

Award No. 8766
Docket No. TE-8075

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Donald F. McMahon, Referee

PARTIES TO DISPUTE:

THE ORDER OF RAILROAD TELEGRAPHERS

THE PENNSYLVANIA RAILROAD COMPANY

STATEMENT OF CLAIM: SUSQUEHANNA DIVISION — DOCKET No 5. Time card from W. A. TREDINNICK, Block Operator, claiming eight hours penalty May 21 and 22, 1954, account available and not called on these dates. Regulation 5-G-1 (i). Also on May 14, 1954.

EMPLOYEES' STATEMENT OF FACTS: Claimant W. A. Tredinnick is regular assigned Block Operator at Hunlock (Pa.) Block Station, tour 11 P.M. to 7 A.M., rest days Friday and Saturday. The rest days of this position are covered by a regular relief assignment. On Friday May 14 and Friday, May 21, 1954, J. P. Herron, the regular assigned relief employee for these days was on vacation. There were no extra employees available to work the third trick position at Hunlock on W. A. Tredinnick's rest days. In the absence of the regular relief employee or an extra employee to work this assignment on Friday May 14 and Friday May 21, 1954, the claimant, W. A. Tredinnick, was entitled to work his rest days at time and one-half rate.

Instead of using the claimant, the Carrier diverted G. A. Roche, a regularly assigned employee at Watkins Glen, from his regular position and required him to work at Hunlock on the third trick on Friday, May 14 and 21, 1954 vice the claimant who was available.

On Saturdays on the third trick at Hunlock, the second rest day of the claimant, the position was regularly filled by relief assignment No. 5, held by E. C. Zekanis. However, Zekanis was absent from May 20 until May 23, 1954 and P. W. Bankus was diverted from his regular position on the third trick at Kendal Block Station and required to work the May 22nd rest day of W. A. Tredinnick at Hunlock. The diversion of forces on rest days is a violation of the applicable Agreement. As there were no regular relief or extra employees to cover the claimant's position on this rest day claimant was entitled to work Saturday May 22, 1954 on his regular position at time and one-half rate of pay as provided for in Regulation 4-J-1.

POSITION OF EMPLOYEES: The governing Agreement between the parties as to Regulations effective September 1, 1949 and as to rates of pay

OPINION OF BOARD: Claimant herein named is the regular assigned operator at Hunlock Block Station, with rest days on Friday and Saturday, and in compliance with the 40 hour week law requirements Carrier had provided relief assignments.

On May 14, 21 and 22, 1954, all regular rest days of Claimant, Carrier assigned operators to his position on such days, but it is contended such operators were not proper relief operators, and that no proper relief operators were available. Carrier should have used Claimant, for which he is claiming pay at the penalty rate. Claimant relies on the provisions of Regulation 5-G-1 (i) of the effective Agreement to support the claim, as follows:

"Where work is required to be performed on a day which is not a part of any assignment, it may be performed by an available extra or unassigned employee who will otherwise not have 40 hours of work that week, in all other cases by the regular employee."

Carrier contends that the operators used on Claimant's rest days as involved here, were properly assigned and used when the regular assigned relief-operators were not available for duty.

On September 24, 1954, the parties executed a Joint Statement of Agreed Upon Facts, and also each of the parties, in addition set out their position in relation to the agreed upon facts. Carrier relies upon the provisions of Regulation 4-M-1 and 5-C-1. See record.

The Board concludes that the operators used by Carrier to fill the relief assignments here involved were improper. The record shows clearly that the regular assigned relief operators were not available to fill the relief position of Claimant, nor were there any qualified extra operators on the Division who were available to be used.

Regulation 4-M-1, has no application to the claim before us, and the substance of this rule has no bearing on the position of the Claimant here. Regulation 5-C-1 does not permit Carrier to use employees from an office different from the one in which the vacancy occurs.

