Award Number 17801
Docket Number TE-17555

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

David L. Kabaker, Referee

PARTIES TO DISPUTE:

TRANSPORTATION-COMMUNICATION EMPLOYEES UNION

THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY

STATEMENT OF CLAIM: Claim of the General Committee of the Transportation-Communication Employees Union on The New York, New Haven & Hartford Railroad, that:

1. Carrier violated Article 13 (a) of the Agreement between the parties when it did not properly assign S. S. Operator P. N. Varrica to 3rd trick S.S. Operator, S.S. 151 Promenade St. (West End) on Monday, October 31, 1966, until further notice on one week (five days) vacation relief.

2. Claim is made for two days pay (8 hours each day at pro-rata rate per hour of $2.9268) for the violation set forth above account claimant available but did not work Tuesday November 1st and Thursday November 3rd.

EMPLOYES' STATEMENT OF FACTS:

(a) STATEMENT OF THE CASE

An Agreement between The New York, New Haven and Hartford Railroad Company and this Union, dated September 1, 1949, as amended and supplemented, is available to your Board and by this reference is made a part hereof.

This claim was timely presented, progressed in accordance with the time limits provided by the Agreement, up to and including conference with the highest officer designated by the Carrier to receive appeals. Having failed to reach a settlement, the Employees now appeal to your Honorable Board for adjudication.

This claim arose out of Carrier's failure to call the senior telegrapher for the first vacancy to be filled on Monday, October 31, 1966.

(b) ISSUE

When two temporary vacancies are to be filled on the same day, should the senior extra telegrapher be called to fill the position having the earliest starting time?

Is the extra telegrapher who is called out of turn entitled to be compensated for the work denied him as the result of Carrier's violation of the Agreement?

The claim was denied on the property on the basis that Mr. Varrica suffered no loss of earnings as compared with the earnings of Mr. Mederios for the week ending November 5, 1966.

Copy of Agreement dated September 1, 1949, as amended, between the parties is on file with your Board and is, by reference, made a part of this submission.

(Exhibits Not Reproduced)

OPINION OF BOARD: Carrier assigned Claimant to cover third trick operator's position at Mystic, Connecticut for one night, Monday October 31, 1966, starting time 10:00 P.M. On same date Carrier assigned Operator Mederios, senior to Claimant to fill a five day vacation relief assignment, Monday, October 31, 1966 to Friday November 4th at S.S. 151 Promenade Street, Providence, R.I., starting time 11:00 P.M.

Claim is made for 2 days pay for Tuesday November 1st and Thursday November 3rd on the ground that had Claimant been properly assigned to the Promenade Street position, he would have worked those 2 days on that position. Claimant bases his claim that he lost 2 days work since he was available on those days but was not used.

Carrier does not attempt to justify its action in not assigning the Claimant and Operator Mederios in accordance with their seniority standing and admits that the resultant mishandling was Carrier's responsibility. However, Carrier's position is that Claimant was not harmed in any way as a result thereof inasmuch as the Claimant earned more money during that week than he would have earned had he been properly assigned. In support thereof it points out that Claimant's wages for 4 days was $105.28 plus $41.15 travel time and expenses totaling $146.43. Both positions paid the same rate; Mederios wages for his work week was $117.07 at Promenade Street. Carrier further maintains that under the "make whole" theory, supported by Awards of this Division, the Claimant sustained no damage and therefore his claim should be denied.

We are exceedingly aware of the fact that the fundamental strength of a Collective Bargaining Agreement is weakened by the violative actions of parties to the Agreement when such actions continue without proper damages or compensation to the injured Party or the employees covered by such Agreement.

We are in full accord with the pronouncement of the theory that the measure of damages for some breaches of a Collective Bargaining Agreement must be that employee shall be made whole for the Carrier's violative act which caused loss to him. In the instant case, however, we can not agree with the Carrier's rationale or logic that the Claimant suffered no loss as a result of the improper assignment. Carrier's argument is based upon the fact that the Claimant's weekly earnings for the week ending November 5th were greater that that which he would have earned, had he been properly assigned to the Promenade Street position.

The vulnerability of the Carrier's position lies in the fact that it uses a week as a comparison basis. We can not recognize that a weekly period is a proper comparison period, or, for that fact, a semi-monthly period or a monthly period. It has no particular sanctity inasmuch as the Claimant's improper assignment for one day deprived him of two days' earnings.

The Board must conclude that the only true test of what damage the Claimant sustained must be on the basis of comparison of what the Claim-

ant earned on November 1st and November 3rd and what he would have earned on those days had he been properly assigned. Since the Claimant did not work on the two days above mentioned, it is obvious that his damage was 8 hours for each of the two above mentioned days at the pro rata rate of $2.9268 per hour.

One further contention of Carrier needs be discussed. It is Carrier's position that the seniority rights of Operator Mederios were violated and not those of the junior man, the Claimant. It reasons therefore that the loss of earnings accrue to the senior man and not to the Claimant by reason of default on the part of the senior man for not presenting a claim.

We recognize that the senior operator could properly present a claim based upon the violation of his seniority rights, but we are exceedingly conscious of the fact that his failure to present a claim does not negate or bar the junior man from filing a claim based upon the violation of his seniority rights. Since the seniority rights of both employees are separate and distinct from one another, we find no support for this contention of the Carrier.

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 27th day of March 1970.

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