



Award No. 18634
Docket No. TE-18854

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Arthur W. Devine, Referee

PARTIES TO DISPUTE:

TRANSPORTATION-COMMUNICATION DIVISION, BRAC
THE ANN ARBOR RAILROAD COMPANY

STATEMENT OF CLAIM: Claim of the General Committee of the Transportation-Communication Division, BRAC, on the Ann Arbor Railroad, T-C 5744, that:

1. Carrier violated the Agreement between the parties when on March 31, 1969, April 1, 2, 3, 4, 5, 7, 8, 9, 10, 11, and 12, 1969, it required Agent-Telegrapher R. L. Chadwick, Clare, Michigan during the regular hours to perform relief work on the Agent-Telegrapher position at Mount Pleasant, Michigan, in the absence of an emergency.

2. Carrier shall, as a result, compensate the senior idle telegrapher, extra in preference, eight (8) hours' pay at the rate of \$3.5672 per hour for each date violation occurred account not being used.

3. Carrier shall also compensate Agent-Telegrapher R. L. Chadwick, eight (8) hours' pay at punitive rate of \$5.3508 per hour, less amount received for such service, and in addition to compensation allowed for service performed on his regular position, for each date violation occurred.

CARRIER DOCKET: A-20.112

EMPLOYEES' STATEMENT OF FACTS:

(a) STATEMENT OF THE CASE

The Agreement between the parties, effective September 1, 1955, as amended and supplemented, is on file with your Board and by this reference is made a part hereof.

Claim was timely presented, progressed, including conference with highest officer designated by Carrier to receive appeals, and it remained declined. The Employees, therefore, appeal to your Honorable Board for adjudication.

The claim arose as a result of a vacancy which developed on the Agent-Telegrapher position at Mt. Pleasant, Michigan, commencing January 15,

Mr. W. L. Larson, Manager Data Origination and Quality Control, declined the claim in a letter dated May 22, 1969. (See Exhibit B)

District Chairman Stevens acknowledged Mr. Larson's declination on May 26, 1969. (See Exhibit C)

On July 9, 1969 General Chairman, Mr. F. G. Worsham, appealed the claim to R. J. O'Brien, Personnel Manager. (See Exhibit D)

Mr. O'Brien declined the claim in a letter dated August 15, 1969. (See Exhibit E)

In a letter dated October 7, 1969, General Chairman Worsham advised the Personnel Manager that he did not accept his decision. (See Exhibit F)

The claim was discussed in conference on January 7, 1970 and in a letter dated February 2, 1970, General Chairman Worsham confirmed the January 7, 1970 conference and stated his position relative to the claim. (See Exhibit G)

The claim was again discussed in conference on February 11, 1970 and in a letter dated February 24, 1970 the Personnel Manager confirmed the January 7 and February 11, 1970 conferences and replied to the statements contained in Mr. Worsham's October 7, 1969 and February 2, 1970 letters. (See Exhibit H)

General Chairman Worsham again stated his position in a letter dated March 4, 1970. (See Exhibit I)

(Exhibits not reproduced.)

OPINION OF BOARD: This claim arose from the following circumstances: A temporary vacancy in the monthly rated position of Agent at Mt. Pleasant, Michigan, occurred because of illness of the regular incumbent. Carrier filled this vacancy, using a regular relief agent whose position had been established by agreement between the parties for just such purposes. This relief employee, however, after filling the vacancy for some time, became unavailable for work and left the Carrier's service. No extra employee was available to fill the resulting vacancy. Carrier then arranged for the occupant of another monthly rated position, R. L. Chadwick, to take care of the work necessary at Mt. Pleasant in addition to that of his own job, and outside of his regular assignment, paying him an additional 4 hours at overtime rate each day as well as a travel allowance.

Employees considered this action of the Carrier to be in violation of their Agreement and filed claim accordingly. The claim as handled on the property, although obscurely stated, alleged that Carrier had no right to arrange for the work at Mt. Pleasant to be performed by Mr. Chadwick, and that in so doing it violated not only his rights but also the seniority and other rights of "an employe * * * senior idle extra man in preference and/or a regular assigned employe * * * on his rest day and/or days * * *." A day's pay was claimed for this employe — at the rate of the Mt. Pleasant position — for each of the twelve claim dates. A day's pay for each of these dates was also claimed for Mr. Chadwick at the overtime rate. Additionally, automobile mileage was claimed for Mr. Chadwick. Employees later concede that the mileage was paid, and that question has thus been laid to rest.

