Award No. 13697
Docket No. TE-12948

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

(Supplemental)

Benjamin H. Wolf, Referee

PARTIES TO DISPUTE:

TRANSPORTATION-COMMUNICATION EMPLOYEES UNION (Formerly The Order of Railroad Telegraphers)

THE PENNSYLVANIA RAILROAD COMPANY

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

> Mr. P. T. Coyle, Wire Chief, "WP" Office, Williamsport, Pennsylvania, shall be allowed an eight (8) hour day at the punitive rate for December 14, 1959, account available and not called on that date to fill vacancy in "WP" Office, second trick. Instead, Extra Operator H. T. Eichelberger was called to fill the assignment in violation of Regulation 5-C-1 (i) of the standard Agreement and the Agreement of August 30, 1957, covering assignment to vacancies at the overtime rate of pay.

EMPLOYES' STATEMENT OF FACTS: Commencing at 3:30 P. M., Monday, December 14, 1959, there existed a one-day rest day relief vacancy on the second shift Assistant Wire Chief's position in "WP" Office, Williamsport, Pennsylvania, assigned hours 3:30 P. M. to 11:30 P. M. The Monday rest days on this position are not embraced within a regular relief assignment; consequently, the position is filled on such days pursuant to that part of Regulation 5-G-1 (i) of the agreement between the parties (which by reference is made a part of this submission) reading:

> "Where work is required by the Company to be performed on a day which is not a part of any assignment, it may be performed by an available extra or unassigned employe who will otherwise not have 40 hours of work that week; in all other cases by the regular employe."

On the date specified the Carrier assigned Extra Operator H. T. Eichelberger to the assignment on the ground that he was "available" under the above rule.

The Employes contend that Eichelberger was not "available" and that instead the Carrier should have assigned P. T. Coyle, the regularly assigned

Your Honorable Board has held that under the Agreement here involved, time not actually worked does not require payment at the time and one-half rate of pay. This question has been settled indisputably by Award No. 5978 of your Honorable Board involving this Carrier. The sole issue in Award No. 5978 was whether the Claimants were entitled to the pro rata or time and one-half rate of pay as a result of having been deprived of certain work on their off-duty days which they were entitled to perform. The Board decided that the Claimants were only entitled to the pro rata rate on the basis the Claimants did not actually perform the work. Consequently, since the Claimant in this case did not actually perform the work on which his claim is predicated, if the claim in this case were payable, which the Carrier denies, payment would be at the pro rata rate, and not at the overtime rate of pay.

III. Under The Railway Labor Act, The National Railroad Adjustment Board, Third Division, Is Required To Give Effect To The Said Agreement And To Decide The Present Dispute In Accordance Therewith.

It is respectfully submitted that the National Railroad Adjustment Board, Third Division, is required by the Railway Labor Act to give effect to the said Agreement and to decide the present dispute in accordance therewith.

The Railway Labor Act, in Section 3, First, subsection (i), confers upon the National Railroad Adjustment Board the power to hear and determine disputes growing out of "grievances or out of the interpretation or application of agreements concerning rates of pay, rules or working conditions." The National Railroad Adjustment Board is empowered only to decide the said dispute in accordance with the Agreement between the parties thereto. To grant the claim of the Employes in this case would require the Board to disregard the Agreement between the parties and impose upon the Carrier conditions of employment and obligations with reference thereto not agreed upon by the parties to this dispute. The Board has no jurisdiction or authority to take such action.

CONCLUSION

The Carrier has shown that the Claimant was not entitled under the Agreement to be used; and, therefore, no rules violation can be said to have occurred, and that the Claimant is not entitled to the compensation which he claims.

Therefore, the Carrier respectfully submits your Honorable Board should deny the claim of the Employes in this matter.

(Exhibits not reproduced.)

OPINION OF BOARD: The Joint Statement of Agreed Upon Facts is as follows:

> "Claimant P. T. Coyle is regularly assigned Wire Chief at 'WP' Office, Williamsport, Pa., with tour of duty 7:30 A. M. to 3:30 P. M., daily except Sunday and Monday. On Monday, December 14, 1959, Extra Block Operator H. T. Eichelberger, a qualified Wire Chief, was used as Assistant Wire Chief from 3:30 P. M. to 11:30 P. M. Eichelberger also worked at Kase Tower on Sunday, December 13, 1959, from 11:00 P. M. to 7:00 A. M."

