

Award No. 10956
Docket No. TE-10136

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

David Dolnick, Referee

PARTIES TO DISPUTE:

THE ORDER OF RAILROAD TELEGRAPHERS

LEHIGH VALLEY RAILROAD COMPANY

STATEMENT OF CLAIM: Claim of the General Committee of The Order of Railroad Telegraphers on the Lehigh Valley Railroad, that:

1. Carrier violated the Agreement when it caused, required or permitted L. E. Strasburg to perform part time service as Agent Telegrapher at Lima, New York, on October 26, 29, 30, and 31, 1956.
2. Carrier shall, as a result of the violations cited in Item 1 above, be required to compensate the senior idle telegraph service employe of the Buffalo District, extra in preference, on a day-to-day basis, for eight hours at the Lima pro rata hourly rate to cover each of the following days or dates: October 26, 29, 30 and 31, 1956.
3. Carrier shall be required to permit joint check of its records for the purpose of ascertaining the names of employes entitled to receive such compensation for each date of violation as set forth in Item 2 above.

EMPLOYES' STATEMENT OF FACTS:

JURISDICTION

There is in full force and effect, collective bargaining agreement(s) entered into by and between Lehigh Valley Railroad Company, hereinafter referred to as Carrier or Management, and The Order of Railroad Telegraphers, hereinafter referred to as Employes or Telegraphers. The Agreement(s) is on file with this Division, National Railroad Adjustment Board and, by reference, is made a part of this submission as though set out herein word for word.

The dispute submitted herein is predicated upon the written Agreement and jurisdiction is conferred by Section 3 (45 USCA Sec. 153) of the Railway Labor Act.

The dispute was handled on the property in the usual manner through the highest officer designated by Carrier to handle such disputes and failed of adjustment.

of the applicable agreement and that Rule 6 permits exactly what was done on the days which the employes claim their agreement was violated. To grant the claim of the Employes in this case would require the Division to disregard the agreement between the parties hereto and impose upon the Carrier conditions with reference thereto not agreed upon by the parties to this dispute. The claim should be denied.

The facts presented in this submission were made a matter of discussion with the Committee in conference on the property.

(Exhibits not reproduced.)

OPINION OF BOARD: Immediately prior to October 26, 1956, C. R. Cooligan was the regular assigned Agent-Telegrapher at Lima, New York. His regular assigned schedule was from 7:00 A. M. to 4:00 P. M. Monday through Friday with Saturday and Sunday as rest days. At that time L. E. Strasburg was the regular assigned Agent-Telegrapher at Victor, New York. His regular assigned schedule was from 8:00 A. M. to 5:00 P. M. Monday through Friday with Saturday and Sunday as rest days. The hourly rate for the Lima position was \$1.98 and for the Victor position \$2.01. Both were on the Buffalo Seniority Roster.

Also at that time, E. C. Spencer was the Regular Rest Day Relief employe on the Buffalo Seniority Roster who worked at different hours during regular scheduled work week and who had Wednesday and Friday as his rest days. H. F. Clark, at that time was regular Tower-Telegrapher assigned to work from 3:59 P. M. to 11:59 P. M. on Wednesday through Sunday with Monday and Tuesday as rest days. He, too, was on the Buffalo Seniority Roster.

At about 12:30 A. M. on Friday, October 26, 1956, Cooligan was suddenly taken ill and died. This was 6½ hours before he was scheduled to report for work. Strasburg was directed by Carrier's Supervising Agent to report to the Lima station. He worked there on Friday, October 26, Monday, October 29, Tuesday, October 30 and Wednesday, October 31, 1956. He worked those days both at Lima and at his regular station at Victor.

Claim was filed "to compensate the senior idle telegraph service employe of the Buffalo District, extra in preference, on a day to day basis for eight hours for October 26, 29, 30 and 31, 1956."

The Organization argues that the Carrier created part time stations contrary to the letter of understanding dated May 18, 1938. This letter which is fully set out in the record was written by Carrier's General Manager to the Organization's General Chairman. It says, in part:

"Referring to your letter of April 28th and our conference here today, concerning part time stations and other matters:

"As a matter of record, I outline herein the items of understanding reached which are as follows:

"1. No more part time stations will be created in accordance with mutual understanding made in February 1937."

