Award No. 9007
Docket No. TE-7974

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Carroll R. Daugherty, Referee

PARTIES TO DISPUTE:

THE ORDER OF RAILROAD TELEGRAPHERS

THE TEXAS AND PACIFIC RAILWAY COMPANY

STATEMENT OF CLAIM: Claim of the General Committee of The Order of Railroad Telegraphers on the Texas and Pacific Railway, that:

(1) Carrier violated the terms of the agreement between the parties when on July 6, 1954, it failed to use K. A. Bossier on the Second Shift Operator position at Addis, Louisiana, and improperly diverted M. B. Hurst from an incomplete temporary vacancy assignment at Chamberlain, Louisiana to perform the work.

(2) Carrier shall compensate K. A. Bossier for July 6, 1954, on basis of eight hours at the time and one-half rate of pay for failure to assign him to the work of his position on his rest day.

EMPLOYES' STATEMENT OF FACTS: There is an agreement between the parties with effective date of May 15, 1950. It is presumed this agreement is on file with your Board, and therefore is hereby made a part of this submission as though copied word for word herein.

Claimant K. A. Bossier is the regular assigned owner of the second shift operator position at Addis, Louisiana. His work week begins on Wednesday and he has assigned rest days of Monday and Tuesday. His assigned hours are 4:00 P. M. to 12 Midnight. The rest days (Monday and Tuesday) are part of a regular relief assignment.

During the work week beginning on June 30, 1954, the regular relief employe assigned to work the rest days Monday, July 5, and Tuesday, July 6, 1954, was not available. The Carrier properly assigned claimant Bossier to work his position on Monday, July 5, as no extra employe was available. There was no extra employe available on Tuesday, July 6, but instead of using Claimant, the Carrier required Mrs. M. B. Hurst to suspend work on the incomplete temporary vacancy at Chamberlain, Louisiana, and perform the rest day relief work on the second shift operator position at Addis, Louisiana, thereby depriving Claimant Bossier of his right to work when he was available and ready to perform the work. Mrs. Hurst was an

position, we respectfully urge that the claim has no merit whatsoever, and if not dismissed, it should be denied.

It is affirmed that all data submitted herein in support of the Carrier's position has heretofore been presented to the Organization and is hereby made a part of the question in dispute.

(Exhibits not reproduced.)

OPINION OF BOARD: The material facts in this case do not seem to be in dispute: Claimant Bossier, regularly assigned occupant of the second trick Telegrapher position at Addis, Louisiana, had a work week of Wednesday-Sunday, with rest days of Monday-Tuesday. Said rest days were part of a regular relief position. On Monday and Tuesday, July 5 and 6, 1954, the incumbent said relief position was unable to work. On that Monday Carrier used Claimant to work the second trick position, paying him at the time-and-one-half rate therefor. On that Tuesday Carrier used extra employe Mrs. Hurst to work said position, taking her for this purpose off a temporary vacancy at Chamberlin, Louisiana, which she had been filling, and blanking the Chamberlin position on said Tuesday, July 6. Mrs. Hurst did not work on Wednesday, July 7, because of the restrictions contained in the Hours of Service Law. She returned to work the Chamberlin vacancy on Thursday, July 8.

In support of the Claim that Carrier should have used Bossier at overtime rate rather than Hurst at pro rata rate on July 6, 1954, at Addis, the Employes argue that Carrier not only caused Hurst to suspend work during her regular hours on said date in order to absorb the overtime Carrier would have had to pay Claimant, thus violating Article 5(i), but also violated the meaning and intent of the 40-hour week provisions of Article 6 as interpreted by this Board, whereunder work on a position's rest days should be given first to the regularly assigned relief man; second, if no such employe exists or is available, to an extra employe; and third, if no extra man is available, to the position's regular occupant on an overtime basis. On this second point the Employes contend that Hurst, having been temporarily assigned to the Chamberlin vacancy, was not an available extra employe on July 6, 1954; Carrier could not take her off said temporary vacancy for use on said rest day at Addis when the regularly assigned employe at the latter location was available to work the position.