The Organization claims that Eichelberger was not "available" as required under Section 5-G-1 (i) of the applicable Agreement which reads as follows:

> "(i) Where work is required by the Company to be performed on a day which is not a part of any assignment, it may be performed by an available extra or unassigned employe who will otherwise not have 40 hours of work that week; in all other cases by the regular employe."

Eichelberger was not available because his use on a second assignment within a 24-hour period was a violation of the Hours of Service Act. Carrier does not deny that the law was violated but argues that the penalty should be imposed by the Government and that the violation does not affect its contractual rights.

We believe that the parties intended the word "available" to include only those employes whose assignments were legal and would not violate any law. Eichelberger was not legally available under the Hours of Service Act, and his assignment to the position was, therefore, a violation of Section 5-G-1 (i).

Since the work was to be performed on a day which is not part of any assignment, Regulation 5-G-1 (i) requires that it be filled by "an available extra or unassigned employe who will otherwise not have 40 hours of work that week." The record is silent about any such employe other than Eichelberger, nor is there any evidence that there was a "regular" employe who performed this work on this trick. Claimant was the "regular" employe on an earlier trick.

The parties are in dispute as to whether their local agreement of August 30, 1957, is applicable to this dispute. Carrier says it is not for the following reasons:

> 1. Eichelberger was properly used at the pro rata rate. The Agreement covers only vacancies to be filled at the rate of time and a half.
>
> 2. The 1957 Agreement applies only to positions which are a part of a regular assignment. It argues that since the vacancy was in an unassigned position, only Section 5-G-1 (i) applies.

Carrier's first reason is based upon an erroneous reading of Section 4-F-1 of the Schedule Agreement, which reads, in part, as follows:

> "4-F-1.
>
> (a) Except as otherwise provided in Regulation 4-E-1 and in paragraphs (b) and (c) of this regulation (4-F-1), time worked in excess of eight (8) hours, exclusive of meal period, on any day, will be considered overtime, and paid on the actual minute basis at time and one-half rate.
>
> (b) In the case of a position the rate of pay of which comprehends an assigned tour of duty of more than eight (8) hours, time worked in excess of such assigned hours on any day will be considered overtime and paid on the actual minute basis at time and one-half rate.
>
> (c) If an employe performs work on two positions within a twenty-four (24) hour period and under any provisions of this Agree-

ment, he has a prior right to be used in both of such positions, he shall be paid at the straight time rate for the first eight (8) hours of service on each position. Except as otherwise provided in paragraph (b) of this regulation (4-F-1), he shall be paid at the rate of time and one-half for time worked in excess of eight (8) hours on either position so worked.

A relief employe performing work on two positions of his assignment within a twenty-four (24) hour period shall be paid at the straight time rate for the first eight (8) hours of service on each position. Except as otherwise provided in paragraph (b) of this regulation (4-F-1), he shall be paid at the rate of time and one-half for time worked in excess of eight (8) hours on either position so worked."

Carrier reads the word "day" in sub-section (a) to mean a calendar day. It argues that Eichelberger's second tour, the one in dispute, was the beginning of his new work week and part of his 40 hours of work that week and hence not part of the day embraced by his first tour of duty.

We think a fair intendment of Section 4-F-1 is that a day begins with the employe's first tour and continues for 24 hours. We have previously so held in interpreting similar contractual provisions in Awards 687, 2030, 2053, 2346, 3539, 4549, 5414, 6017, 6656, 12805 and 12693. In Award 4681, on this property between the same parties, we held an earlier clause governing work in excess of 8 hours on any day to mean within 24 hours from the time the employe begins to work.

We must reject the Carriers' argument that the 1957 agreement is not applicable because it was filled on a pro rata basis. The local agreement is as follows:

"AGREEMENT ENTERED INTO AUGUST 30, 1957, BY AND BETWEEN THE PENNSYLVANIA RAILROAD COMPANY AND GROUP 2 EMPLOYES COVERED BY THE REGULATION OF THE TELEGRAPHERS' AGREEMENT ON THE NORTHERN REGION, WHICH PROVIDES FOR THE FILLING OF VACANCIES WHEN NECESSARY TO FILL SUCH VACANCIES AT THE TIME AND ONE-HALF RATE OF PAY, DIRECTLY OR INDIRECTLY.