It is the Organization's position that part time positions were created when Strasburg was directed and did work the four days at both Lima and Victor stations. The stations are about 10 miles apart.

The Carrier argues that it did not violate any agreement because:

- “1. There were no extra telegraphers available
2. There were no regular men available
3. Since an emergency existed Rule No. 6 governs.
4. No rule in the Agreement requires Carrier to use regularly assigned men on their off-days.”

On the first point there is no dispute. The parties agree that there were no extra telegraphers available.

In support of the second point, Carrier contends that there were no regular men available who were eligible to work under the Hours of Service Act. This issue was not raised on the property and there is nothing in the record concerning the provisions of the Hours of Service Act. The fact is that Spencer had a rest day on Friday, October 26 and another on Wednesday, October 31. Clark had rest days on Tuesday and Wednesday, October 29 and 30. In a letter dated January 6, 1958 Carrier's Chief of Personnel wrote, in part:

“I understand Paragraphs 2 and 3 of the claim requested payment of compensation to senior idle telegraph service employe of the Buffalo District extra in preference for each of the dates involved.

“Under the circumstances stated in my letter of April 10, 1957, there is no rule of the current agreement that requires the Company to use senior idle telegraph service employes who are off duty on their rest days to fill vacancies such as in the case at Lima on the dates of this claim when there is no qualified extra employe available, and it is exactly for a situation of this kind that Rule 6 of the agreement was adopted. **I do not question Messrs. Spencer and Clark were off duty on their rest dates you state**, but I do not consider that they had any right to be used at Lima in preference to the manner in which the work was taken care of at that station on the dates involved.”
(Emphasis ours.)

Spencer had worked on Thursday, October 25, 1956 from 7:59 A. M. to 3:59 P. M. If he had been assigned to work on Friday, October 26, from 7:00 A. M. to 4:00 P. M., the Carrier would not have violated Sections 2 and 3 of the Hours of Service Act. On Tuesday, October 30, Spencer worked between 3:59 P. M. and 11:59 P. M. If he had been assigned to work Wednesday, October 31, from 7:00 A. M. to 4:00 P. M., it would have been in violation of that Act.

Clark worked Sunday, October 28 from 3:59 P. M. to 11:59 P. M. He could not have worked Cooligan's shift on Monday, October 29, without violating that Act. He could have, however, worked on Tuesday, October 30, his second rest day.

The pertinent part of Sections 2 and 3 of the Hours of Service Act provides as follows:

“ * * * Provided, that no operator, train dispatcher, or other employe who by the use of the telegraph or telephone dispatches reports, transmits, receives, or delivers orders pertaining to or affecting train movements shall be required or permitted to be or remain on duty for a longer period than nine hours in any twenty-four hour period in all towers, offices, places, and stations continuously operated night and day, nor for a longer period than thirteen hours in all towers, offices, places, and stations operated only during the daytime, except in case of emergency, when the employes named in this proviso may be permitted to be and remain on duty for four additional hours in a twenty-four hour period or not exceeding three days in any week: Provided further, The Interstate Commerce Commission may after full hearing in a particular case and for good cause shown extend the period within which a common carrier shall comply with the provisions of this proviso as to such case.

“Section 3. (As amended May 4, 1916.) That any such common carrier, or any officer or agent thereof, requiring or permitting any employe to go, be, or remain on duty in violation of the second section hereof shall be liable to a penalty of not less \$100 nor more \$500 for each and every violation. * * *.”

The Organization has argued that the Carrier is not now permitted to inject the provisions of this Act since it is a new issue and that this Board may not consider it. In support thereof the Organization submitted a comprehensive brief citing many awards on the subject. We have examined that brief and we have read the Awards. All of them have to do with procedural or factual matters, not with substantive jurisdictional problems which are made a prerequisite by Acts of Congress. The Hours of Work Act like the Railway Labor Act is substantive law which takes precedence over procedural matters, past practices, and issues of fact. Neither may the parties, by contract or practice, nor may this Board, ignore the specific limitation of work hours contained therein. Failure to raise the issue on the property can be no waiver of its specific provisions. This is not a new issue within the meaning of the Awards cited by the Organization. We are obliged to hold that Spencer was not eligible to work on Wednesday, October 31 and Clark was not eligible to work on Monday, October 29. This leaves work days of Friday, October 26th and Tuesday, October 30, to be determined.

