Award No. 14679
Docket No. TE-13090

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

(Supplemental)

John H. Dorsey, 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:

1. Carrier violated the terms of the Agreement when and because:

(a) It required or permitted D. A. Walsh, regularly assigned operator at IQ Tower, Buffalo, New York, with assigned hours of 3:00 P. M. to 11:00 P. M., rest days Tuesdays and Wednesdays, to suspend work on his own assignment for the purpose of performing relief work, as follows:

On April 9, 10, 11, 15, 16 and 17, 1960, at PRR Crossing (FW), Buffalo, New York, from 11:00 P. M. to 7:00 A. M. (Carrier's file: Teleg. Item 167).

On May 3, 4, 5, 8, 10, 11, 12, 15 and 17, 1960, on a regular relief position, relieving employes on the three tricks at PRR Crossing (FW), Buffalo, New York. (Carrier's file: Teleg. Item 169).

(b) It required or permitted E. R. Buckner, regularly assigned operator at PRR Crossing (FW), Buffalo, New York, with hours of 10:30 P. M. to 6:30 A. M., rest days Wednesdays and Thursdays, to suspend work on his own assignment for the purpose of performing relief service, as follows:

April 9, 10, 11, 12, 13, 16 and 17, 1960, at BX Tower, Buffalo, New York, from 12:00 Midnight to 8:00 A. M. (Carrier's file: Teleg. Item 168).

2. Carrier shall adjust the compensation of the two above named claimants, for each date above specified and relevant to each claimant, on the following basis:

(a) Time and one-half rate for relief service performed during hours outside of the regularly established hours of their regular assignments.

(b) Eight hours at time and one-half rate for relief service performed on the rest days of their regular assignments.

EMPLOYES' STATEMENT OF FACTS: The parties' Agreement, effective March 1, 1957, reprinted in booklet form, subsequently amended, is by reference considered in evidence in this dispute.

The positions involved in the dispute are listed on page 44 in said booklet as follows:

Location	Office	Position	No. of Positions	Rate (3-1-57)
* * *				
Buffalo Tower	IQ	OBL	3	2.086
PRR Crossing	FW	OBL	3	2.134
* * *				
Buffalo	BX	OC	3	2.206

Key (To extent applicable)

B — Block Operator

C — Clerk

L — Leverman, and/or Signalman and/or handle switches by lever or by hand.

O — Telegraph Operator and/or Telephoner, and/or Printer Machine Operator.

* * * * *

The positions at the three above locations are assigned for seven days, on around-the-clock service, and the assignment schedule of each of the above positions is as follows, using Office symbols for reference:

"IQ"

1st Trick — 8:00 A. M. to 4:00 P. M., Sunday & Monday rest days.

*2nd Trick — 4:00 P. M. to 12:00 M. N., Tues. & Wed. rest days.

3rd Trick — 12:00 M. N. to 8:00 A. M., Thursday & Friday rest days.

"FW"

1st Trick — 8:00 A. M. to 4:00 P. M., Sun. & Mon. rest days.

2nd Trick — 4:00 P. M. to 12:00 M. N., Tues. & Wed. rest days.

**3rd Trick — 12:00 M. N. to 8:00 A. M., Wed. & Thurs. rest days.

Regular Relief Position covers: 1st Trick on Sunday & Monday
2nd Trick on Tues. & Wed.
3rd Trick on Thursday
(Rest days — Fri. & Sat.)

"BX"

1st Trick — 6:30 A. M. to 2:30 P. M. (rest days irrelevant)

2nd Trick — 2:30 P. M. to 10:30 P. M. (rest days irrelevant)

3rd Trick — 10:30 P. M. to 6:30 A. M. (rest days irrelevant)

*Claimant Walsh's position

**Claimant Buckner's position.

2. Claim filed on behalf of E. R. Buckner for time and one-half for allegedly working outside his regular hours, April 9, 10, 11, 12, 16, 17, 1960, plus the difference between straight time and time and one-half for working his relief day, April 13, 1960. (Item 168)

3. Claim filed on behalf of D. A. Walsh for time and-half for allegedly working outside his regular hours, May 3, 4, 5, 8, 10, 11, 12, 15 and 17, 1960. (Item 169)

which claims were discussed in conference March 15, 1961.

