

Award No. 13034
Docket No. TE-12016

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

(Supplemental)

Robert J. Ables, Referee

PARTIES TO DISPUTE:

**THE ORDER OF RAILROAD TELEGRAPHERS
SOUTHERN RAILWAY COMPANY**

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

1. Carrier violated the Agreement when on Monday, April 27, and Tuesday, April 28, 1959, it required or permitted H. L. Powell, an extra employe who had worked 5 days and 40 hours in his work week at Orange, Virginia, to perform the work on the second shift position at Monroe, Virginia, when the regular assigned Rest Day Relief employe was not available.

2. Carrier shall compensate Mrs. R. N. McDarris, the regular assigned second shift employe at Monroe, Virginia, who was available, for eight hours at time and one-half rate for April 27 and 28, 1959.

EMPLOYEES' STATEMENT OF FACTS: Mr. H. L. Powell, in April of 1959, was an extra man assigned to perform work as Clerk-Telegrapher on second shift position at Orange, Virginia. The work week of the second shift position began on Wednesday and had assigned rest days of Monday and Tuesday. As an extra man, Mr. Powell worked Wednesday, April 22; Thursday, April 23; Friday, April 24; Saturday, April 25; and Sunday, April 26, on the second shift position at Orange, Virginia. He had thereby completed his forty hours of work in his work week, which began on Wednesday, and was entitled to the two rest days of Monday and Tuesday, April 27 and 28.

The following Bulletin No. 3 was issued under date of April 27:

"Alexandria, Va., April 27, 1959

BULLETIN NO. 3

All Agents:

All Agent-Telegraphers:

All Agent-Telephoners:

All Clerk-Telegraphers:

April 23, 1959. A regular telegrapher has no right to claim a temporary vacancy in a relief assignment on his rest days in preference to a qualified extra telegrapher, and this regardless of whether the extra telegrapher is to be paid at the straight time rate or the time and one-half rate for the work performed.

I do not understand how you can say that an extra telegrapher was not available and at the same time admit that extra Telegrapher Powell was used on the two days in question to fill the temporary vacancy in the relief assignment, and that he was properly compensated at the time and one-half rate for April 27-28 as provided in our understanding. Insofar as extra telegraphers are concerned, I must repeat that there is no difference in a temporary vacancy in a relief assignment and a temporary vacancy in any other regular assignment. It simply would not make sense to say that an extra telegrapher can be used on a temporary vacancy in a relief assignment if he is to be paid at the straight time rate but that the same extra telegrapher cannot be used if under our memorandum he must be paid at the time and one-half rate."

It will be observed that the employees are evidently of the opinion that the provisions of Rule 4 (1) are applicable in this particular case. Carrier respectfully points out that Rule 4 (1) is not applicable, as it deals only with "work on unassigned days," i.e., where work is required by the carrier to be performed on a day which is not a part of any assignment. It has no application to temporary vacancies in established assignments. The work performed by extra telegrapher Powell on April 27-28, 1959, was in connection with a temporary vacancy in a regular relief assignment established in accordance with Rule 4 (e).

For the reasons set forth herein, the claim is not supported by the rules and provisions of the effective agreement, and should be denied in its entirety. Carrier respectfully requests that the Board so decide.

(Exhibits not reproduced.)

OPINION OF BOARD: The facts are not in dispute. An extra man, H. L. Powell, had filled an assignment for 5 days, Wednesday through Sunday, at Orange, Virginia, and was assigned to work at Monroe, Virginia, within the same seniority district, on the following Monday and Tuesday, which were his rest days under his earlier assignment. He was paid at the time and a half rate for the work on Monday and Tuesday. The position at Monroe was a regular relief position which could not be filled by the regular relief employee. There were no other qualified men to fill this temporary vacancy.

The regular incumbent of this position, Mrs. R. N. McDarris, who is the Claimant here, and was senior to Powell, also was on her rest days. She was not called to fill the vacancy. The claim is for eight hours for each day at the time and one-half rate of pay of her assigned position second shift.

The question in this dispute is whether Mrs. McDarris, the regular incumbent of the position who was on her rest days was entitled under the Agreement to be called to fill this temporary vacancy in preference to Powell, an extra employee, who had worked 40 hours on another assignment, and who also was on his rest days.

Employees' Position. The employees claim that the Carrier violated the Agreement when it permitted Powell to fill the temporary vacancy, rather than McDarris. In support of their claim the employees argued initially that

Rule 4 (1) of the 40-Hour Week Rule was violated. This is the so-called Work on Unassigned Days Rule, which gives priority first to the regular assigned relief employees, then to available extra employees who will not otherwise have forty hours of work in their work week, and, finally, if neither of the above are available, by the regular employee — where work is performed on a day which is not part of any assignment.