Carrier's third point is that Cooligan's death was an emergency and is, therefore, covered by Rule 6 of the Agreement. This Rule reads:

“Relief Work by Regular Employes

Employes holding temporary or permanent assignments shall not be required to work at other than their regular positions, except in cases of emergency. When required to work temporarily at other than their regular positions in such emergency cases, employes shall be paid at pro rata rate at the higher rate of the two positions and, in addition, shall be allowed actual necessary expenses, or \$1.00 per day, whichever is greater, and pro rata rate for time consumed in traveling

to and from such emergency assignment, plus any additional earnings accruing on their regular assignments during their absence. Employees so worked under this rule shall lose no time."

The record shows that Cooligan died about 12:30 A. M. on Friday, October 26, 1956. Carrier's Supervising Agent was not aware of Mr. Cooligan's death until 8:00 or 8:30 A. M. on that morning, an hour to an hour and one-half after the regular Agent-Telegrapher was to have started work at the Lima station. This is an emergency contemplated by Rule 6. It is true that the Carrier could have called Spencer who was home, but we need to consider the total situation, the circumstances and the urgency of the need for an immediate assignment. Tuesday, October 30 was not such an emergency contemplated by Rule 6. The Carrier had from Friday, October 26, to Tuesday, October 30, to examine the Seniority Roster and assign the proper employe for work on that day. Clark who was on his rest day should have been assigned to work on that day.

We cannot agree with Carrier's fourth point that "it was not required to use regularly assigned men on their off-days." Whether or not the Carrier may use regularly assigned employes to fill temporary vacancies depends upon the circumstances in each case. The Awards cited by the Carrier do not apply to the conditions before us. The strongest Award cited in favor of the Carrier is 6737 (Shake). There we held that the Carrier had the right to assign an Agent-Telegrapher for four hours at his own station and four hours at a station regularly occupied by another employe who was ill. This temporary assignment continued for three days. In that case no claim was filed in behalf of the senior idle employe, extra in preference, but in behalf of the employe who worked both positions the three days. He asked for four hours additional pay for each of the three days to compensate him for the full eight hours at his regularly assigned station in addition to the four hours work at the temporary assignment. We held that the employe was properly paid. We said: "The Claimant lost no time, was paid at the higher rate applicable to the two positions on which he worked, and was reimbursed for his travel expense in accordance with the Agreement."

Here Strasburg was also paid in accordance with the Agreement. But the claim is not filed in behalf of Strasburg, but in behalf of the "senior idle telegrapher, extra in preference." Furthermore, we have here an agreement contained in a letter dated May 18, 1938, wherein Carrier agrees that "no part time stations will be created." While we can conceive that part time stations may be created in emergency situations such as that which existed on October 26, 1956, at Lima, New York, they may not be created even for a few days where senior regular idle telegraphers are available and where an emergency does not exist. Clark was available and could have worked on October 30, 1956.

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 Carrier did not violate the Agreement by assigning Strasburg to work at both stations on October 26, 29 and 31, 1956, but did violate the Agreement on October 30, 1956, by not assigning H. T. Clark to work at the Lima, New York, station on that date.

AWARD

Claim sustained as to October 30, 1956; otherwise denied, all in conformity 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 7th day of December 1962.

**LABOR MEMBER'S DISSENT TO AWARD 10956,
DOCKET TE-10136**

I have no quarrel with the findings of the majority that the Carrier is not privileged to create part time stations, as set out in the letter agreement dated May 18, 1938. Neither can I find fault with the majority for holding that the factual situation on the one day, October 26, 1956, amounted to an emergency.

I cannot, however, agree with the holding of the majority that a member of this Board may inject a theory that compliance with the agreement was not possible because of alleged conflict with the Hours of Service Act. The Carrier advanced no such theory. Its whole position was that an emergency existed by reason of the fact that no extra employe was available, thus bringing Rule 6 into operation.

The Hours of Service Act excuses a carrier from full compliance in such cases on not more than three days in any week. There was no contention that any of the claimants should have been used on more than two days in any week.

It is clear that the argument regarding the Hours of Service Act not only was not raised by the Carrier, but was in conflict with its contentions. Thus we have an Award which disposes of a portion of a dispute on a point which was never in dispute between the parties.

To the extent indicated, I consider Award 10956 to be in error, requiring this partial dissent.

J. W. Whitehouse
Labor Member