Award No. 9027
Docket No. TE-8376

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Donald F. McMahon, Referee

PARTIES TO DISPUTE:

THE ORDER OF RAILROAD TELEGRAPHERS

SOUTHERN PACIFIC COMPANY (Pacific Lines)

STATEMENT OF CLAIM: Claim of the General Committee of The Order of Railroad Telegraphers on the Southern Pacific (Pacific Lines) that:

1. Carrier violated the terms of the current Telegraphers' Agreement when on September 7 and 8, 1953 it suspended D. Kerr, regularly assigned rest day relief employe, Lordsburg, New Mexico, from his regular assigned position and required him to work on the first shift Telegrapher-Clerk position at Lordsburg, New Mexico; also on September 7, 1953, Carrier improperly suspended F. E. Johnson, regularly assigned first shift Telegrapher-Clerk at Lordsburg, New Mexico, and required him to work second shift Telegrapher-Clerk position at Lordsburg, New Mexico when no emergency existed.

2. (a) Mr. D. Kerr shall be compensated eight (8) hours at the rate of his assigned position, in addition to amounts paid, September 7 and 8, 1953.

(b) Mr. F. E. Johnson shall be compensated eight (8) hours at the rate of his assigned position, in addition to amounts paid, September 7 and 8, 1953.

EMPLOYES' STATEMENT OF FACTS: There is now, and has been at all times, in full force and effect, a collective bargaining agreement, between the parties, hereinafter referred to as the Telegraphers' Agreement. The agreement bears the date of December 1, 1944 (reprinted March 1, 1951) including revisions. Copies of this agreement and amendments are on file with your Board and are, by reference, included in this submission the same as though set out herein word for word.

The dispute involves interpretation of the agreement and was handled on the property as prescribed by the Railway Labor Act, as amended, and in accordance with the usual handling of grievances. The claim was denied

compensation (he) would have received on (his) regular assigned position," and the payment made under Rule 9 is the full extent of payment due pursuant to the agreed-upon result of carrier's collective bargaining with its employes represented by petitioner. The provisions of Rule 5, 12 and 15 do not govern in situations covered by Rule 9.

During handling on the property, petitioner also referred to Third Division Awards Nos. 2346, 2695, 2823, 2859, 3417, 4075, 4352, 4499, 5927 and 6015, which in each case involved use of clerical employes off of their regular assignments in other than emergency circumstances, a situation not involved in the instant case.

CONCLUSION

Carrier asserts that it has conclusively established that the claim in this docket is entirely lacking in either merit or agreement support and, therefore, requests that said claim be denied.

All data herein submitted have been presented to the duly authorized representative of the employes and are made a part of the particular question in dispute.

The carrier reserves the right, if and when it is furnished with the submission which has been or will be filed ex parte by the petitioner in this case, to make such further answer as may be necessary in relation to all allegations and claims as may be advanced by the petitioner in such submission, which cannot be forecast by the carrier at this time and have not been answered in this, the carrier's initial submission.

(Exhibits not reproduced.)

OPINION OF BOARD: Claims are progressed here by the Organization and are designated as to named employes in Part 2, Statement of Claim.

The parties both rely on the provisions of Rule 9 of the effective Agreement to support their contentions as set out in the record. The question for this Board to determine is whether or not an emergency existed on September 7 and 8, 1953, and was Carrier justified in its action on such dates. It follows that if an emergency existed on said dates, the claims are not supported under Rule No. 9. If such an emergency did not exist contrary to the contention of Carrier, the claims should be sustained.

The parties are agreed that an emergency did exist on September 5 and no claims are made for such date, and it is conceded that Carrier used regularly assigned employes at Lordsburg in strict compliance with the provisions of Rule No. 9 of the Agreement on such date.

There is evidence in the record that Carrier had an available relief employe at Rodeo, some 46 miles from Lordsburg, who should have been used instead of Claimants who held regular assignments. Certainly, while an emergency did exist on September 5, that same emergency could not under Rule 9, be extended for three additional days, when Carrier had sufficient knowledge of conditions on September 5, and had a relief employe available during such time. Carrier was not justified in its action taken here, as there was no emergency existing here after September 5, 1953.

The claim should be sustained.

FINDINGS: The Third Division of the Adjustment Board, upon the whole record and all the evidence, finds and holds:

That the parties waived hearing on this dispute.

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 Carrier violated the Agreement as alleged.

AWARD

Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 20th day of October, 1959.

DISSENT TO AWARD NO. 9027, DOCKET NO. TE-8376.

Award No. 9027 sustains the claim in its entirety holding,—(1) that the temporary vacancy on a regular assignment, occasioned by its incumbent reporting off sick on short notice, could only be construed as creating an emergency situation for that one day; and (2) that an extra employe filling another temporary vacancy prior to, through, and after this claim period should have been considered as available for the temporary vacancy in Item (1) after the first tour thereon.

The Award of the majority is in error because,—

(a) No Agreement provision makes an extra employe occupying a temporary vacancy on one regular assignment available at the same time for another temporary vacancy on another regular assignment—to so hold is to rob Peter to pay Paul. **Award 7174** (Carter).

(b) Temporary vacancies on regular assignments accrue to extra employes by Agreement rule; hence the absence of an available extra employe to fill such a temporary vacancy incident to an emergency created through sickness must be construed as continuing that sickness emergency until such time as an extra employe becomes available therefor. **Award 6843** (Messmore).

(c) Claimant Johnson, having been paid a day's pay for loss sustained account of the Hours of Service Law on September 8, 1953, is entitled to no more under the Agreement provisions.

For these reasons, we dissent.

/s/ J. E. Kemp

/s/ R. M. Butler

/s/ W. H. Castle

/s/ C. P. Dugan

/s/ J. F. Mullen