Carrier has violated the agreement as alleged by the organization. This Board has consistently held in numerous cases that are similar to the one before us that the punitive rate of pay will not be allowed, unless the work claimed is in fact performed. Claimant is only entitled to pay herein at the pro rata rate.

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 Employees involved in this dispute are respectively Carrier and Employees 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 provisions of the Agreement were violated.

AWARD

Claim sustained as per Opinion and Findings.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: A. Ivan Tummon
Executive Secretary

Dated at Chicago, Illinois, this 8th day of April, 1959.

DISSENT TO AWARD 8766, DOCKET TE-8075

In this Award the majority compounds error upon error.

This claim was that Claimant should have been used to work on the days off or rest days assigned his position. The majority finds, and could do no other, that the Claimant relied on Regulation 5-G-1 (i), which is quoted in the Opinion, to support his claim. Significantly, however, the majority completely failed to rule on the direct applicability of this regulation to the facts, for if it had it would have found that the Claimant had no claim whatever thereunder. The facts are not disputed. The days off assigned Claimant's position are a part of regular relief assignments established pursuant to the appropriate Agreement provision and, on the dates in question in addition to others, the regular relief employees were temporarily absent. **The days off assigned Claimant's position, being a part of regular relief assignments, were assigned days, not unassigned days or days not a part of any assignment.** Should, as here, the regular relief employees be absent, the result is a temporary vacancy, the same as may exist on any position and the filling of such vacancies in regular relief assignments **is not** subject to Regulation 5-G-1 (i). **Awards 7176, 7298.** This in itself warranted denial of the claim.

The majority further errs by concluding that the Carrier violated the Agreement on the basis Regulation 4-M-1 was inapplicable and Regulation 5-C-1 did not permit what was done. One of the rest days assigned Claimant's position was a part of Relief Position No. 3 and the other was a part of Relief Position No. 5. The regular incumbent of Relief Position No. 3 was absent May 10 to May 21, 1954, and the regular incumbent of Relief Position No. 5 was absent May 20 to May 23, 1954. The days in question were but parts of the overall temporary vacancy in the respective regular relief assignments. Regulation 5-C-1 is an "office seniority move-up rule" in that it provides that the senior employee in the office may make application for a temporary vacancy therein of less than thirty (30) days and that other employees in the office may advance in order of seniority to the positions made temporarily vacant by such change with the last position vacated being filled by an extra employee. It is undisputed that neither Claimant nor any other employee in the office made application for either vacancy. Even if they had, they would have been required to take the entire vacancy, not just parts thereof. **(Award 7298)** It is further undisputed that while extra employees were available they were not qualified, with the result that the temporary vacancies still remained to be filled and for the reasons stated above, Regulation 5-G-1 (i) could have no application whatever. Regulation 4-M-1, however, provides for the use of a regularly assigned employee to work temporary in a position other than his regular position and further provides how such employee will be paid if so used. Carrier used regularly assigned employees to fill the entire vacancies in the

respective regular relief assignments and paid them therefor as provided in Regulation 4-M-1. Available extra employees were qualified to fill the vacancies thus created and were so used. Compare Awards 8017, 6686. For the reasons stated, the temporary vacancies in the respective regular relief assignments could not be filled under Regulation 5-C-1 and, under the existing facts, Regulation 5-G-1 (i) had no application whatever. Carrier's resort to Regulation 4-M-1 was, therefore, proper and in Award 6291, with Referee McMahon, involving these same parties, it was held:

"From a review of the record and a study of the regulations, we conclude that Carrier did have the authority under Regulation 4-M-1 (a) and (b) to assign the employe to a temporary vacancy during the time involved in his regular assignment. This Regulation simply gives Carrier the right to assign an employe having a regular assignment to a temporary assignment and allows him a rate of pay at whichever is the higher of the two positions. * * *"

For the reasons stated, the Award is erroneous and we dissent.

/s/ C. P. Dugan

/s/ J. F. Mullen

/s/ R. M. Butler

/s/ W. H. Castle

/s/ J. E. Kemp