Award No. 10395
Docket No. TE-8813

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

(Supplemental)

Arthur Stark, Referee

PARTIES TO DISPUTE:

THE ORDER OF RAILROAD TELEGRAPHERS

TENNESSEE CENTRAL RAILWAY COMPANY

STATEMENT OF CLAIM: Claim of the General Committee of The Order of Railroad Telegraphers on the Tennessee Central Railway, that:

1. Carrier violated agreement when on August 1 to 20, 1955, it used an employe of another craft to relieve C. M. Smith, Agent, Cookeville, Tennessee, for vacation.

2. Carrier shall compensate C. M. Smith, monthly rated employe, for the period August 1 to August 20, 1955, at the time and one-half rate.

EMPLOYES' STATEMENT OF FACTS: There is in full force and effect a collective bargaining agreement entered into by and between the Tennessee Central Railway Company, hereinafter referred to as Carrier, or Management, and The Order of Railroad Telegraphers, hereinafter referred to as Employes or Telegraphers. The Agreement was effective May 1, 1924 and has been amended in many respects. The original agreement, as amended, is on file with this division and is by reference included in this submission as though set out herein word for word.

This dispute was handled on the property in the usual manner through the highest officer designated by Carrier to handle such disputes and failed of adjustment. This Board under the provisions of the Railway Labor Act, as amended, has jurisdiction of the parties and the subject matter.

This dispute involves the question as to whether the Carrier violated the agreement between the parties when commencing on August 1, 1955, and continuing through August 20, 1955, it used an employe of another craft to relieve the Claimant for his vacation. The employe used was a Mr. E. M. DeMoss. Mr. DeMoss is a regular employe of the company holding seniority as a clerk and occupying a position covered by the agreement between the Carrier and the Brotherhood of Railway and Steamship Clerks. It was the contention of the Carrier in handling this dispute on the property that it had the right to use whomsoever it pleased to provide vacation relief. It was the contention of the employes that the vacation relief should have, under the circumstances involved in this case, been provided by an employe covered by the Telegraphers' Agreement and that since Carrier failed to do so the Claim-

Carrier was obligated to grant claimant a vacation with pay when it was found that he could be released therefor, under which circumstances he has no contractual rights to the work of the position during the period of the vacation. Claimant had contractual rights to return to his assignment at the end of the vacation period, but not during said period, and to the regular pay of his position during the vacation period, all of which was satisfied. He has not been deprived of any compensation nor has he suffered any loss, and the claim filed in his behalf is utterly devoid of support and wholly without merit. Carrier, therefore, respectfully requests that it be denied in its entirety.

All data submitted herein has been presented in substance to the duly authorized representatives of the Employes and is made a part of the particular question in dispute.

The Carrier is making this submission without having been furnished copy of Employes' petition and respectfully requests the privilege of filing a brief answering in detail the ex parte submission on any matters not already answered herein, and to answer any further or other matters advanced by the petitioner in relation to such issues.

(Exhibits not reproduced).

OPINION OF BOARD: This case and two companion cases (TE-8814 and TE-8844) are concerned with the propriety of assigning E. M. DeMoss, an employe covered by an Agreement between the Carrier and the Brotherhood of Clerks, to relieve three agents during vacation periods in the summer of 1955.

C. M. Smith, an agent at Cookeville, Tennessee, was entitled to three weeks' (18 days) paid vacation in 1955. That years vacation schedule for employes covered by the O. R. T. Agreement was established in February, at which time an August 1-20 vacation period was assigned Claimant Smith. (Claimants in the companion cases were assigned June 13-24 and June 27-July 16 vacation periods.)

It is undisputed that in June, when DeMoss was assigned to relieve various O. R. T. employes, there was a shortage of employes qualified for agency work who were available for vacation relief purposes. (The O. R. T. in its written submission to the Board, notes: "Carrier representative states, and we are not prepared to dispute it, that there were no extra employes available.) The Carrier's survey, in fact, showed "There was no qualified extra employe and all others were regularly assigned."

On June 7, W. E. Manning, General Superintendent and Chief Engineer, sent to Smith, the other Claimants, the General Chairman and other affected employes, copy of a letter to DeMoss designating him to "relieve certain on line agents and cashiers for their vacations this year." DeMoss (classified since March 21, 1955 as Assistant Demurrage Clerk at Nashville, but also qualified as an Agent) was specifically directed to relieve five agents and two cashiers (in the clerks unit) for varying periods between June 13 and October 7 covering 137 days (all but 14 in the O. R. T. unit). DeMoss, was also advised that he probably would be designated to relieve two other agents during November 7-20 and November 28-December 17 vacation periods.

