

Award No. 18010
Docket No. TE-17166

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

John J. McGovern, 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 and Hartford Railroad, that:

1. Carrier violated the Agreement between the parties when on February 10, 1966 it permitted S. S. Operator G. F. Smith to displace S. S. Operator R. J. Vachon, who in turn displaced John J. Hogan.

2. Carrier shall compensate R. J. Vachon the difference between what he earned and one and one-half times the rate of first trick, Jackson Street, Worcester, Massachusetts for each day he worked third trick at that point during the period February 10 and April 3, 1966.

3. Carrier shall compensate J. J. Hogan for each day lost during the period February 10 through April 1, 1966 at the rate for third trick Jackson Street, Worcester, and at one and one-half times the rate of that position for all hours worked during that period after the assigned hours of that position.

4. Carrier shall compensate J. J. Hogan for all deadheading and automobile mileage incurred during the period February 10 through April 1, 1966.

EMPLOYEES' STATEMENT OF FACTS: 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 presented and progressed in accordance with the time limits provided by the Agreement up to and including appeal and 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.

Vachon from Mr. Smith's permanent assignment on the first trick at Jackson Street. Mr. Vachon in turn reverted to his regular assignment on the third trick at Jackson Street, thereby displacing Operator J. J. Hogan, who reverted to the spare board.

In subsequent discussion of this matter between Superintendent J. A. Gregg, former General Chairman J. F. Kelleher and Committee members, it was agreed that Mr. Smith should not have been allowed to return to his regular position under the circumstances and it was further agreed that he would not be permitted to return to the temporary position he had held at Webster and he would not be allowed to work until the agency at Webster was rebulletined under the provisions of Article 28(c) or until such time as the permanent owner returned and displaced him from this position. Accordingly, Mr. Smith was removed from his permanent assignment on the first trick at Jackson Street and the claimants returned to their respective temporary assignments.

The claim is predicated on the contention that because Mr. Smith returned to his permanent assignment, the resulting displacements required the claimants to work on the rest days of the temporary assignments from which displaced.

The claim was denied on the property on the grounds that claimants Vachon and Hogan suffered no monetary loss when they were required to revert to his permanent assignment and spare board, respectively, as each performed service five days in each of the week endings involved herein.

The instant claim was progressed through the prescribed channels on the property up to and including the undersigned.

Attached in exhibit form is copy of pertinent correspondence as follows:

CARRIER'S EXHIBIT A: General Chairman's appeal.

CARRIER'S EXHIBIT B: Carrier's decision.

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

(Exhibits not reproduced.)

OPINION OF BOARD: This dispute involves a claim for compensation in favor of two employees affected by an improper displacement. It arose from the following circumstances: The regular occupant of the first trick S. S. Operator position at Jackson Street, Worcester, Massachusetts, G. T. Smith, in exercise of his seniority, moved to a temporary vacancy in the position of Agent-Operator at Webster, Massachusetts. The resulting temporary vacancy on first trick at Jackson Street was duly filled by Claimant R. J. Vachon, whose regular assignment was the third trick at Jackson Street. The temporary vacancy in his position was filled by Claimant J. J. Hogan from the spare board. All of these moves were made in conformity with applicable rules of the agreement giving effect to the employees' seniority rights.

However, Mr. Smith, after filling the temporary vacancy in the position of Agent-Operator at Webster for some three months, was disqualified. And,

although the temporary vacancy had not terminated, he was permitted to return to his regular assignment on first trick at Jackson Street, displacing Claimant Vachon, who, in turn, went back to his regular assignment on third trick at Jackson Street, displacing Claimant Hogan. Mr. Hogan reverted to the spare board.

Employees disagreed with Carrier's action of permitting these reverse movements, contending that Smith had no right to return to his regular assignment until the temporary vacancy at Webster was terminated by one or another of a number of methods provided by the agreement. After considerable handling by the parties, Carrier conceded that Smith should not have been permitted to return to his regular assignment under the circumstances. He was required to vacate the Jackson Street position, and claimants were returned to the respective temporary vacancies they had previously occupied.

Employees contend that since the claimants were wrongfully required to work positions other than those to which they were entitled during the period that Mr. Smith was permitted to return to the Jackson Street assignment they should be compensated.

On the property the Employees were somewhat vague as to the precise measure of damages claimed until the General Chairman's appeal to Carrier's highest officer dated June 17, 1966. There, he clearly asked that each of the two claimants be paid the difference between the straight time rate and time and one-half for two days in each of the five weeks they were not permitted to work the assignments to which they were entitled. The theory, of course, was that since rest days attach to positions and since the claimants actually worked the rest days of their proper assignments, they were entitled to the time and one-half rate rather than the straight time rate which was paid.

A review of the record shows conclusively that the Employees expanded the monetary portion of the claim. Employees also claimed that Hogan should be additionally compensated for his deadheading and mileage during this five week period. The theory here obviously was that Hogan, during this period, was constructively the occupant of the third trick at Jackson Street, therefore, his actual working at other places entailed travel for which the agreement provides deadhead and mileage payments.

Carrier objects strenuously to this expansion of the claim, contending that it is contrary to the procedural rules of the Board which prohibit the injection of new issues or the "mending of holds" by either party at Board level. The objection is well taken, and is hereby sustained. This principle is so well established that citation of awards is unnecessary. We will consider only the claim as handled on the property.

We agree with the position of the Employees that claimants, being entitled to the rest days of the assignments they had a right to occupy during the five week period in question, were entitled to the payment provided by the agreement for work performed on those days, that is, time and one-half. The claim for the difference between that rate and the straight time rate, which was paid, will be sustained, each claimant to be allowed the equivalent of one-half time for ten days.

On the property the Carrier made no response to the claim for dead-heading and mileage allowance in favor of Claimant Hogan. But in its submission to the Board the Carrier offers reasons why this portion of the claim should be denied. As noted above, the Board does not look with favor upon attempts by either party to "mend their holds" at Board level. Since no reasons were given by Carrier on the property, none can be accepted now. Instead, we must consider the Carrier to have waived any defense it may have had to this portion of the claim. It will, accordingly, be sustained without interpreting the agreement as it might apply to any other case.

For the foregoing reasons, the claim will be sustained to the extent herein indicated.

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 to the extent indicated in the Opinion.

AWARD

Claim sustained in accordance with the Opinion and Findings.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 30th day of June 1970.