actually worked, Carrier paid Claimant the higher rate.

The case turns upon the proper interpretation of the phrase "regular rate" as used in Rule 20 (g). The record shows that under Rule 3 (h) of the 1940 Agreement, which preceded the current one, employes were to be placed on temporary positions or vacancies within ten days, but no penalty was provided if this was not done. However, Rule 3 (e) of the 1940 Agreement provided as to permanent vacancies and new positions that "when an employe bids in a vacancy and is not placed within 30 days he shall be paid at the rate of position bid in, and resulting necessary expenses for each day held from newly assigned positions, in excess of thirty (30) day after position is bulletined."

The record shows that an employe was held off of a temporary position for more than ten days in 1946 and filed a claim under the old Agreement. Although there was no penalty provision with regard to temporary positions

or vacancies, Carrier applied the principle of penalty payment provided in the Agreement as to permanent positions and vacancies, and paid the Claimant in that incident at the rate of the job on which he should have been placed, including pay for rest day work which was actually performed by the incumbent of that position, and paid for at time and one-half, during the time that the job rightfully belonged to the Claimant. Thus, in the only instance of interpretation of Rule 3 (e) of the old Agreement which appears in the record, the parties interpreted the phrase "the rate of position bid in" as including time and one-half pay for rest day work actually performed on that position.

In the current Agreement, effective March 1, 1952, old Rule 3(e) now appears intact as Rule 20(b). Rule 3(h) appears now as Rule 20(g), but has been changed by the addition of the specific penalty provision cited at the beginning of the Opinion. Carrier contends that this penalty provision providing for pay at the "regular" rate clearly eliminates any right of Claimant to payment for rest day work performed by the incumbent of the San Benito position. It cites in support of this contention Award No. 4515 of this Division which was handed down prior to the negotiation of the current Agreement. In that award, the factual situation was similar to the one in the instant case, and the rule involved read as follows:

> "'A successful applicant shall be placed on his newly assigned position within thirty (30) days from the date of the assignment notice, or be compensated thereafter on the basis of the established rate of either that position or the position on which he works, whichever rate is the greater, and in addition thereto an expense allowance of two dollars ($2.00) per calendar day.'"

The Claimant there was held on his old job, was paid at the rate of the old job which was greater than the rate of his newly acquired position, and was also paid $2.00 per day. He claimed overtime pay for rest day work which was actually performed by the employe on his new position during the period while he was held off. The Division held that the "established rate" did not include pay for rest day work, and denied the claim.

We think that the discussion of the meaning of "established rate" in Award 4515 is equally applicable to the phrase "regular rate" here; and that the decision there requires a holding in this case that pay for the rest day work is not included in the "regular rate." We are convinced that this is the correct interpretation of the rule by the fact that to hold otherwise would be to hold that the word "regular" in Rule 20(g) has no meaning and was inserted in that rule for no purpose. The parties already had Rule 3(e) in their old agreement which used the word "rate" alone, and had interpreted that rule to include the type of payment which is claimed here. When they negotiated the current Agreement and added a penalty provision to the rule covering temporary assignments, they could very well have used this same language. Instead, they added the word "regular" to the penalty provision in Rule 20(g), while they carried Rule 3(e) forward into the new agreement without change as Rule 20(b). We must assume that the parties intended some other meaning for the phrase "regular rate" than they intended for the single word "rate" as used in Rule 20(b); otherwise, they would not have added the word. Since the word was added, and now appears in the rule, it must be given meaning; we feel that "regular rate" as used here is essentially the same as "established rate" as used in the rule in Award 4515 and that the ruling in that case governs here.

FINDINGS: The Third Division of the Adjustment Board, after giving the parties to this dipsute 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 not violated.

AWARD

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: A. Ivan Tummon
Executive Secretary

Dated at Chicago, Illinois, this 25th day of February, 1957.