The O. R. T. General Chairman immediately protested these assignments, advising the Carrier on June 6 that:

"* * * relieving employes covered by the O. R. T. Agreement

belongs to the employes on the Agents-Operators' Seniority List, under that agreement; and I must insist that employes from this list be used to protect this relief work, and not a clerk or any other employe who is not covered by the O. R. T. Agreement."

Despite the O. R. T.'s protest, DeMoss was instructed to carry out his assignments. He relieved Claimant Smith at Cookeville between August 1 and August 20, during which period Smith received contractual vacation pay at straight time rates. (There is no evidence regarding DeMoss' earnings or whether he acquired seniority under the O. R. T. Agreement.) On August 26 the O. R. T. submitted a formal complaint, alleging:

"* * * Since Mr. Smith, * * * was improperly relieved for his vacation, he is due pay for this period, * * * just as he would have been if he had worked the vacation period. Only employes from the seniority roster of the Agents-Operators are entitled to this work, and since the employe used, Mr. DeMoss, was from another class and craft (a clerk), he was not entitled to perform this work * * *"

The O. R. T. argues, in substance, as follows:

1. Rules 1 and 17 of the basic Agreement control here. The Scope Rule (Rule 1) reserves the work of station agents to Telegraphers. The seniority provisions of Rule 17 provide for the acquiring of seniority rights by each employe on the basis of his service in work or positions covered by the Telegraphers' Agreement.

2. It would be contrary to the philosophy of craft bargaining for any nonoperating union to enter into any Agreement which would permit the Carrier to divert work from the craft for any period of time.

3. This Division has frequently sustained claims of agents when persons outside their craft were assigned their duties (Awards No. 3820, 4482, 5652, 5123).

4. In Award No. 8135 this Board made a positive interpretation of the rule covering the identical question now before use. In Award No. 10120, moveover, the Board held that the Scope Rule was violated when the Carrrier utilized an Employe not covered by the Agreement to perform work of an Employe on vacation. Similar rulings have been made in Awards No. 5657 yand 5917.

5. Interpretations of the Vacation Agreement support the O. R. T.'s contention that work covered by the Scope Rule may not be given to men in other crafts. Although the Carrier may hire a vacation relief worker "off the street" under 12(c) of the Vacation Agreement, it does not have the right to use an employe from another craft to relieve vacationing employes.

The Carrier contends:

1. The Vacation Agreement controls here (Awards No. 8345, 5461, 8128). While providing for hiring of a new employe to furnish vacation relief to Telegraphers, it makes no distinction between hiring a man "off the street" and utilizing a clerical employe who has no Telegrapher seniority.

2. Since, in the case at hand DeMoss acquired the status of a regular vacation relief employe, the seniority principle did not have to be followed (Awards No. 8815, 6874, 7336).

3. It has been the practice, on this property, to employ others as regular vacation relief workers when no Telegraphers are available.

4. The Vacation Agreement prohibits employes being paid in lieu of taking vacations except when they cannot be spared because of service requirements.

5. In any event, Claimant Smith has no claim here since he took his vacation as scheduled and has already been properly compensated.

There can be no doubt that Management is obligated, under Article 4(a) of the Vacation Agreement, to grant earned vacation, except when "requirements of the service" will not permit. Employes do not have the right to work rather than take vacations. On the other hand, Management must adhere to is contractual commitments when providing vacation replacements.

The question posed in the present case is whether, under all the circumstances in existence in 1955, Management had the contractual right to relieve Claimant Smith during his vacation with DeMoss, an employe from another craft. None of the cited awards cover this precise point or deal with the provisions of Article 12(c) of the Vacation Agreement which states:

> "A person other than a regularly assigned relief employe temporarily hired solely for vacation relief purposes will not establish seniority rights unless so used more than 60 days in a calendar year. If a person so hired under the terms hereof acquires seniority rights, such rights will date from the day of original entry into service unless otherwise provided in existing agreements."

The term "regularly assigned relief employe" in 12(c) did not apply to DeMoss. In the parties July 10, 1942 Interpretations of the Vacation Agreement they agreed that this designation covers "only those persons described generally in Articles 6, 10(b), and 12(a) who are assigned to regularly fill positions of absent employes."