Carrier defends by stating that (1) the claim is barred because (a) the denial decision of Carrier's highest appeals officer was not formally rejected by the Employes within the 60-day limit prescribed in Section 1(b) of Article V of the National Agreement of August 21, 1954, and (b) the Employes' appeal to this Board was not made within the 9-month limit required by Section 1(c) of said Article of said Agreement; (2) as to the merits, Hurst was an available extra employe on July 6, 1954, and nothing in the Agreement prohibited Carrier from blanking the Chamberlin position so as to make her available for the Addis position on said date; and (3) nothing in the Agreement gave Claimant any right to work the Addis position on said date, because (4) it was a temporary vacancy subject to Article 2(h) of the Agreement, and it was not work on an unassigned day subject to Article 6(1).

From this summary of the Parties' contentions on the merits, it will appear that, whether one takes the Employes' or the Carrier's route of argument, he arrives at the conclusion that, apart from the question raised

by Article 5(i), the central issue is whether Hurst was a properly available extra employe on July 6, 1954.

But Carrier's two procedural points must first be dealt with. As to the first, the Board rules that the provisions of Article V, Section 1(c) of the August 21, 1954 Agreement constitute an exception to the provisions of Section 1(b) thereof. The claim-denial decision referred to by Carrier was that of January 10, 1955, by Carrier's highest appeals official; and Section 1(c) specifically excepts appeals from such decisions (to this Board), making them subject to the 9-months limit. Award 8528.

As to the second procedural point, the Board finds that notice of intent to file an ex parte submission was received by this Division within nine months from the above-mentioned date of January 10, 1955. The Board rules that said notice constituted the institution of proceedings mentioned in Section 1(c) and that therefore the confronting claim is properly here for determination on its merits.

As to the merits, the application of Article 5(i) is first to be considered. The Board finds that since Carrier blanked the Chamberlin position on July 6, 1954, there were no regular hours for said position on said date during which Hurst could be said to have suspended work in order to absorb the overtime otherwise payable to Claimant on the Addis position. Therefore Article 5(i) was not violated—**provided** Carrier had the right to blank the Chamberlin position. Whether Carrier had this right is a matter to be determined below in respect to the above-stated central issue in the case, namely was Hurst properly available for the Addis position on July 6, 1954? As to Article 5(i), it is enough to say that, if Carrier possessed said right said Article was not violated.

As to the central issue, the Board finds, as it has in many other cases, that Carrier had the right to blank the Chamberlin position on July 6, 1954. The facts that Carrier paid Hurst for said position when she did not work same on July 7 and that she returned to work thereon on July 8 do not justify an inference that Carrier's blanking on July 6 was illegal or a subterfuge or both. Weekly work guarantees apply to the employes but not necessarily to the position. The Board can find no prohibition of such blanking in the Agreement.

Given Carrier's right to blank the Chamberlin position on July 6, 1954, it follows that Hurst, as an extra employe, was available on said date for work on the Addis position. She was entitled to said work, no matter whether said position be considered a temporary vacancy under Article 2(h) and (i), as Carrier contends, or whether said position be considered subject to this Division's interpretations of the 40-Hour Week provisions of Article 6, as the Employes argue. Article 2(h) and (i) says that a temporary vacancy of less than 90 days duration is to be filled by the senior extra employe (provided he is available and competent and provided he does not have more than 40 hours of work in his work week when an available junior employe has less than 40 hours of work in his own work week). Hurst fitted these requirements. As to Article 6, the regular relief man was not available for the Addis position, and Hurst was. Being available, she was properly in line for said position.

It should be noted that the Board does not (and does not have to) rule on the question of whether Hurst would have been a properly available

extra employe if Carrier had not blanked the Chamberlin position, e. g., had used some other employe thereon while moving Hurst to Addis.

In the light of all the above, an affirmative award is not justified.

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 not violated.

AWARD

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: S. H. Shulty
Executive Secretary

Dated at Chicago, Illinois, this 13th day of October, 1959.