

Award No. 12947

Docket No. TE-11793

NATIONAL RAILROAD ADJUSTMENT BOARD

**THIRD DIVISION
(Supplemental)**

Benjamin H. Wolf, Referee

PARTIES TO DISPUTE:

THE ORDER OF RAILROAD TELEGRAPHERS

BOSTON AND MAINE RAILROAD

STATEMENT OF CLAIM: Claim of the General Committee of The Order of Railroad Telegraphers on the Boston and Maine Railroad that:

1. Carrier violated the agreement between the parties when, on September 27, 1958, it improperly removed N. H. Lajoie from Relief Position No. 7 and placed him on the extra list.

2. Carrier shall compensate N. H. Lajoie at the time and one-half rate for all time worked outside the assigned hours and on the rest days of Relief Position No. 7 on which he was not used commencing September 27, 1958 and continuing through November 17, 1958.

EMPLOYES' STATEMENT OF FACTS: The agreements between the parties are available to your Board and by this reference are made a part hereof.

Relief Position No. 7 on the Fitchburg Division is a regular position established for the purpose of furnishing rest day relief. It has the following cycle or assignments:

Wednesday	2nd trick WR Jct.
Thursday	2nd trick Claremont Jct.
Friday	2nd trick Claremont Jct.
Saturday	3rd trick Claremont Jct.
Sunday	3rd trick Claremont Jct.
Monday	Rest Day
Tuesday	Rest Day

At the time cause for this claim arose Operator R. J. Moran held the regular assignment to Relief Position No. 7 but was away on a leave of absence attending school under the so-called "GI Bill of Rights". The position had been bulletined as a temporary vacancy and was bid in by and assigned to Operator N. H. Lajoie. Having acquired the position in this manner, Operator

through October 2, 1958, (4 days work with 2 days rest). A decision must be in the negative for the following reasons:

(a) In order to avoid an Hours of Service violation, Claimant Lajoie, being the only spare man qualified for the job, was used.

(b) The railroad had no way of predicting that Mr. Robinson was to be retained in the dispatcher's class—not being able to displace as anticipated.

In view of the foregoing, claim should be denied.

OPINION OF BOARD: Claimant N. H. Lajoie was filling Relief Position No. 7 on the Fitchburg Division, under bulletin as a temporary employe, when he was replaced by Operator D. S. Robinson. On August 27, 1958, Robinson had notified Carrier and the Local Chairman that he wanted to exercise his right to displace Lajoie. Robinson had the right to do so under Article 38 of the ORT Agreement which gives such rights to ORT employes who return to the bargaining unit after promotion to train dispatcher positions. The question involved in this dispute is whether Robinson used the proper method of displacing Lajoie. The Organization thinks that he did not.

Claimant argued that train dispatchers returning under Article 38 are obliged to follow the procedures set forth in Article 13. Both Articles are set forth at length in Organization's ex parte submission and only those portions which pertain to our arguments will be repeated here.

Neither party offered any evidence of the practice used in displacing employes by returning promoted employes. We are, therefore, left with only the language of the pertinent provisions and none of the factual circumstances which might illuminate the meaning of the language.

Article 38 (b) provides that an ORT employe promoted to a train dispatcher position in returning to the bargaining unit may "displace the junior regularly assigned employe on his seniority district or take his place on the spare list."

This Board has previously held that a temporary employe even though he has obtained his position by bulletin and bid is not the "regularly assigned employe". Award 12094 (Wolf).

The regularly assigned employe was operator R. J. Moran who was on leave of absence. It was Moran whom Robinson displaced, and Lajoie had no more rights than any other temporary employe whose temporary position was terminated by the return of the permanent employe.

The Organization argues, however, that Article 13 applies and that it sets forth the procedure which Robinson should have followed but did not. We do not think Article 13 applies.

Article 13 (a) says:

"When a position is to be abolished the Railroad shall give not less than 48 hours' notice to the affected employe, copy to the Local Chairman."

The position referred to can only be one covered by the ORT Agreement since ORT could not bargain for any employe not represented by it.

Paragraph (b) refers to a "permanent position" which is abolished. This can mean only those positions, as in Paragraph (a), that are covered by the Agreement and are permanent.

Because Paragraphs (a) and (b) have reference only to ORT positions which are abolished, they do not apply to train dispatcher positions which are beyond ORT's jurisdiction. They make no reference to supervisory, official or train dispatcher employee who return to ORT jurisdiction as Article 38 does and, therefore, do not establish procedure for such employees. The remainder of Article 13 has no relevancy here.

The Organization argued that Carrier, itself, thought Article 13 was applicable and that this admission should carry weight here. It is true that Carrier did so argue. (See Carrier's ex parte Submission, Page 2). This position, however, was reversed in Carrier's Reply to the Employees' Submission (Page 1). The admission in the first instance was merely an argument as to interpretation not an admission of fact. Article 13 does not apply and the fact that the Carrier thought it did, does not cloak it with the mantle of authority. Carrier was mistaken and later reversed its position.

We find that Robinson had the right to and did properly displace Moran and through him Claimant Lajoie. The displacement, however, did not actually occur until October 3, 1958 when Robinson began to perform the duties of the job. Lajoie had the right to remain on the job until the regularly assigned employee actually displaced him. He would, therefore, have been entitled to stay on until October 3. Carrier, however, justified his removal on other grounds.

Lajoie was removed September 27. Carrier asserts that Lajoie was assigned to a vacancy at White River Junction because he was the only available qualified spare man. The assignment was necessary to avoid an Hours of Service violation, the incumbent at White River Junction having been removed for money shortages. Carrier assumed that Lajoie would be a spare man on September 27 because Robinson was due back to displace him that day. Robinson did not return because he was needed to replace a sick train dispatcher.

In our opinion Carrier acted reasonably to handle unforeseen emergencies by reassigning personnel as permitted by Article 15, Emergency Service. LaJoie did not lose out since he earned as much at the emergency position as he had before.

The only claim Lajoie has a right to is for the overtime rate of time and a half for work on September 29, the sixth day he worked that week. He is entitled to half time additional for that day, which amounts to \$9.30.

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 Carrier violated the Agreement.

AWARD

Claim (1) denied.

Claim (2) sustained to 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 9th day of October, 1964.