IT IS AGREED:

When a vacancy occurs and it is necessary to fill such vacancy or resulting vacancy at the time and one-half rate of pay, it will be filled in the following manner:

1. (a) If a vacancy is created by a regular relief employe being absent from duty, except as otherwise provided for herein, the work will accrue to the regular incumbent of the position who is observing his rest days or the temporary incumbent, as the case may be.

(b) If the regular or temporary incumbent of the position in question is not available, except as otherwise provided for herein, the work shall then accrue to the senior qualified employe (District Roster seniority) assigned to the location in-

volved who is absent from duty observing rest days, provided his use thereon will not interfere with his availability for his regular assignment.

2. If a vacancy is created by the occupant of a position, permanent or temporary (other than a relief position) reporting off duty, except as otherwise provided for herein, the vacancy shall be filled by the senior qualified employe (District Roster seniority) assigned to the location involved who is absent from duty observing rest days, provided his use on such vacancy will not interfere with his availability for his regular assignment.

3. If the vacancy cannot be filled in accordance with the provisions of Paragraphs 1 or 2 of this Agreement, except as otherwise provided for herein, it shall then be filled by the senior qualified available extra Group 2 employe.

4. If the vacancy cannot be filled in accordance with the provisions of Paragraphs 1, 2 or 3 above, it shall then be filled by any qualified Group 2 employe."

Since the payment of time and a half depends on the circumstances, not the nature of the position, the only test of its applicability must be whether the Carrier filled the position and was obliged to pay time and a half to the person assigned. Its application is not thwarted by the erroneous payment of pro rata pay. Carrier did fill the vacancy with an employe who was entitled to time and a half. This was the circumstance upon which the parties intended the local agreement to take effect.

Carrier's second argument says, in effect, that even if the local agreement is applicable, this is not the kind of situation to which it applies; that it was intended to cover vacancies in assigned positions as a counterpart to Section 5-G-1 (i) which covers unassigned positions.

The caption of the local agreement makes no distinction between assigned and unassigned positions. Its whole tenor is to cover all contingencies "when necessary to fill such vacancies at the time and one half rate." Paragraphs 1 and 2 do, indeed, cover contingencies arising out of a vacancy in an assigned position, but paragraphs 3 and 4 are all-inclusive, and must be held to apply to vacancies in unassigned as well as in assigned positions.

This conclusion is supported by the fact that on the property the Carrier made no defense that this was a vacancy in an unassigned rather than an assigned position. This defense appeared for the first time in the Carrier's Ex Parte submission. In any event, we do not read the local agreement as being restricted to vacancies in assigned positions.

There remains the final argument of Carrier that Claimant was not the proper person to make the claim. This claim was not made on the property. It appears for the first time in Carrier's Ex Parte submission. In the handling on the property, the Carrier took the position that Claimant had no demand right to work on his assigned rest day, and that even if Eichelberger had been paid at time and a half, Claimant would have no claim, since his use would entail additional expense because he would have to be paid at the Wire Chief rate of pay rather than that of the Assistant Wire Chief.

Carrier now argues that Claimant is neither the "regular" employe entitled under Section 5-G-1 (i) nor does he fit under any category in the local Agreement of 1957.

It is unnecessary to discuss the propriety of raising such defenses for the first time before this Board instead of on the property because in any event, we think Claimant was a qualified Group 2 employe and could have been appointed under paragraph 4 of the local agreement. The record is silent as to anyone with a right superior to that of the Claimant, and we may not presume that the Carrier, given the opportunity, might have chosen someone else.

The awards cited by Carrier on whether Claimant was the proper person are distinguishable. In Award 11049, Claim was denied because Claimant failed to make written application for the work as required.

In Award 11107, the "regular" employe was known and named. We do not know if there was a "regular" employe in our case.

In Award 11296, two claims were denied because another Claimant was awarded a call for the improper assignment.

In Award 7818, there was a regular employe; other awards cited on this point are not relevant.

We adhere to the view that in assessing damages, the penalty rate should not be granted in compensating for work not actually performed. We shall, therefore, award Claimant damages at the pro rata basis.

