Award No. 13769
Docket No. TE-12881

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Kieran P. O'Gallagher, Referee

PARTIES TO DISPUTE:

TRANSPORTATION-COMMUNICATION EMPLOYEES UNION (Formerly 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 it failed and refused to post Relief Position No. 14 for bids as provided by the rules which deprived W. F. Perry of his rights to acquire the position.

2. Because of this violative action, Carrier shall compensate W. F. Perry as follows:

Monday, May 2 through Monday, June 13, 1960.....$ 920.08

Computed at eight hours at straight time rate ($2.705) on each Monday, Tuesday and Wednesday, 19 days – $411.16;

On each Thursday and Friday the difference between eight hours at straight time and eight hours at time and one-half rate (basic rate $2.492), 12 days – $119.52;

On each Saturday and Sunday, eight hours at the time and one-half rate ($4.057), 12 days – $389.40;

Monday, July 25 through Sunday, November 13, 1960.....$2,467.84

Computed at eight hours at straight time rate on each Saturday, Sunday and Monday, rate $2.755, 48 days – $1,057.92;

On each Tuesday and Wednesday, eight hours at time and one-half rate ($4.132), 32 days – $1,057.60;

On each Thursday and Friday the difference between eight hours at straight time and eight hours at time and one-half rate (basic rate $2.755) $352.32.

Total amount due claimant.....$3,387.92

It will be observed by comparison with Article 12(c), supra, that this rule imposed a dual test, as distinguished from the present rule. In other words, the old rule required advertising when a vacancy of indefinite duration had actually existed for the prescribed period, irrespective of its prospective duration at the end of that period.

Whatever ambiguity there might be in interpreting the existing rule, that is, whether the actual existence of the vacancy is to be taken into account in computing the thirty-day period, is removed by the fact the parties eliminated the language which formerly required that result in 1944.

On May 3, 1944, then General Chairman H. L. Jones presented to the company proposals for revision of the 1939 agreement. The proposal for amendment included the following in substitution for the second paragraph of then existing Rule 12(a) quoted above:

"ARTICLE XII.

(b) Temporary positions and temporary vacancies **when known** to be for thirty (30) days or more duration, either on leave of absence or otherwise, shall be advertised in accordance with the provisions of Section (a) of this Article." (Emphasis ours.)

This proposal was accepted by the company without change and was incorporated in the resulting agreement effective August 9, 1944. It was carried into the present agreement effective August 1, 1950, without change except for relettering as paragraph (c).

The change in 1944 did two things. It shortened the period of time from sixty to thirty days. On the other hand, it eliminated the language automatically requiring, irrespective of its prospective duration, advertising of any vacancy once it had actually existed for the prescribed period. The change in language was at the instance of the organization. It cannot be construed as without intended effect.

The record is clear that the vacancy in Brown's assignment was never "known to be" in excess of thirty days. It was not required to be bulletined.

Assuming without conceding some merit to the claim, the penalty demanded is unconscionable and without support in the agreement or precedents on the property. The penalty, if any, on the Boston and Maine with the Petitioner in instances of improper assignment has been the loss of earnings traceable to the misapplication of the rule. The decisions of this Board are to like effect. Awards 5306, 7946.

On an earnings basis, claimant was paid for the periods here involved $3,785.88. He claims $3,387.92. There is no equity demanding a substantial doubling of his earnings assuming he should have been assigned to the Brown vacancy.

The claim is without merit and should be denied.

OPINION OF BOARD: This dispute arose from a contention by Claimant Perry that when the incumbent of a Regular Relief Telegrapher's (Train Director's) position worked as an extra train dispatcher his position should have been posted for bids under Article 12 (c) of the applicable agreement.

The pertinent portion of Article 12 (c) reads as follows:

"Temporary positions and temporary vacancies when known to be for thirty days or more will be bulletined and filled in accordance with paragraphs (a) and (b) of this Article."

The record shows that although the claim was handled on the property as two actions based on separate absences of the incumbent of the Regular Relief position (Brown), the parties considered the incidents to result in a single issue. Brown worked on a number of train dispatcher vacancies and also took a vacation during the period involved in the claim.

During this entire period Brown on occasion worked his Regular Relief assignment as Train Director on days that he did not work as a train dispatcher. In its submission, the Carrier as to the first claim period states that "None of these dispatchers' vacancies existed for as much as thirty days" and as to the second claim period that "None of these absences occasioning his use existed for as much as thirty days."

The Employes do not dispute these statements. Rather, they contend that Brown should not have been permitted to work as a Train Director at any time while he was consistently being used as a train dispatcher under another agreement. Here lies the crux of the dispute. If Brown was improperly used to work his regular assignment on days when he was idle as a train dispatcher the claimant would be in a good position to support his contention.

This Division of the Board, however, seems to have consistently held that such use of a telegrapher is not improper. In Award 12725 this precise question was decided contrary to the Organization's theory. And in Award 3674 it was held that service as a train dispatcher has no bearing upon the rights of an employe under the telegraphers' agreement.

We are constrained, therefore, to hold that in the absence of a rule to the contrary there is no violation of the telegraphers' agreement when an employe, temporarily working as a train dispatcher, is permitted to work his telegrapher assignment when he is available for such service.

It follows that Brown was not improperly used on his regular assignment, and since he was not actually absent from that assignment for as much as a thirty day period at any time, Article 12 (c) did not require the bulletining of the vacancies. The claim must 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 not violated.

AWARD

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 29th day of July 1965.