Award No. 17196
Docket No. TE-16198

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

(SUPPLEMENTAL)

Morris L. Myers, Referee

PARTIES TO DISPUTE:

TRANSPORTATION-COMMUNICATION EMPLOYEES UNION

MISSOURI PACIFIC RAILROAD COMPANY

STATEMENT OF CLAIM: Claim of the General Committee of the Transportation-Communication Employees Union on the Missouri Pacific Railroad (Gulf District), that:

1. Carrier violated Rule 25(d) of Telegraphers' Agreement when on December 6, 1964 it permitted Telegrapher S. T. Henderson to displace Telegrapher J. S. Smith at New Braunfels, Texas after Telegrapher S. T. Henderson had completed his forty hour week assignment, whereas, Telegrapher J. S. Smith had only worked twenty-four hours in his work week.

2. Carrier shall compensate Telegrapher J. S. Smith two days' pay (16 hours) at the prevailing rate of the position at New Braunfels which he was entitled to work.

EMPLOYES' STATEMENT OF FACTS: The two telegraphers involved in this dispute are both extra employees who hold seniority on the Palestine Division. Telegrapher S. T. Henderson's seniority dates from March 4, 1957. Telegrapher J. S. Smith is junior and his seniority dates from August 24, 1964.

Extra Telegrapher Henderson was relieving the agent-telegrapher at McNeil, Texas. The position of agent-telegrapher at McNeil, Texas has an assigned work week of Tuesday through Monday with Sunday and Monday as assigned rest days. Mr. Henderson worked the position Tuesday, December 1, Wednesday, December 2, Thursday, December 3, Friday, December 4, Saturday, December 5. The two rest days of the position were Sunday, December 6, and Monday, December 7.

Mr. Henderson requested the Carrier to permit him to displace junior telegrapher J. S. Smith on the second shift at New Braunfels, Texas beginning Sunday, December 6. The Carrier permitted him to make this displacement.

Junior extra man J. S. Smith was working at New Braunfels, Texas, second shift position, which has a work week beginning on Thursday through Wednesday with assigned rest days of Tuesday and Wednesday. The assigned hours of the position are 3:00 P.M to 11:00 P.M. In the work week beginning Thursday, December 3, junior extra man Smith had worked Thursday, December 3, Friday, December 4 and Saturday, December

rapher S. T. Henderson being permitted to displace him off the 3:00 P.M. to 11:00 P.M. job at New Braunfels, it being alleged there was a violation of Rule 25(d) as result of senior telegrapher who had worked forty hours in his work week being permitted to displace a junior employe who had worked less than forty hours in his work week. Rule 25(d) is quoted below for ready reference:

Rule 25 (d):

"Senior extra employes when available and competent will be used in preference to junior extra employes but cannot claim extra work in excess of forty hours in his work week if a junior extra employe who has had less than forty hours work in his work week is available. Senior extra employes will be allowed to displace junior extra employes. An extra employe who displaced another extra employe on position where a transfer is involved will be required to effect transfer of accounts during the last two hours of tour of duty on the day previous, unless other arrangements agreeable to all concerned are made. Transfer of accounts will be made by the employes involved without expense to the Railway Company. Under this Rule extra employes must accept the work to which entitled."

OPINION OF BOARD: The facts in this case are undisputed. Mr. S. T. Henderson was an extra telegrapher and had worked Tuesday, December 1, 1964, through Saturday, December 5, 1964, on an assignment at McNeil, Texas. The two rest days in this position were Sunday and Monday. Mr. Henderson requested the Carrier to permit him to displace the Claimant, Mr. J. S. Smith, an extra telegrapher working at New Braunfels, Texas, and junior in seniority to Mr. Henderson, beginning Sunday, December 6, 1964. The Carrier granted Mr. Henderson's request and Mr. Henderson did in fact displace Mr. Smith and worked both Sunday and Monday, December 6 and 7, 1964, at New Braunfels, Texas. It is this displacement for these two days that the Claimant alleges violated the Agreement for the following reason.

The telegrapher's position at New Braunfels in which the Claimant was working had a work week of Thursday through Wednesday with assigned rest days of Tuesday and Wednesday. The Claimant had worked Thursday, December 3, 1964, through Saturday, December 5, 1964. Thus, when the Carrier permitted Mr. Henderson to displace the Claimant, he (Smith) had worked only three days in his workweek. The Claimant asserts that he was entitled to work the remaining two work days of the work week and claims pay for those two days, contending that the Carrier violated Rule 25(d) in permitting Mr. Henderson to displace him. The relevant portion of Rule 25(d) upon which the Claimant relies reads as follows:

"Rule 25

EXTRA EMPLOYES

(d) Senior extra employes when available and competent will be used in preference to junior extra employes but cannot claim extra work in excess of forty hours in his work week if a junior extra employe who has had less than forty hours work in his work week is available. Senior extra employes will be allowed to displace junior extra employes. . . ."

It is unquestioned that at the time Mr. Henderson displaced the Claimant, Mr. Henderson, who was senior to the Claimant, had worked forty hours in his work week, and it is equally unquestioned that the Claimant had worked less than forty hours in his work week. The Carrier does not deny that Henderson had no contractual right to displace the Claimant on the two days herein involved.

The Carrier's major defense to the claim is that the above-quoted portion of Rule 25(d) is intended to protect **only** a senior extra employe, not a jusior extra employe, and that the forty-hour limitation is present in Rule 25(d) as a limitation on the senior extra employe's contractual protection. Another way of putting it is that Rule 25(d) did not require the Carrier to displace the Claimant on the two days in question, but that the Rule did not give the Claimant the right to work on those days if the Carrier **desired** to displace him.

This Carrier's defense is imaginative in its concept, but the Board does not believe that it is meritorious. The Board cannot assume that Rule 25(d) was negotiated solely for the protection of senior extra employes. The Organization represents junior extra employes as well as senior extra employes, and the Organization could well have been concerned with protecting the rights of the junior employes by limiting the rights of senior employes when it negotiated the Rule. Certainly the Carrier presented no evidence in the record to establish that the Organization had no such concern.

The Carrier also defends against the claim on the grounds that the Claimant was needed for vacation relief at Round Rock, Texas, beginning on Tuesday, December 8, 1964, and that he could not have been available to work on that date at Round Rock had he continued to work at New Braunfels on December 6 and 7, 1964, without violating the Agreement as interpreted by the Organization. However that may be, it is the Carrier's responsibility to schedule vacation relief in such a way as not to violate the Agreement. To schedule vacation relief otherwise and to use such scheduling as a defense against a violation of the Agreement cannot be permitted by this Board.

Lastly, the Carrier contends that there can be no remedy in this case because the Claimant suffered no monetary loss inasmuch as "he worked sufficient days during the pay period to receive full pay." That the Claimant may have worked enough days after the two days for which claim is herein made so as to "compensate" him for the two days he lost that were rightfully his to work was pure coincidence and chance and, therefore, a result that the Board cannot properly take cognizance of in determining a remedy for the Carrier's violation. Consequently, 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 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 violated.

AWARD

Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 6th day of June 1969.

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