Award No. 15442
Docket No. TE-14054

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

John H. Dorsey, Referee

PARTIES TO DISPUTE:

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

THE ATCHISON, TOPEKA & SANTA FE RAILWAY COMPANY

STATEMENT OF CLAIM: Claim of the General Committee of The Order of Railroad Telegraphers on The Atchison, Topeka and Santa Fe Railway, that:

1. The Carrier violated the Agreement between the parties on or about November 25 and 26, 1961, by requiring Extra Telegrapher W. R. Lyman, Turner, Kansas, to work seven days in his work week and thereafter refused to compensate him at the overtime rate for work performed in excess of forty hours or five days in his work week, and

2. The Carrier shall now be required to pay Claimant W. R. Lyman the difference between the pro rata and time and one-half rates, and

3. The Carrier shall further be required to compensate Mr. D. M. Wright for eight hours at pro rata for each day the Turner assignment was improperly filled by Lyman plus time and one-half for all service performed outside the assigned hours account Claimant Wright being the senior available extra telegrapher for the assignment beginning November 25, 1961.

EMPLOYES' STATEMENT OF FACTS: There is in full force and effect an agreement entered into by and between The Atchison, Topeka and Santa Fe Railway Company, hereinafter referred to as Carrier, and The Order of Railroad Telegraphers, hereinafter referred to as Employes or Organization. The Agreement bears an effective date of June 1, 1951, is on file with this Board and is, by reference, made a part hereof. In addition thereto, reference will be made to the August 21, 1954 Agreement and the August 19, 1960 Agreement.

A temporary vacancy existed on the relief position at Turner, Kansas, beginning November 25, 1961. Extra employe D. M. Wright was entitled to fill this vacancy in accordance with Article XX Sections 3(a), 3(b) and 7 of the Agreement since he was the senior available extra employe. This fact notwithstanding, extra employe W. R. Lyman was assigned to fill this

"April 10, 1962
135-154-84

Mr. D. A. Bobo, General Chairman
The Order of Railroad Telegraphers
Suite 208 Columbian Building
Topeka, Kansas

Dear Sir:

Referring further to your appeal claim of March 13, 1962, File 48L61-656, in behalf of Extra Telegraphers W. R. Lyman and D. M. Wright:

Without reviewing the facts other than to state that Extra Telegrapher W. R. Lyman, who was relieving Agent-Telegrapher F. W. Wilson at Nortonville while on vacation, did not work on Thanksgiving Day, November 23, 1961, and only worked 32 hours during the work week of the employe he was relieving, I am unable to find any support for your appeal claim under the rules of the Telegraphers' Agreement and it is, accordingly, declined for that and the following additional reasons:

First: Since Extra Telegrapher W. R. Lyman had not worked 40 straight time hours in a work week when released from the vacancy he was protecting at Nortonville, he was available for another vacancy within the meaning of Article XX, Section 17, of the Telegraphers' Agreement and was, therefore, properly used to fill the temporary vacancy on Relief Operator Position No. 9320 commencing at 7:59 A.M., November 25, 1961, under the terms of Article XX, Section 7, of the current Telegraphers' Agreement.

Second: Since it was not compensation for time worked, the eight hours' holiday pay that is granted employes under Article III, Holidays, of the August 19, 1960 Non-Operating Employes' Agreement, cannot be considered as hours worked in determining if extra employes have '* * * worked forty straight time hours in a work week' as that phrase appears in Article XX, Section 17, of the Telegraphers' Agreement.