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

That the parties waived oral hearing;

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.

AWARD

Claim sustained to extent set forth in the Opinion.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 30th day of June 1965.

CARRIER MEMBERS' DISSENT TO AWARD 13697,
DOCKET TE-12948
(Referee Wolf)

The error committed in this award is inexcusable. At the outset, we are not concerned in this dissent with the Majority's findings on the propriety

or impropriety of the Carriers' actions in using an extra Block Operator who was unavailable under the Hours of Service Law. However, we are deeply concerned and dismayed over the Referee's arbitrary disregard of contract rules of interpretation which he admittedly knows and expounded upon in other cases.

Assuming, arguendo, the Carrier used the wrong employe to perform work on an unassigned day, the sole question remaining was whether Claimant had any right to the work. He did not claim that right — under the terms of the Unassigned Day Rule Regulation 5-G-1(i) — as he was not "the regular employe", but rather, he claimed under the provisions of the August 30, 1957 Local Overtime Agreement. The basic question was whether that Agreement applied.

The Carrier contended this Agreement covered only those types of vacancies defined therein, and work on unassigned days was not included. **Award 8303.**

The Referee, in utter disregard of basic principles of contract construction, interprets the Overtime Agreement to include both the type of work specifically defined therein in Paragraphs 1 and 2, and also unassigned work under Paragraphs 3 and 4. To do this, he was compelled to ignore the use of the definite article "the" in the phrase "If the vacancy" as referred to in Paragraphs 3 and 4. Needless to say, the parties to the Agreement would not have used the definite article "the" if they were talking about any vacancy that might arise. The Referee was cited abundant authority in support of Carriers' position on this point. His attention was repeatedly directed to the definition of the word "the" as found in Black's Law Dictionary, reading:

> "THE. An article which particularizes the subject spoken of. 'Grammatical niceties should not be resorted to without necessity; but it would be extending liberality to an unwarrantable length to confound the articles "a" and "the." The most unlettered persons understand that "a" is indefinite, but "the" refers to a certain object." Per Tilghman, C. J., Sharff v. Com., 2 Bin. (Pa.) 516; Penn. Mut. Life Ins. Co. v. Henderson (D.C.) 244 F. 877, 880; Howell v. State, 138 S.E. 206, 210, 164 Ga. 204; Boston & M. R.R. v. City of Concord, 98 A. 66, 67, 78 N. H. 192; Jackson v. Quarry Realty Co. (Mo. App.) 231 S.W. 1063, 1066; Hoffman v. Franklin Motor Car Co., 122 S.E. 896, 900, 32 Ga. App. 229. 'The' house means only one house. Rocci v. Massachusetts Acc. Co., 110 N.E. 972, 973, 222 Mass. 336, Ann Cas. 1918C, 529."

It is obvious the Referee does not believe the parties to the Overtime Agreement were sufficiently conversant with "grammatical niceties" to make the distinction between "the" and "a" which even "unlettered persons" are able to make. This is the only explanation it is possible to reach in view of the Majority's conclusions.

However, even this explanation is repudiated by the Overtime Agreement itself. In the first and second paragraphs, the parties used the phrase "If a vacancy, etc." and then defined the specific vacancy which was being discussed. In the third and fourth paragraphs, the parties used the phrase "If the vacancy, etc.", and then referred back to Paragraphs 1 and 2. Thus, it is quite apparent the parties were sufficiently conversant with the distinction between these two words, and deliberately used them in the manner which grammatical textbooks say they should be used.

We further find the Referee's conclusions here even more unacceptable in view of his interpretation of the "Unassigned Day Rule", Regulation 5-G-1(i). That rule permits the assignment of work on unassigned days to extra or unassigned employes, but in all other cases to "the regular employe." He admits the use of the article "the" in that rule particularizes the individual that may be used. Why wasn't the same conclusion reached as to the vacancies covered when "the" was interpreted in the Overtime Agreement? Unfortunately, you will get no rational explanation from this award.

We find this decision contradictory, inconsistent and repugnant to general principles of contract construction, and we dissent.

W. F. Euker
R. A. DeRossett
C. H. Manoogian
G. L. Naylor
W. M. Roberts