

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

(Supplemental)

Morris L. Myers, Referee

PARTIES TO DISPUTE:

TRANSPORTATION-COMMUNICATION EMPLOYEES UNION

**NORFOLK AND WESTERN RAILWAY COMPANY
(Lake Region)**

STATEMENT OF CLAIM: Claim of the General Committee of the Transportation-Communication Employees Union on the Lake Region of the Norfolk and Western Railroad, that:

1. Carrier violated Rule 24 (b) as amended by refusing to allow D. R. Decker, Extra Telegrapher, to displace to the 3rd shift telegrapher position at Warrenton, Ohio, on August 31, 1964, in accordance with his request.
2. Carrier shall compensate Mr. Decker for time lost due to this refusal, for eight (8) hours' pay at the rate of the position at Warrenton, Ohio, to which he was denied to displace.

EMPLOYEES' STATEMENT OF FACTS: The Agreement between the parties effective February 1, 1951 as amended and supplemented is available to your Board and by this reference is made a part hereof.

This claim was presented to the Chief Train Dispatcher, his decision appealed to the Superintendent and thence to the Director of Personnel of the Carrier including conference within the time limits as provided by the parties. TCU Exhibits 1 through 12 are copies of the correspondence exchanged on the property. Having failed to secure settlement with the Carrier, the Employees appeal these claims to your Honorable Board for adjudication.

By agreement between the parties, the work week of extra telegraphers is Monday through Sunday. On Monday, August 31, 1964, the status of Mr. D. R. Decker was that of an extra telegrapher (unassigned). He had performed no service in that work week. About 10:00 A. M., on that date he received a telegram from the Chief Train Dispatcher, instructing him to protect a vacancy at Ironville Tower, Toledo, Ohio, beginning 7:00 A. M., the following day, Tuesday, September 1, 1964. He immediately discussed these instructions with the Chief Train Dispatcher on the telephone and expressed his desire to exercise his seniority by displacing a junior extra telegrapher,

CARRIER'S EXHIBIT D - January 10, 1965 - Rejection of denial - District Chairman to Superintendent.

CARRIER'S EXHIBIT E - March 5, 1965 - Appeal - General Chairman to Director of Personnel.

CARRIER'S EXHIBIT F - May 3, 1965 - Denial of appeal - Director of Personnel to General Chairman.

CARRIER'S EXHIBIT G - August 24, 1965 - Affirmation of denial - Director of Personnel to General Chairman.

(Exhibits not reproduced.)

OPINION OF BOARD: The Claimant in this case, Mr. D. R. Decker, was an extra telegrapher and was unassigned as of Monday, August 31, 1964. At about 10:00 A.M. on that date he received directions from the Carrier to protect a vacancy at Ironville Tower, Toledo, Ohio, beginning at 7:00 A.M. on Tuesday, September 1, 1964. The Claimant, who was then residing in Sherrodsville, Ohio, approximately 160 miles southeast from Ironville Tower, immediately called the Carrier and asked to displace a junior extra telegrapher on the third trick, beginning at 10:30 P.M., on Monday, August 31, 1964 at Warrenton, Ohio, Warrenton being only about 40 miles southeast from Sherrodsville. The Carrier denied the Claimant's request, upon which denial the Claimant sent a telegram to the Carrier about noon on Monday, August 31, 1964 stating:

"Being Denied Bump Rights on Third Trick Warrenton, Ohio, commencing 10:30 P.M., August 31st, 1964, as per our telephone conversation, will go to Ironville Tower Tuesday morning at 7:00 A.M., September 1st, 1964, for three weeks."

Claimant herein lays claim for 8 hours' pay at the rate of the position at Warrenton, Ohio, on the basis that he was entitled to displace the extra telegrapher at Warrenton on August 31, 1964 by virtue of his seniority. The Claimant alleges a violation of Rule 24 (b) of the Agreement by the Carrier, the relevant portion of which Rule reads as follows:

"(b) Ability and qualifications being sufficient, extra employes if available will be assigned first-in, first-out, but cannot claim extra work in excess of 40 hours in their work week, if a following extra employe who has had less than 40 hours in his work week is available and qualified: provided, when an extra employe has held an assignment for a period of five work days or more, he may be displaced by a senior extra employe (making written application for the position) who is without work if such senior extra employe has had less than 40 hours' work in his work week. * * *"

The Carrier asserts several defenses to the claim. The first defense is that the Claimant was not "without work" within the meaning of the above-quoted Rule when he requested to displace the extra telegrapher at Warrenton, for the reason that as of the time of the request he had already been assigned to work at Ironville Tower. This defense is without merit. "Work" and "assignment to work" are not synonymous. There can be no question

but that the Claimant was "without work" on August 31, 1964, and his assignment to work on September 1, 1964 cannot alter his "work" status on the previous day.

As an example, were this defense of the Carrier to prevail, it could deprive a man of "work" by the Carrier's assigning a senior extra telegrapher on Monday to a vacancy on Thursday, notwithstanding the fact that he had seniority rights to bump other extra telegraphers on the intervening days. The Board finds it impossible to conclude that in such an example, when the senior extra telegrapher earns no wages on such intervening days, he is, none-the-less, not "without work" simply because he was assigned on Monday to fill a vacancy on Thursday.

The second defense asserted by the Carrier is that the Claimant made no "written application" to bump the junior extra telegrapher at Warrenton, as required under Rule 24 (b). It is undenied that the Claimant's request to displace the Warrenton telegrapher was oral, and if nothing more had occurred, this defense would have been meritorious. However, more did occur. The Claimant almost immediately following the denial of his oral request sent a telegram to the Carrier confirming that the request had been denied. Thus, the obvious purpose of the contractual requirement that an application to displace be written was fully served by the telegram that was sent by the Claimant, and the defense of the Carrier in this regard cannot stand.

The third defense of the Carrier is that there has been a past practice of considering Rule 24 (b) as being satisfied when it makes an assignment to a telegrapher, even though the assignment to work occurs on a day other than when the telegrapher is actually to commence working on the assignment. Even had the Carrier established by evidence that such a past practice existed, as distinguished from a mere allegation of such a past practice, which it did not do, the Board must reject this defense of the Carrier to the extent that it attempts to equate "work" to an "assignment to work."

However, the Board wishes to make it clear that it is not deciding that the time factor between an application for displacement and when the displacement is to occur is not to be considered in the application of Rule 24 (b). It makes no sense that if a telegrapher makes application to displace a junior telegrapher under circumstances where it is not reasonably possible for the Carrier to make the displacement under time and distance limitations that exist that the Carrier is, nevertheless, in violation of contract. In this case, the Carrier made no showing by evidence in the record on the property that it was not reasonably possible to allow the Claimant to displace the junior extra telegrapher at Warrenton and to fill the vacancy at Ironville Tower in the time that was available to it to do so after application was made by the Claimant. Had the Carrier sustained that burden by evidence in the record on the property, the decision of this Board in this case would not be as it is.

The claim will be sustained.

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 Employees involved in this dispute are respectively Carrier and Employees 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 violated.

AWARD

Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of **THIRD DIVISION**

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 23rd day of April, 1969.