Yours truly,

/s/ L. D. Comer"

OPINION OF BOARD: An Agent-Telegrapher at Nortonville was granted a three-week vacation from November 6 to 26, 1961, inclusive. He was relieved during that period by Extra Telegrapher W. R. Lyman, one of the Claimants herein. The position was assigned to work 7:00 A.M. to 4:00 P.M. Monday through Friday; rest days Saturday and Sunday. November 6 was a Monday and first day of the work week of the position. In the first two weeks of the assignment Claimant Lyman worked Monday through Friday and observed the Saturday and Sunday rest days. The third work week of the assignment began on Monday, November 20, and the work week ran through Sunday, November 26 — the work days of the work week ran through Friday, November 24, and included the Thanksgiving holiday on Thursday, November 23. Claimant Lyman qualified for the holiday, did not

work, and was paid for that day at pro rata rate, as provided for in the Holiday Agreement. On Saturday, November 25, Claimant Lyman was assigned to a two-week vacation vacancy which he worked on that and the following day — both being rest days of his previous assignment — for which he was paid at pro rata rate. The Claim as to him is for the difference between the rate paid and time and one-half. This gives rise to issues as to: (1) whether Claimant Lyman had earned as rest days Saturday and Sunday, November 25 and 26, and entitled to be paid at the rate of time and one-half for working those days; and (2) whether he was available for assignment to a two-week vacation vacancy beginning Saturday, November 26, because he had worked actually only 32 hours in the work week beginning November 20.

As to whether Claimant Lyman was entitled to time and one-half for November 25 and 26, we find that he stood in the place and stead of the regularly assigned occupant of the position and had earned those rest days. Therefore, for work on those days Carrier was contractually obligated to pay him at the time and one-half rate; Award Nos. 10391, 11076, 13050 and 14698 (same parties as herein). We will sustain paragraphs 1 and 2 of the Claim.

The next issue, relative to paragraph 3 of the Claim, is whether Claimant Lyman was available for assignment, as an extra employee, on November 25. Carrier in defense cites the following rules in Article XX of the Telegraphers' Agreement:

> "SECTION 7. Subject to the provisions of Sections 8 of this Article XX, temporary vacancies of thirty (30) days or less shall be filled from the extra list by the senior available qualified employe thereon."
>
> * * * * *
>
> "SECTION 17. Wherever in this Article XX provision is made for the use of extra employes, it is understood that, except in case of emergency, an extra employe who has worked forty straight time hours in a work week shall not be available for another vacancy in the same work week. If an extra employe has worked less than forty straight time hours in a work week and then becomes available for a subsequent vacancy in the same work week, he shall be permitted to protect such subsequent vacancy, even though he will thereby work more than forty hours in that work week, and shall be paid only straight time therefor."

Carrier argues that since Claimant Lyman had performed no service or work on Thursday, November 23, 1961 (Thanksgiving holiday), and had, therefore, "actually" worked only 32 hours straight time in the work week (commencing Monday, November 20) he became the senior available employe on the extra list when he completed the last work day (November 24) in the work week of that assignment. Carrier says that the phrase "worked less than forty straight time hours in a work week" must be interpreted to mean hours "actually" worked. We find that the intent of the Holiday Agreement is that a holiday, not worked, falling on a work day of a work week is to be construed as a work day in the interpretation and application of the Rules Agreement. Consequently, we find that, within the contemplation of Section 17, supra, Claimant Lyman worked forty hours in the work week November 20 through November 26 and was not available on November 25 for a vacancy in the same work week. Award No. 14698.

By wrongfully assigning Claimant Lyman to the two weeks vacation vacancy Carrier committed another violation of the Agreement by failure to assign to that vacancy the senior idle extra employe, Claimant Wright. Carrier, **arguendo,** say Claimant Wright is not entitled to compensation if we sustain paragraphs 1 and 2 of the Claim because Carrier may not be twice penalized for the same violation. We find that: (1) the claims relative to Claimants Lyman and Wright are separate and distinct; (2) it has been proven that each Claimant suffered monetary damage as a result of the violations; (3) under the make whole principle, both Claimants are contractually entitled to be compensated to the extent of monetary loss each suffered because of the violations; and (4) the compensation is for damages suffered, and is not a penalty.

In the Carrier's Submission it is shown that Claimant Wright was damaged in the amount of $55.84. We will sustain paragraph 3 of the Claim only to that extent.

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

Paragraphs 1 and 2 of Claim sustained.

Paragraph 3 of Claim sustained to the extent prescribed in the Opinion.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 31st day of March 1967.

Keenan Printing Co., Chicago, Ill. Printed in U.S.A.