DeMoss, then, was presumably a person "temporarily hired solely for vacation relief purposes." But was he?

It is true that in their 1942 Interpretations the parties agreed that "hiring" in 10(b) should be read as though it meant "providing" or "furnishing" a relief worker. But there is some doubt whether this applies equally to the "temporarily hired" persons in 12(c). (10(b) provides in part that not more than the equivalent of 25% of a vacationer's workload can be distributed among fellow employes without "the hiring of a relief worker * * *")

If "hired" is used in its usual sense, DeMoss was not "hired" for vacation relief; instead, he was transferred from employment in another craft.

Moreover, we find in 12(c) the phrase "temporarily hired **solely** for vacation relief purposes' (emphasis ours). It seems apparent that DeMoss was not hired **solely** to relieve vacationing Telegraphers. Rather, he was assigned to relieve two agents covered by the O. R. T. Agreement in June, and July, one cashier covered by the B. R. C. Agreement in July, an O. R. T. agent in August (Claimant Smith), a B. R. C. clerk in August-September, and two more O. R. T. agents in September and October) plus two more O. R. T. agents, possibly, in November and December).

Additionally, DeMoss' relief assignments were not continuous. For ex-

ample, he had no relief assignment between July 19 and August 1, or between October 7 and November 7. It can be assumed that he spent those periods performing his regular clerk's duties.

We have here, then, a crossing of craft lines which we do not believe was contemplated by the parties in their Vacation Agreement. Speaking with reference to 10(b), Referee Morse noted in his authoritative 1942 award:

> "* * * it is to be definitely understood that the agreement cannot be applied in a manner which will cross craft or class lines."

While Referee Morse did not mention 12(c) in this regard, it is not likely, in our judgment, that a different principle can be applied in connection with that clause.

In sum, when we analyze DeMoss' employment status for the last six months of 1955 we find that the Carrier assigned him back and forth between the B. R. C. and O. R. T. crafts as follolws:

Prior to June 13	B. R. C.
June 13-24	O. R. T. (Double Springs)
June 27-July 16	O. R. T. (Lebanon)
July 18-19	B. R. C. (Lebanon)
July 20-31	B. R. C.
August 1-20	O. R. T. (Cookeville)
August 22-September 2	B. R. C. (Cookeville)
September 5-16	O. R. T. (Watertown)
September 19-October 7	O. R. T. (Baxter)
October 9-November 6	B. R. C.
November 7-26 (possibly)	O. R. T. (Crossville)
November 28-December 17 (possibly)	O. R. T. (Carthage)

All these were vacation relief assignments except (1) those prior to June 13, (2) July 20-31, (3) October 9-November 6, (4) those after December 17. This record establishes, in our judgment, that DeMoss was not "temporarily hired solely for vacation relief purposes" as contemplated in Article 12(c) of the Vacation Agreement.

Although the Carrier adverted to a "past practice", there is no convincing evidence in the record which reveals a consistent pattern of assigning employes from outside the O. R. T. craft to relieve during vacation periods.

To what relief, then, is the Claimant entitled? The Carrier points out that he did take his vacation and was paid for it. Article I, Section 4 of the 1954 National Agreement provides only that an employe "shall be paid the time and one-half rate **for work performed** during his vacation period in addition to his regular vacation pay" (emphasis ours). Moreover, Management maintains that Claimant is attempting to gain "collateral advantage" out of the Vacation Agreements in violation of their spirit and intent (and contrary to Referee's Morse's 1942 injuncion).

True, Claimant Smith did not specifically seek to work his vacation period and accepted pay for vacation time. Yet, the Carrier was on notice immediately following its instructions to DeMoss in June 1955. It had ample opportunity to revise its plans (had it so desired) and to change Smith's vacation dates, or to make other proper and suitable arrangements. It certainly could have anticipated receiving a complaint when it actually sent DeMoss out on

his assignments. Some penalty, therefore, is justified.

We recognize that had Smith worked during his scheduled vacation period he would have received double time and one-half. But he did not work, and he received a vacation which cannot now be withdrawn. Under the circumstances, a penalty of pro rata rate is sufficient, in our judgment, to remedy this violation.

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 Employe involved in this dispute are respectively Carrier and Employe 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 has been violated.

AWARD

Claim sustained to the extent indicated in the Opinion.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 7th day of March, 1962.