Award No. 16187
Docket No. TE-15425

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

(Supplemental)

Paul C. Dugan, Referee

PARTIES TO DISPUTE:

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

DENVER AND RIO GRANDE WESTERN RAILROAD

STATEMENT OF CLAIM: Claim of the General Committee of The Order of Railroad Telegraphers on the Denver and Rio Grande Western Railroad, that:

1. Carrier violated the Telegraphers' Agreement when on April 1, 2, 3, 6, 7, 8, 9 and 10, 1964, it blanked the 3:00 P. M. to 11:00 P. M. position and on April 18, 1964, when it blanked the 2:00 P. M. to 10:00 P. M. position at the DC Relay Office, Denver, Colorado.

2. Carrier shall compensate the following operators who were available to perform work on the dates set forth at the time and one-half rate for eight (8) hours each day:

Mr. D. Hoxey	April 1, 1964
Mrs. M. Hollis	April 2, 3, 6, 1964
Mr. D. D. Farlow	April 7, 8, 9, 10, 1964
Mr. G. W. Hall	April 18, 1964

EMPLOYES' STATEMENT OF FACTS: There is in evidence an Agreement by and between the Denver and Rio Grande Western Railroad Company, hereinafter referred to as Carrier, and its employes represented by The Order of Railroad Telegraphers, hereinafter referred to as Employes and/or Organization, effective June 1, 1946, including changes and agreed-to interpretations to date of reissue, July 1, 1963, rates of pay effective May 1, 1962, and as otherwise amended. Copies of said Agreements are available to your Board and are, by this reference, made a part hereof.

This dispute involves three (3) questions:

1. Does Carrier, under applicable rules, have the right to distribute among other employes in DC Relay Office, Denver, Colorado, more than twenty-five (25) percent of the work load of a position, the occupant of which is on vacation;

blanked before and after this claim under similar conditions, but this is the first claim made that a tag end day assigned simply to fill out a relief position to a 40-hour week should be filled by another regular employe on an overtime basis when the regularly assigned employe is off. On none of the days of this claim was any position blanked that was necessary to continuous operation of the Carrier. Complete communication service was maintained in DC Office without burdening or having to hold any employes on overtime to keep up with the work. The work in DC office is not divisible so that it can be ascertained whose duties are being performed. Telegraphers' work in DC telegraph office is interchangeable with all of the employes of the telegraphers' craft assigned to that office and there are no specifically assigned duties to any particular employe. The wire chief on first trick, Night Chief Operator on second trick, and Late Night Chief on third trick have a minimum of supervisory work, dividing up the work according to its flow. The chief operators on each trick infrequently may test circuits, but normally they all work right alongside the telegraphers and perform the same type of duties. The telegraphers work on various printer and microwave circuits as needed. The positions are not bulletined with defined duties.

Inasmuch as the volume of work was such that Mr. Martin could be spared without burdening the other employes in DC office and Section 6 of the Vacation Agreement does not require filling a position under these circumstances and the Agreement does not specify that such positions must be filled when an incumbent is off due to sickness or other reasons, claim was denied. Claims for punitive pay were rejected on the basis of Third Division awards to the effect that payment for time not worked is compensable at straight time rates only. Claims were submitted in favor of regular employes under the provisions of Rule 20(g), which rule becomes operative only when extra telegraphers are not available. Carrier additionally denied the claims on the basis that assigned employes were not involved inasmuch as there were extra telegraphers available; and, because the time limit rule requires that "all claims must be presented in writing by or on behalf of **the employe involved** . . ." and the claimants named in this dispute had shown no involvement and, in fact, were in no way involved.

OPINION OF BOARD: The issue involved herein is whether or not Carrier violated the Agreement when it left unfilled temporary vacancies on regularly assigned positions where the regular occupant was off on vacation and ill and also whether or not Carrier violated the Agreement for failing to fill a position where regular occupant was used as an extra train dispatcher.

The undisputed facts are that the regular occupant of Telegrapher 5 position, J. J. Martin, was off on vacation on April 1, 2, 3, 6 and 7, 1964. Mr. Martin was also off duty on account of illness on April 8, 9 and 10, 1964. The Carrier did not fill this position during these time periods. Also, the 3rd Relief Saturday (Tag End) position was left unfilled by Carrier when the regularly assigned relief employe was used as an extra train dispatcher.

