

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Luther W. Youngdahl, Referee

PARTIES TO DISPUTE:

**THE ORDER OF RAILROAD TELEGRAPHERS
THE DELAWARE, LACKAWANNA & WESTERN
RAILROAD COMPANY**

STATEMENT OF CLAIM: Claim of the General Committee of The Order of Railroad Telegraphers on the Delaware, Lackawanna & Western Railroad Company, that:

(1) the carrier violated Rule 7-(b) of the Telegraphers' Agreement when on December 19, 1942, it bulletined a position of leverman Terminal Tower, Hoboken, New Jersey, hours 1:00 A. M. to 9:00 A. M.;

(2) the carrier violated Rule 11 of the Telegraphers' Agreement when coincident with the bulletining of the said position on December 19, 1942, it began the suspension of the applicant incumbent from work 12:00 midnight to 1:00 A. M.; and

(3) W. D. Boyd, who was the successful applicant and was assigned to the position on January 4, 1943, and any other employe who may have filled this position in Boyd's absence between January 4, 1943, and December 22, 1943, the date on which the violation was discontinued by the carrier, are entitled to and shall be paid one hour's overtime at the overtime rate of pay for each day service was commenced between twelve midnight and 6:00 A. M.

EMPLOYEES' STATEMENT OF FACTS: An agreement by and between the parties, bearing effective date of May 1, 1940, is in evidence; copies thereof are on file with the National Railroad Adjustment Board.

Carrier's Bulletin No. 424, dated December 19, 1942, over the signature of Chief Train Dispatcher, H. E. Crusier, reads in part:

"Applications will be received by the undersigned during the next ten (10) days for the following Tower positions:

"Leverman, Terminal Tower, Hoboken—

Hours 1:00 A. M. to 9:00 A. M.
Rate \$1.02 per hour."

The rate here quoted, through the process of national mediation and agreement was increased 4¢ an hour effective February 1, 1943, and 5¢ an hour additional effective December, 1943.

Carrier's Bulletin No. 427, dated January 4, 1943, over the signature of Chief Train Dispatcher, H. E. Crusier, reads in part:

"Successful applicant for the following positions as Towermen:

"Leverman, Terminal Tower, Hoboken—W. D. Boyd."

December 22, 1943, Superintendent Thexton advised in letter to General Chairman Slocum that it was developed a leverman was working 1:00 A. M. to 9:00 A. M. in violation of Rule 7 (b) and the assignment was corrected by the Chief Dispatcher. Rule 11, referred to in Employees' Notice of Submission of this claim to the Board has not been referred to in any correspondence between the employees and the Carrier—therefore, the dispute under Rule 11 of the Telegraphers' Schedule is not properly before the Board. (See Award 2099 Third Division.) In any event it has no application.

POSITION OF CARRIER: Rules and Rates of Pay for Telegraphers—Rule 7 (b) reads:

“(b) Where three consecutive shifts are worked covering the twenty-four (24) hour period, no shift shall have a starting time after twelve o'clock (12:00 M.) midnight and before six (6:00) A. M.”

Employees are claiming under the rule that the incumbent of the position is entitled to be paid one hour's overtime at the overtime rate of pay for each day service was commenced between twelve midnight and 6:00 A. M.

There is absolutely nothing in this rule to justify an insinuation that the Carrier is obliged to pay any such penalty as requested by the employees.

The employees occupying the position in question were adequately compensated in accordance with Rule 2—Basic Day—which reads:

“Except as specified in Rule 3, eight (8) consecutive hours, exclusive of the meal hour, shall constitute a day's work, except that where two or more shifts are worked, eight (8) consecutive hours with no allowance for meals shall constitute a day's work.”

Article 7 (b) is silent as to compensation. Accordingly, the Board will not read into it something which is not there. To do so by fiat would create a new rule, which is beyond the power of the Board.

“It is not advisable even to reach a result which might appear to attempt to read into a rule something which is not there. The weight of authority as well as sound reason supports this principle.”

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When the improper bulletined hours were brought to the attention of the Carrier, the necessary adjustment was made to conform to the Telegraphers' Schedule rules.

The Carrier contends the grievance having been corrected, the request for compensation is not valid.

OPINION OF BOARD: Rule 7 (b) of the Telegraphers' Agreement provides:

“Where three consecutive shifts are worked covering the twenty-four (24) hour period, no shift shall have a starting time after twelve o'clock (12:00 M.) midnight and before six (6:00) A. M.”

