Award No. 13908
Docket No. TE-12946

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

(Supplemental)

Benjamin H. Wolf, 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 place L. A. Adams on his position acquired by bid, Relief No. 21, within the time provided by the Rules.

2. Because of this violation Carrier shall compensate L. A. Adams in the amount of a day's pay of eight (8) hours, at the rate of $2.518 per hour, for each day July 29, 30, 31, August 1, 2, 5, 6, 7, 8, 9, 12, 13, 14, 15, 16, 19, 20, 21, 22 23, 26, 27, 28, 29, and 30, 1960 (25 days).

EMPLOYES' STATEMENT OF FACTS: The Agreement between the parties, effective August 1, 1950, together with its supplements, is available to your Board and by this reference is made a part hereof as though set out herein word for word.

L. A. Adams, claimant, prior to July 8, 1960, was regularly assigned to the position of Third Telegrapher-Leverman at Springfield, Massachusetts. This is a seven-day position with hours of assignment of 10:00 P. M. to 6:00 A. M. Rest days of the position are Tuesday and Wednesday.

On June 27, 1960, Carrier bullletined (posted for bids) as a permanent vacancy, Relief No. 21, Headquarters at Springfield, Massachusetts, assigned to work as follows (all at Springfield):

Friday	TL	Hours	6:00 A. M.	to	2:00 P. M.	Rate $2.468	per hour
Saturday	TL	Hours	6:00 A. M.	to	2:00 P. M.	Rate $2.468	per hour
Sunday	TL	Hours	2:00 P. M.	to	10:00 P. M.	Rate $2.468	per hour
Monday	TL	Hours	2:00 P. M.	to	10:00 P. M.	Rate $2.468	per hour
Tuesday	TL	Hours	10:00 P. M.	to	6:00 A. M.	Rate $2.468	per hour

Wednesday and Thursday — Rest Days.

II.

Assuming without conceding an additional penalty is required, the claim here made is without basis in the agreement, or in the precedents on the property or before this Board.

At the outset, it is pertinent the claims for August 2, 9, 16, 23 and 30 are improper. On these dates, claimant worked the third trick, the very same position he would have covered had he been seasonally placed on the relief assignment. Certain it is, no penalty can be allowed for doing precisely the work that would have been required had the alleged violation not occurred.

The claim is for twenty-five days' pay. If the railroad had had a qualified man available, effective on the first date of claim, the claimant would have earned less money that that which he actually earned while continuing on the third trick position at the same tower.

Had claimant been assigned the relief job on July 29, he would have earned $493.60 during the period of claim. Remaining on the third trick position and covering many of the rest days on that job, he earned $641.68, or $148.08 more than he would have earned had he been placed on the position as claimed.

In summary, there is no merit to the claim. Further, there can be no monetary claim for the reasons explained above.

OPINION OF BOARD: Claimant bid for and was assigned to position Relief No. 21, and was so notified on July 8, 1960. He was not placed on this position, however, until September 2, 1960, although Article 12(b) states that the successful bidder "will be assigned, promptly notified and placed on the position within twenty days from the date of the bulletin."

The claim is for 8 hours' pay at the straight time rate for each of the 25 days involved. Carrier's defenses are that an emergency existed justifying the application of Article 15, Emergency Service, and that, in any event, Claimant earned more money during the period of time involved than he would have earned on the position to which he was entitled and, therefore, he suffered no loss of earnings.

As to the first defense the record shows that the only reference made on the property relating to a possible emergency was contained in Carrier's highest officer's statement:

> "Due to requirements of the service, it was impossible to have allowed the Claimant to take the position, because it would have resulted in numerous other employes being required to double in order to cover the respective positions."

The alleged emergency was the lack of a proper replacement. The record shows that Carrier knew as early as June 27, 1960, that a replacement would be necessary. It had until July 29, a period of more than a month in which to prepare for this contingency. It can hardly be deemed an emergency that after so long a preparatory period, Carrier did not have a replacement ready. Carrier's statement that numerous other employes would be required to double to cover the position refutes the contention that it was an emergency and proves it was a matter of cost and convenience. We are led to the con-

clusion that Carrier violated Article 12(b) in failing to place Claimant on the position to which he was entitled within the required 20 days.