The employees also allege, generally, that the seniority Rule (18) was violated since McDarris had greater seniority than Powell. They contend that Powell had lost any priority he might have had by reason of his being an extra employee because he was no longer "qualified" for this assignment, since he had already worked 40 hours, and was on his rest days.

Later, in further argument on the case, the employees switched their emphasis from reliance on the Work on Unassigned Days Rule [Rule 4 (1)] to a general reliance on the 40 hour week rule, which they contend has been construed in a number of awards to establish priority of allocation of work for rest day relief service first, to the regular relief man, second, to the extra man who has not had 40 hours' work in a week, and then to regular employees.

Carrier's Position. The Carrier contended initially that Powell was entitled to the work on a theory of new assignment — that is, he had completed his 40 hour week on a Sunday, after which he was returned to the extra board and under the Agreement, an extra man's work week starts on Monday, so Powell was starting a new work week when assigned to the temporary vacancy at Monroe. Later, the Carrier maintained that either Powell or McDarris could have been used on this relief assignment and "neither would have any claim to the work in preference to the other." Then, the Carrier moved to the argument that "a regular telegrapher (McDarris) has no right to claim a temporary vacancy in a relief assignment on his rest days in preference to a qualified extra telegrapher" (Powell). With this argument, Carrier rested its case on the conclusion that the work in dispute was a separate assignment and that Powell was a qualified extra employee who had preference in the assignment over the regular incumbent in accordance with Rule 21 — Vacancies and Filling Positions.

Discussion. The basic question emerging from the chameleon-like changes in the positions of the parties is whether the disputed work was a temporary assignment to which the Carrier was obligated to assign an extra employee under Rule 21 (b), regardless of the number of hours worked (whether 40 hours or more, or whether on rest day or not); or, as the employees contend, no extra employee was available because Powell had already worked 40 hours and was on his rest days with the result that the regular incumbent was entitled to the overtime work under the relief on rest day priority requirements of the 40 hour rule.

Passing over the early employee contention that the work on Unassigned Days Rule is controlling here since the employees effectively abandoned this position, and because a regular relief position is an assignment, we examine the decisions under the 40-Hour Week Rule relied on by the employees in support of their claim.

In Award 9393, it was held that the regular incumbent was entitled to the disputed work because the extra man was not then available since he was serving on another assignment at the time. No rule was cited in the opinion in support of the decision.

In Award 6524, the 40 Hour Work Week Rule was applied generally to support the employees' claim that the regular employee was entitled to the

disputed work. No particular rule of that Agreement was cited in support of the decision, as the Carrier members noted in their dissent. In this decision, as in others, the Board construed the provisions of the 40-hour agreement generally to require that work on rest days should be assigned in the first instance to the regularly assigned relief man, if there be such; secondly, to an extra man; and, if an extra man is not available, to the regular occupant of the position on an overtime basis.

The antecedents for this interpretation of the 40-hour agreement are obscure, but they seem to stem from the National Rest Day Rule which preceded the 40-hour rule. Award 4728 (1950) Robertson. The National Rest Day Rule quite specifically established the priorities of work on rest days to be regular relief, qualified extra man and regular incumbent in that order.

The absence of a specific provision in the 40-hour rule to support this priority of assignment "rule" for relief on rest days no doubt accounts for the labored decisions supporting such priorities in rest day assignments. However, the net result of the decisions of a number of Boards considering this question has been to accept this construction of the 40-hour rule. Therefore, based on the long term and consistent interpretation of the work on rest day requirements, McDarris' claim here should be sustained, so long as it can be shown that Powell was not a qualified (and, therefore, not available) extra employe having greater precedence than McDarris.

In this connection, Carrier's new assignment theory and the proposition that Powell was, therefore, a qualified extra employe, is weak. This argument was obviously intended to meet the priorities of assignment requirements of the 40-hour rule pertaining to rest day relief (and thereby tacitly acknowledges its applicability). The fact that the Carrier paid Powell at the time and one-half rate explodes this theory.

We conclude, therefore, that Powell was not a qualified extra man of the kind necessary to satisfy the requirements of Rule 21 (b) or the relief on rest day requirements of the 40 hour rule, as consistently interpreted by this Board over an extended period of time. The claim, therefore, should be sustained, but at the pro-rata rate as uniformly held in the past.

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 violated.

AWARD

Claim sustained at pro rata rate.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 30th day of October, 1964.