At the conference, your attention was directed to the fact that what is here complained of has been a common practice up and down the entire railroad for years. You recognize this to be a fact. It was further pointed out to you that all of these employes were asked if they wanted to fill the vacancy involved and all employes agreed. Thus, these employes could not in any sense of the word have been 'required' to fill these vacancies. It follows that there could not have been any 'diversion' of these employes and, therefore, the conditions of Rule 24 of the applicable rules agreement could not possibly provide any basis for a claim. That this is so was held in Award 8017, wherein it was said:

> 'Essentially, the claim is based upon the contention that Schroeder was improperly removed from his regular position under Rule 10, which provides that employes will not be required to suspend work during regular hours or to absorb overtime, and under Rule 17, which provides that regularly assigned employes will not be required to perform services on other than their regular positions except in cases of emergency. It is clear from the record that **Schroeder was not 'required' to perform services on Gang's position, but rather that he requested that he be permitted to do so. Certainly, under the circumstances of this case, no claim would lie for Schroeder based on Rules 10 and 17, and if Schroeder has no claim based on these rules, it is difficult to see how Claimant is in any better position.'** (Emphasis ours.)

Based upon the foregoing, our denial decision of these three claims during conference is herewith confirmed.

Concerning your request to revise the conditions of Rule 19(b), we will advise you at a later date as to our decision in this matter.

Yours very truly,

/s/ F. Diegtel
Asst. Vice President–
Labor Relations."

OPINION OF BOARD: The assigmnents of Claimants as set forth in the Claim, disregarding the words "required or permitted," stand uncontroverted. The issue is whether Carrier's failure and refusal to pay compensation as prayed for in the Claim violates Rule 24(a) of the Agreement which reads:

"RULE 24.

REGULARLY ASSIGNED EMPLOYES DIVERTED TO WORK ON OTHER THAN REGULAR POSITIONS

(a) Regularly assigned employes will not be required to perform service on other than their regular positions except in emergencies. When used to perform such service on other than their regular positions, they will be paid the rate of the position they fill, but not less than the rate of their regular position, and will be allowed actual necessary expenses while away from their regular position. Regularly assigned employes diverted to perform service on other than their regular positions within the same terminal district or town in which their regular positions are located will be paid at straight time rate for only the necessary additional time enroute which would not be incurred had they remained on their regular positions and will be reimbursed for only necessary additional expenses. Where diverted to perform service on regular relief assignments, the provisions of Rule 29 and Rule 30(c) 1, 2, 3, 4, 5, and (d) shall apply. Regular assigned employes (including regular rest day relief employes) diverted under this Rule shall be paid at the time and one-half rate for all time worked outside of the assigned hours of their regular position."

Carrier contends that: (1) Claimants were not required to accept the relief assignments; (2) the penalty rates prescribed in Rule 24(a) are applicable only when an employe is required to fill a position; and (3) historically the Rule has been applied on the property as in (2).

The Organization contends that: (1) the penalty rates agreed to in Rule 24(a) are payable without regard to whether the employe is required to fill the assignment or whether he accepts an offer to fill or asks to fill the position at pro rata rate; (2) an employe within a collective bargaining unit may not in concert with Carrier vary the terms of the collective bargaining agreement concerning rates of pay; and (3) where the Rule is unambiguous past practice is no defense to its enforcement.

The record makes clear that Claimants were not "required" to fill the positions; and, they willingly performed the work of the positions at the pro rata rate. We, therefore, are immediately confronted with interpreting Rule 24(a) to determine whether the penalty rates prescribed therein are only applicable when the employe is required to fill a position.

The word "required" is found only in the first sentence of Rule 24(a). This sentence is a guarantee to employes that they will not be required to accept a position except in emergencies. It has nothing to do with rates of pay and in on way qualifies the following language of the Rule.

The last two sentences of Rule 24(a) are pertinent. They make clear that only necessary conditions precedent to an employe qualifying for the prescribed penalty rate of pay is that he be a regularly assigned employes "diverted" to perform work "on regular relief assignments" outside of the assigned hours of his regular position. The facts of record prove that these conditions prevailed in this case.

We find that Rule 24(a) is not ambiguous. Therefore, we hold that evidence of past practice on the property is immaterial. See, caption "D. The Weight of Past Practice" of our Opinion in Award No. 12667.

Since no less an authority than the Supreme Court has held that terms of a collective bargaining agreement may not be evaded by the actions of an individual employe in concert with an employer, we are compelled to reject Carrier's defense that Claimants asked for the assignments with willingness to perform the work at the pro rata rate. Order of Railroad Telegraphers v. Railway Express Agency, Inc., 321 U. S. 342; J. I. Case Co. v. NLRB, 321 U. S. 332. The collective bargaining agent has the statuatory duty to police and enforce the collective bargaining agreement.

For the foregoing reasons we will sustain the Claim.

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 sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 29th day of July 1966.

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