The second defense involved the measure of damages. The Claimant asks a day's pay of 8 hours for 25 days. Carrier asserts that if Claimant had worked the position to which he was entitled he would have earned $493.60 during the period of the claim, whereas he actually earned $641.68. It argued that he suffered no loss of earnings. The record indicates that this excess in earnings was due to the Claimant's working 6 and 7 days a week at time and a half for the overtime. The record also indicates that on 5 of the days for which Claimant asks a day's pay he actually worked the job to which he was entitled. Carrier quite properly points out that as to those 5 days the claim is for time already paid for and is, therefore, improper.

The measure of damages urged by the Carrier has been widely accepted. Indeed, at the panel discussion of this claim, Carrier's representative pointed to 64 recent awards sustaining its point of view including one by this Referee (Award 13171). The Organization, however, advances several reasons why this point of view is not appropriate in this case:

1. In Award 3437, a claim on this property between these same parties, we held otherwise and although their Agreement has since been renegotiated there was no attempt by the parties to change the award by collective bargaining. The Organization argues that the parties have thereby accepted the principle of Award 3437 as binding upon them.

2. The offset claimed by Carrier includes earnings on the sixth and seventh day of the week. It does not seem proper for Carrier to benefit by the fact that the employe worked extra hours overtime to provide Carrier with the setoff. It would be as though instead of being punished for violating the Agreement, Carrier received extra hours of work as a reward for the breach.

The general principle which covers damages is the phrase "loss of earnings" and it has generally been held that the total amount earned is a proper setoff against the loss of earnings. In most cases, however, the question of when the work was done as distinguished from the amount earned is neither raised nor considered and yet it is a proper subject for inquiry, for it cannot be said that an employe has not suffered a loss of earnings if he has to work more hours or days to equal what he was entitled to by contract. To illustrate, if an employe is entitled to a position where he would earn $130 for a 5 day, 40 hour week and Carrier wrongfully places him in a position which pays $100 for a 5 day, 40 hour week but works him overtime on the sixth day so that he earns $130.00 for the period, it is hard to escape the conclusion that the employe has suffered a loss, 8 hours of more work than he would have had to work for the same money.

In our opinion, the general rule is inadequate to cover the damages where the employe works more days or different days from those required on the position to which he is entitled. Carrier recognizes this principle in its protest that Claimant should not be compensated for those days on which he worked the stint to which he was entitled.

The question involved is how to fragment the period involved in measuring damages. The Carrier argues that it should not be fragmented at all and the Organization argued in panel discussion that it should be fragmented by the hour for that was, indeed, the method used in Award 3437 where the employe was

awarded pro-rata for the hours he should have worked and time and a half for the hours he actually worked, less what he was paid for the days involved.

To fragment the claim by the hour would here be improper. First, because the claim is limited to the pro-rata for the days involved and this Board has no power to augment the claim before it. Second, because a man does not hold himself out as ready to work more than 8 hours a day and when he gets 8 hours work he has not lost the 8 hours he should have had, but merely worked another 8 hours in substitution thereof. If he had worked the entitled hours, he would not have then worked the improper hours. He can only claim, therefore, that he was inconvenienced by the change in hours, not that he lost an opportunity to work 8 hours that day.

This argument is not applicable by the day, because he loses 8 hours' pay if he does not work the days on which he is entitled to work and he works extra hours if he works on a day when he should be scheduled off. By this reasoning the only days when Claimant was entitled to work but did not were Tuesdays of each week involved. The calendar shows that Tuesdays were August 2, 9, 16, 23 and 30. The record reveals that on these days he not only worked but he worked the very position to which he was entitled as relief and was paid at the overtime rate.

Thus, using the rule of damages which we think proper in this case, we conclude that the Claimant did not lose an opportunity to work, and thereby did not suffer a loss of earnings, on any day on which he would have been entitled to work if he had not improperly been held off his rightful position.

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 Carrier violated the Agreement.

AWARD

Claim No. 1 sustained.

Claim No. 2 denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 21st day of October 1965.