Carrier frankly concedes a violation of this rule in that it bulletined the position of Leverman, Terminal Tower, Hoboken, New Jersey, with hours from 1:00 A. M. to 9:00 A. M.; assigned the position to W. D. Boyd, January 4, 1943, and permitted the 1:00 to 9:00 A. M. assignment to continue from January 4, 1943 until December 22, 1943. On December 22, 1943, the starting time was changed to comply with the rule.

While conceding a violation of the rule, Carrier attempts to invoke in its favor Rule 4, which provides for overtime when an employe works in excess of 8 hours on any day. Carrier contends that there is no showing that Boyd or any other employe worked in excess of 8 hours on any day and, therefore, no compensation is due.

In determining this issue all the applicable rules must be considered together, in the light of their obvious purpose. Rule 4 must be interpreted in connection with Rule 7 (b) and Rule 2, and, so considered, it means that any employe is entitled to overtime if he works in excess of 8 hours (the basic day under Rule 2) with the 8-hour shift commencing not later than 12:00 midnight in accordance with 7 (b). Under such computation employe is entitled to overtime for work performed after 8:00 A. M. To permit the computation of the 8-hour shift to be made from 1:00 A. M. would be to disregard the plain implications of 7 (b). Because the employe did not actually work the hour between 12:00 midnight and 1:00 A. M. is no defense to Carrier in this case and does not justify its escape from the effects of its conceded violation of 7 (b).

Carrier further asserts that 7 (b) contains no penalty provisions and no damage being shown, there can be no recovery. In Award 685 the Division quoted with approval a statement from the report of the Emergency Board created by the President of the United States on February 8, 1937, as follows:

“The penalties for violations of rules seem harsh and there may be some difficulty in seeing what claim certain individuals have to the money to be paid in a concrete case. Yet, experience has shown that if rules are to be effective there must be adequate penalties for violation.”

This is sound doctrine and it is reaffirmed by this Board. Surely the parties to the Agreement did not engage in the idle ceremony of setting up comprehensive rules for the settlement of disputes without proper and adequate penalty in the event of a violation thereof. To so conclude would be to impair, if not completely destroy, the effectiveness of the rules.

Finally, it is claimed by Carrier that retroactive compensation is not justified and that in any event the award should be restricted to a period from December 3, 1943 (date of formal claim) to December 22, 1943. We cannot agree with this contention. It is true that formal claim was made in a letter dated December 3, 1943 by a representative of the General Committee to the Carrier. However, this same representative, under date of February 18, 1943, wrote the Carrier and, among other things, stated:

“Please so arrange that no shift shall have a starting time after 12:00 midnight and before 6:00 A. M. Telegraphers’ Rule 7 is our authority.”

Though the Committee was then only specifically claiming that a trick was wrongful started at 5:30 A. M., it also requested a compliance with the rule as to the midnight starting time and, therefore, Carrier was put on notice of any violation of the rule. Aside from this, we do not believe Carrier in this case is in a position to demand notice before compensation is justified. There no doubt may be cases where the question of the timeliness of the protest should be given due consideration in determining whether there should be a reward, but this is not such a case. Each case must be decided on its own facts, and the conclusion here reached is not intended as a precedent generally unless similar facts arise. In the instant case the Carrier has offered no proof in justification or mitigation of the violation of the rule. A protest of the violation and demand for adherence to the rule was timely made. The obligation to adhere to the rules is reciprocal. As it was aptly stated by Referee Shake in Award No. 2611:

“It was as much the duty of the Carrier to conform to the current Agreement as it was that of the employe and his organization to protest a violation thereof and it would be inequitable to permit the Carrier to reap a benefit from its own wrong.”

FINDINGS: The Third Division of the Adjustment Board, after giving the parties to this dispute due notice of hearing thereon, and upon the whole record and all the evidence, finds and holds:

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 employe and any other employe who may have filled the position in his absence is entitled to an award from January 4, 1943 to December 22, 1943, for one hour's overtime at the overtime rate of pay for each day's service commenced between 12:00 midnight and 6:00 A. M.

AWARD

Claim sustained in accordance with Opinion and Findings.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: H. A. Johnson
Secretary

Dated at Chicago, Illinois, this 8th day of March, 1945.