

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Frank Elkouri, 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 and Western Railroad Company that beginning with March 1, 1945, to the date each 7-day position was assigned a definite rest day each calendar week (the records indicate such definite rest days were generally assigned during December 1946 and January 1947) the Carrier shall now designate Sunday as the rest day of each such position and pay to employees then occupying said 7-day positions, and who worked on such rest days, a minimum day of eight hours at time and one-half rate, less payments previously made.

EMPLOYEES' STATEMENT OF FACTS: An agreement by and between the parties, known as the Telegraphers' Agreement, bearing effective date of May 1, 1940, except Article 8 (Rest Day Rules, Employees' Exhibit No. 4) effective March 1, 1945, is in evidence; copies thereof are on file with the National Railroad Adjustment Board.

November 20, 1946, the parties hereto executed an agreement embodying rest day rules; said agreement (Employees' Exhibit No. 4) has an effective date of March 1, 1945.

The Organization contends that for retroactive payment purposes each 7-day position should have had assigned to it one rest day (Sunday) each calendar week, beginning March 1, 1945, until actual rest days were established, and the incumbent thereof, if required to perform service on any or all of such Sundays, time and one-half rate should be allowed retroactively.

Carrier's retroactive payments were computed on the basis that "all seven day men will be entitled to one-half day extra for each Sunday (rest day) or Holiday worked during the period March 1, 1945 to December 31, 1946 (the date rest days were generally assigned), except that each time the continuity of days of service is broken by a lay-off, there will be no retroactive payment for that week, and a new consecutive period starts from the day employee returns to service." (Underscoring ours.)

On or about December 31, 1946, the Carrier, generally, assigned one rest day to each 7-day position. Since these assignments a break in the continuity of service of an employee does not affect payments to employees if and when such rest days are worked, nor has such break established a new rest day.

rules provide that management will fill the position with a regular assigned relief employe or an extra employe on a Rest day and pay the **Pro Rata Rate**.

The Employes in presenting this claim have failed to particularize a single instance where an employe covered by the **Telegraphers' Agreement** suffered a monetary loss as the result of the Carrier's computation of retro-active payments under the **Agreement of November 20, 1946**.

The request made by the Organization to your Board to require the Carrier to designate Sunday as the Rest Day on each position between March 1, 1945 and December 1, 1946 is an attempt to have the Board establish new and different working conditions. Your Board is without authority to take such action and has so ruled in numerous awards.

A court would refuse to enforce any such vague claim which, obviously, would require extraneous evidence to establish it in the case of every particular individual.

"Claims that are 'vague', uncertain and indefinite will not be entertained." (**Award 10250—First Division.**)

In **Railroad Yardmasters v. Indiana Harbor Belt Railway Co., 70 Fed. Supp. 915**, in dismissing a suit to enforce an award of this Board because the claim was "too vague" to be enforced, the court said:

"Furthermore, the statement of claim is indefinite. It does not contain the names of the two yardmen over who the dispute arose. **Extraneous evidence would have to be introduced** to give the award meaning."

Under no circumstances should this Board attempt to rewrite rules presently obtaining or establish changed working conditions.

"To adopt the practice of **broadening or extending** the terms of any instrument by a tribunal such as ours will only lead to confusion and uncertainty and ultimately to injustice and hardship to both employes and carrier. **Far better for all concerned is a course of procedure** which adheres to the elemental rule leaving parties by **negotiation** or other proper procedure to make certain that which has been uncertain." (**Award 2622—Third Division.**)

Here there is no uncertainty, and the rules require denial of the claim. The evidence is that the Organization has endeavored to change working conditions by an attempt to have the carrier agree to a tortured interpretation of the rule. **Failing in that attempt it now seeks to have the Board legislate new working conditions.** But it has been repeatedly held that the Adjustment Board has no power to do this.

