Award No. 13756
Docket No. TE-13068

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

William H. Coburn, Referee

PARTIES TO DISPUTE:

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

ERIE-LACKAWANNA RAILROAD COMPANY

STATEMENT OF CLAIM: Claim of the General Committee of The Order of Railroad Telegraphers on the Erie-Lackawanna Railroad, that Carrier violated the terms of the Agreement, when, on Monday and Tuesday, September 12 and 13, 1960:

1. (a) It failed and refused to properly compensate G. A. Tremba, extra operator, for "doubling" service performed on both of such dates, whereby he was required to work a second assignment on the 2nd trick, after completing a full assignment on the 1st trick, on both days totaling 16 consecutive hours each day.

(b) Carrier shall now compensate G. A. Tremba at time and one-half rate for all service performed in excess of eight hours in each of the two specified dates.

2. (a) It failed to properly assign R. C. Strojny to protect his regular assignment on his two rest days, above stated, when the occupant of the regular relief position who was scheduled to provide relief thereon was unavailable to cover same.

(b) Carrier shall now compensate R. C. Strojny for eight hours at time and one-half rate for each of the two specified dates.

EMPLOYES' STATEMENT OF FACTS: The Agreement between the parties to this dispute, reprinted in booklet form, bears an effective date of March 1, 1957. Said Agreement, and amendments thereto bearing an effective date subsequent to March 1, 1957, is by this reference considered in evidence in this appeal.

Carrier maintains these around-the-clock seven day positions in its "XD" Office, located in Erie Terminal Building in Youngstown, Ohio:

Classification	Assigned Hours	Rest Days
Operator	7:59 A. M. to 3:59 P. M.	Saturday-Sunday
*Operator	3:59 P. M. to 11:59 P. M.	Monday-Tuesday
*Operator	11:59 P. M. to 7:59 A. M.	Wednesday-Thursday

*Claimant Strogny's position.

the extra employe at straight time. Moreover, even if this had been work not a part of any assignment, Rule 10 (m) of the applicable agreement provides that such work would first be the right of an extra employe and then the right of the regular employe. Rule 10 (m) reads as follows:

"RULE 10.

(m) Where work is required by the carrier to be performed on a day which is not 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."

Carrier reiterates that there is no rule of agreement, and Petitioner so recognized when it cited no rule, that provides claimant R. C. Strojny with the right to perform the involved work on his rest days. The claim should be treated accordingly and denied.

IV. CONCLUSION

Carrier submits that the foregoing record conclusively proves that both claims are without support under the rules agreement. And, based upon the facts and authorities cited, the claims should, therefore, be denied in their entirety.

OPINION OF BOARD: The facts are not in dispute. Claimant Tremba was an extra employe. At the time the dispute occurred he was working the first trick at "DY" office, substituting for the regularly-assigned incumbent. On September 12 and 13, 1960, after having worked the aforesaid trick for eight hours, he was used to work the second trick at "XD" office. These dates were the rest days of the incumbent whose regularly-assigned relief man was not available to protect the assignment.

Claimant was paid eight hours at the straight time rate for each of the assignments worked on September 12 and 13.

The claim seeks payment to the Claimant for all service performed by him in excess of eight hours at the time and one-half rate on the specified days, and payment to the regularly-assigned incumbent of eight hours at the time and one-half rate for each day.

Under Rule 7 (a) of the effective Agreement ". . . time worked in excess of eight (8) hours . . . **on any day,** shall be considered overtime and paid for at the time and one-half rate." (Emphasis ours.) Rule 7 (c), relied upon by the Carrier, relates to time worked ". . . in excess of 40 straight time hours **in any work week** . . ." (Emphasis ours.) Clearly Rule 7 (a) and not 7 (c), which relates only to weekly overtime, is applicable here where Claimant worked in excess of eight hours on the two specified days. Item 1 of the claim will, therefore, be sustained.

Referring now to the second part of the claim, the Board finds no merit in the Employes' contention that Rule 10 (m) was violated. That rule applies only to work on **unassigned** days. (See Awards 6503 and 7176.) The work here involved was a part of a regular assignment usually performed on the rest days of that assignment by a regularly-assigned relief man. Acocrdingly, Rule 10 (m) is neither applicable nor controlling under the facts of this case.

Nor do we find any rule support for the argument of the Employes that the claim of Mr. Strojny is valid because Mr. Tremba was not the "available" extra man entitled to perform the rest day work under the established rule governing preference to such work as enunciated by the Board in Award 9393 and many others. That order has been held to be as follows:

First, to the regularly-assigned rest day relief man, if available;

Second, to a qualified and available extra man;

Third, to the regular incumbent of the position.

There is no showing in this record that Tremba, the only extra man involved, was not "available" to take the rest day work. True, he had already worked one eight hour day on each of those rest days and for any time worked in excess of 8 hours he would have to have been paid on an overtime basis. But Tremba was "available" to perform that overtime work and under the established order (supra) he had preference to such work over the regular incumbent Strojny.

Paragraph 2 of the claim will, therefore, be denied.

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 the Agreement was violated.

AWARD

Part 1 of the Claim is sustained; Part 2 is denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 26th day of July 1965.

DISSENT TO AWARD 13756,
DOCKET TE-13068

I quite agree with the finding of the Majority — the Referee and Carrier Members — that Claimant Tremba should have been paid at the overtime rate for the overtime work he performed on the two days involved.

I feel obliged, however, to disagree with the Majority's finding that Tremba, after having worked a full eight hours on the first shift at "DY" office, was nevertheless "available" for another full eight hours work on the second shift at "XD" office on the same days.

Recognizing that the Employes' improper reliance on Rule 10 (m) might have been confusing, I still believe there was no reason for the failure of the majority to observe, or at least discuss, those awards which hold that an extra employe on an unfinished assignment is not available for rest day relief work on another assignment. I cited Awards 5049, 9393, 6970, 7174, 13320, 13321, 13322 as examples. I also cited the Carrier Members' dissent to Award 9027 in which they said:

> ". . . 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)."

Failure of the majority to follow the principle established by these decisions — without assigning any reason for such failure, amounts to palpable error, in my opinion.

The decision on this portion of the claim also ignores the long established and well known public policy of our nation that eight hours constitutes a day's work, a policy implicit not only in the law of the land such as the Fair Labor Standards Act, and numerous directives of government, but also in the agreement which was here being considered. Rule 5 clearly states that eight hours is a day's work.

The decision of the majority that Tremba was available is thus seen to be contrary to all properly applicable criteria, and is thus of no precedential value.

For the reasons stated, and to the extent indicated, I dissent.

J. W. Whitehouse
Labor Member