The Employees' position, not very clearly stated but as gleaned from the grossly excessive verbiage of their presentation, seems to be that Carrier effected what amounts to a temporary consolidation of positions contrary to the clear intent that such consolidations can properly be made only by agreement between the parties, thereby depriving some employee of an opportunity to work the days in question; also, that the amount paid Chadwick for the work performed at Mt. Pleasant was less than was required by the agreement provisions.

Carrier's position, also somewhat obscured by excessive and sometimes irrelevant argument, is, in the final analysis, merely a categorical denial that its action was improper under the agreement. This is not to say, however, that Carrier's position is insufficiently presented because the burden of proving its case rests with the Petitioner.

The Employees' theory of the case, insofar as they have offered rules or agreement provisions for support, presents two questions for decision: (1) Did Carrier run afoul of any agreement provision in arranging for Mr. Chadwick to perform the work at Mt. Pleasant in addition to that of his own position? (2) Did Carrier properly pay Mr. Chadwick for the additional work?

With respect to the first of these questions we must note that the alleged agreement of Chadwick to do the work for four hours' overtime is wholly irrelevant. It is firmly settled that an individual employee may not enter into agreements that have the effect of varying the terms of the collectively bargained agreement. The decisive point for consideration here is whether the parties' agreement prohibits the use of an employee to perform work in addition to that of his own assignment.

The Employees contend that various provisions have such prohibitory effect. We have carefully studied those provisions and the Employees' arguments relating to them. None of the provisions cited directly prohibits the Carrier from using an employee in the manner here complained of. But, the Employees argue, there is such an implication. The difficulty with this argument is that it requires speculation, an activity not properly available to the Board.

If such a prohibition were intended it would have been easy to include appropriate language. We have observed that Rule 11, entitled "Regular Assigned Employees Doing Extra Work," contains no such prohibition as is sometimes contained in similar rules on other properties.

We must, therefore, conclude that the Employees have failed to prove that use of Chadwick to perform the work at Mt. Pleasant was violative of any provision of the Agreement. It follows that claims 1 and 2 must be denied.

With respect to the second question for decision we have an entirely different situation. The position at Mt. Pleasant is a monthly rated position subject to some special provisions which must of necessity take precedence over general provisions. Rule 4(b) reads as follows:

"Positions shown in Rule 30 on monthly basis shall not be subject to the provisions of Rules 5, 6, 7, 8 and 9, except as specifically provided in Rule 9."

Rule 6 provides for the payment of overtime and calls. By operation of Rule 4(b), Rule 6 is not applicable to the Mt. Pleasant position. Therefore,

the payment of four hours' overtime at time and one-half rate to Chadwick was not provided for by the Agreement.

Rule 9, Section 3(b) is a special rule, applicable only to those positions shown in Rule 30 under the caption "Monthly Rated Positions," of which the Agent position at Mt. Pleasant is one. The third paragraph of Rule 9, Section 3(b) reads as follows:

"To determine the pay for an employee working only a part of the month on a position covered by this Section 3(b), divide the monthly rate by the number of working days in the month (calendar days of the month less rest days) and multiply the result by the number of working days he worked on the position."

This provision is directly and clearly applicable to the facts before us. Chadwick worked "on the position" only a part of the months involved, one day in March and eleven days in April.

Since the position is not subject to the Basic Day, Overtime and Calls, Meal Period, Starting Time, and most of the Work Week rules (Rules 5, 6, 7, 8 and 9) the quoted provision provides the only basis of payment for an employee required to work only a part of a month on such a position.

Carrier has paid Chadwick four hours at overtime rate for each day he worked on the position. This is the equivalent of six hours at straight time rate. The computation required by Rule 9, Section 3(b), third paragraph, would result in the equivalent of two additional hours at straight time rate for each day involved. To that extent he was underpaid, and to that extent only the claim in Part 3 of the Statement of 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 only to the extent indicated in the Opinion.

AWARD

Claims 1 and 2 denied;

Claim 3 sustained to the extent indicated in the Opinion and Findings.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: E. A. Killeen
Executive Secretary

Dated at Chicago, Illinois, this 16th day of July 1971.

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