"This Division is without authority to change existing agreements between carriers and their employes or to establish new agreements or working conditions." (**Awards 700, 701, 702, 703, 704, First Division.**)

"This Board * * * determines questions dealing with **where the parties have placed themselves by their agreements.**

It does not have jurisdiction to say what should be but rather what **is** the situation." (**Award 7057—First Division.**)

(Exhibits not reproduced.)

OPINION OF BOARD: The claim here is that "the Carrier shall now designate Sunday as the rest day of each such position and pay to employes then occupying said 7-day positions, and who worked on such rest days, a minimum day of eight hours at time and one-half rate, less payments previously made."

The Memorandum of Agreement of November 20, 1946, (made retroactive to March 1, 1945 for some purposes) provided for the setting up of rest days

for seven day positions, and it provided further that when the regular incumbent of the position was used on his rest day, he should be paid time and one-half rate. Section 1 (a) of the Memorandum Agreement provides that: "The rest day on such position shall be assigned and shall be the same day of each week, but may be changed to meet service requirements by giving not less than seventy-two (72) hours written notice to the employees affected."

The method used by the Carrier to assign rest days to meet the retroactive requirements of the Memorandum Agreement was a violation of the above quoted part of Section 1 (a). It cannot be said that the changes made by the Carrier were made "to meet service requirements." Also, there is nothing in the Rules that says that when an employee is assigned one day off in seven that he must work the entire six days of his assignment to entitle him to the premium rate specified for work on his rest day.

The method suggested by Petitioners for the assignment of rest days for the retroactive period appears to be both simple and fair. They ask that Sunday be assigned, but the record shows that at one time they stated that they were agreeable to the use by the Carrier of any other day, just so the day designated is used consistently, and is not changed in violation of the Agreement. The Carrier should not be allowed to apply the rule one way for the purpose of determining retroactive payments, and another way in actual operation since November 20, 1946. Since Sunday is the logical rest day where no other rest day had been assigned, it will be considered the rest day to be used in the computation of the retroactive payments.

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 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 Carrier violated Section 1(a) of the Agreement of November 20, 1946.

AWARD

Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: A. I. Tummon
Acting Secretary

Dated at Chicago, Illinois, this 7th day of February, 1949.

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Interpretation No. 1 to Award No. 4303

Docket No. TE-4057

NAME OF ORGANIZATION: The Order of Railroad Telegraphers.

NAME OF CARRIER: Delaware, Lackawanna and Western Railroad Company.

Upon application of the representatives of the Employees involved in the above award, that this Division interpret the same in the light of the dispute between the parties as to its meaning and application, as provided for in Section 3, First (m), of the Railway Labor Act, approved June 21, 1934, the following interpretation is made:

The question submitted for answer in this interpretation is whether Award 4303 orders that extra employees who substituted for regularly assigned employees and who were required to work on the rest day of the regularly assigned employees be paid time and one-half for the rest-day service. The question is to be answered in the negative in that Award 4303 was not intended to order such payment to extra employees.

Section 1(a) of the Memorandum of Agreement of November 20, 1946 provides for premium pay for rest-day service for employees occupying seven-day positions. Section 1(b) provides that extra employees who work on rest days shall be paid pro rata rates. It is urged, however, that when an extra employee relieves a regularly assigned employee at least one day before and one day after the assigned rest day, and is required to work on the rest day, the extra employee must be paid time and one-half for the rest-day service. But as was stated in Award 4304, involving a companion case to the one here under consideration, it would have been easy for the parties to say that extra employees would attain all of the rights of regularly assigned employees upon working a specified number of consecutive days if the parties had intended such, but they did not say so. And as was stated in Award 4322, also a companion case, penalty time is the exception, not the rule, and if a rule does not affirmatively and clearly provide that the employees in question be given such, then it is not in order.

Referee Frank Elkouri, who sat with the Division as a member when Award No. 4303 was adopted, also participated with the Division in making this interpretation.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: A. I. Tummon
Acting Secretary

Dated at Chicago, Illinois, this 1st day of July, 1949