First, in regard to Carrier blanking Telegrapher 5 position while the regular occupant, Mr. Martin, was off ill, this Board has held on numerous occasions that management has the prerogative to fill or not fill a position unless some rule of the Agreement limits this right. See Award No. 12686 and 15046. There is nothing in the Agreement here that prohibits Carrier from blanking Telegrapher 5 when the regularly assigned occupant, Mr. Martin, was off ill on April 8, 9 and 10th, 1964.

Second, in regard to Carrier's action in not filling 3rd Relief, Saturday (Tag End) Position when the regularly assigned relief occupant worked as an extra train dispatcher, we likewise find no rules in the Agreement that requires Carrier to work the position.

Finally, we come to the question whether or not Carrier violated the Agreement when it failed to fill Telegrapher 5 Position on April 1, 2, 3, 6 and 7, 1964, when the regularly assigned occupant of the position was on vacation.

It is the Organization's position that Article 6 and Article 10(b) of the Vacation Agreement were violated when Carrier failed to fill Telegrapher 5 Position when the regularly assigned occupant of the position was off on vacation.

Article 6 of the Vacation Agreement provides as follows:

"The Carriers will provide vacation relief workers, but the Vacation System will not be used as a device to make unnecessary jobs for other workers. Where a vacation relief worker is not needed in a given instance and if failure to provide a vacation relief worker does not burden those employes remaining on the job, or burden the employe after his return from vacation, the Carrier shall not be required to provide such relief worker."

Article 10(b) of the Vacation Agreement reads as follows:

"(b) Where work of vacationing employes is distributed among two or more employes, such employes will be paid their own respective rates. However, not more than the equivalent of twenty-five percent of the work load of a given vacationing employe can be distributed among fellow employes without the hiring of a relief worker unless a larger distribution of the work load is agreed to by the proper local Union Committee or official."

The Organization's position is that inasmuch as the work was done by other telegraphers at the DC relay station, and that there wasn't any diminution of the work being performed by the other employes, and thus a 100% transfer of the work of the vacationing employe to the other employes, then per se the Claimants have met their burden in proving that over 25% of the work load of the vacationing employe was distributed among the other employes without the hiring of Claimants to fill said relief position.

The Organization, in oral argument, argued that inasmuch as the duties of Telegrapher Position 5 must be kept up on a daily basis, then the Organization has made a prima facie case when it has shown that Telegrapher Position 5 was not filled and then the burden shifts to the Carrier to prove that said position did not need to be filled; that the Carrier did not meet its burden by proving that regularly assigned employes performed the work; that Referee Morse's interpretation of Article 10(b) shows that where there is a 100% transfer of work required to be done by other employes, then this would per se be a violation of the Vacation Agreement.

First, in regard to Organization's claim that Carrier violated Article 6 of the Vacation Agreement, we are of the opinion that the Organization's contention in this regard is without merit because no positive evidence was adduced to show that the remaining telegraphers in the DC relay office were burdened in the performance of work normally performed by the vacationing Telegrapher 5, and further no positive evidence was shown to prove that

a burden was placed on the vacationing Telegrapher 5 when he returned to work because of work remaining to be performed.

The Organization argues that if Carrier fails to show that there wasn't any diminution of the work being performed by the other telegraphers at the DC relay station after Telegrapher 5 started on his vacation, then it can be conclusively concluded that the duties of Telegrapher 5 position had to be kept up and Carrier per se couldn't blank Telegrapher 5 position.

We do not agree with the Organization that the burden is on the Carrier to show that the work being performed by the other telegraphers in the DC relay station diminished after Mr. Martin was on vacation. On the contrary, in order for the Organization to prove a violation of 10(b) of the Vacation Agreement, it had the burden of showing by a preponderance of evidence of probative value that more than 25% of the work load in excess of that normally performed by the vacationing Telegrapher 5 had been assumed by the remaining telegraphers in the DC relay office; or a burden had been placed on the remaining telegraphers in the performance of work normally performed by the vacationing Telegrapher 5; or a burden was placed on the returning Telegrapher 5 because of work remaining to be performed. See Awards 14473 and 15218.

Inasmuch as the Organization failed to meet its burden of proving by a preponderance of evidence of probative value that more than 25% of the normal work load of the vacationing Telegrapher 5 had been assumed by the other telegraphers in the DC relay office or that a burden had been placed on the other telegraphers in said office, or that a burden was placed on the Telegrapher 5 when he returned from his vacation, we therefore must deny 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 Agreement was not violated by the Carrier.

AWARD

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 5th day of April 1968.

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