Award No. 5531
Docket No. TE-5341

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Alex Elson, Referee

PARTIES TO DISPUTE:

THE ORDER OF RAILROAD TELEGRAPHERS

WABASH RAILROAD COMPANY

STATEMENT OF CLAIM: It is the claim of the General Committee of Railroad Telegraphers on the Wabash Railroad that the Carrier violated the Telegrahers Agreement when they required E. T. Brant, regularly assigned third trick telegrapher, at North Kansas City, Missouri, to work from 12:00 o'clock midnight August 31, 1949 to 7:00 A.M., September 1, 1949, and declined to compensate him therefor;

That Thursday, September 1, 1949, being one of the rest days assigned to the third trick position at North Kansas City, Missouri, E. T. Brant shall be paid for eight (8) hours at time and one-half rate, $2.41½ per hour, total $19.24, for service actually performed by him on that date.

EMPLOYES' STATEMENT OF FACTS: Due to change in the starting time of the three telegrapher positions at North Kansas City, Missouri, effective September 1, 1949, the third trick position being changed from 12:00 o'clock midnight to 8:00 A.M. daily to 11:00 P.M. to 7:00 A.M. daily, the regularly assigned employe, E. T. Brant, was required by the Carrier to work from 12:00 o'clock midnight, August 31, 1949 to 7:00 A.M., September 1, 1949, the Carrier declining to compensate him for this service and the relief telegrapher worked the third trick position 11:00 P.M., September 1, 1949 to 7:00 A.M. September 2, 1949, and was compensated for eight (8) hours for September 1, 1949.

There are three regularly assigned, seven day week positions at North Kansas City, Missouri. Prior to September 1, 1949, the regular assigned hours of those positions were:

First Telegrapher—8:00 A.M. to 4:00 P.M.—Rate $1.35 per hour —Daily with one assigned rest day.

Second Telegrapher—4:00 P.M. to 12:00 midnight—Rate $1.35 per hour—Daily with one assigned rest day.

Third Telegrapher—12:00 midnight to 8:00 A.M.—Rate $1.35 per hour—Daily with one assigned rest day.

The rest day of each position being filled in accordance with Mediation Agreement Case A-2070, which is made a part of and is annexed to as appendices "A" and "B" of the agreement effective November 1, 1946.

Southeastern Carriers' Conference Committees and the employes thereof represented by the Sixteen Cooperating Railway Labor Organizations through their Conference Committees, the representatives of the parties considered various problems which would arise in connection with the application of the staggered work week.

The parties recognized the confusion and misunderstandings arising in connection with the scheduling of rest days and the establishment of relief assignments where some of the positions involved were assigned to start work at 12:00 midnight. It was deemed advisable and of mutual benefit to change the starting time of such positions effective September 1, 1949, so that the occupant of no position would thereafter be assigned to start work at that exact hour.

It was recognized by the representatives of the parties that the Carrier had the right under the rules of the Telegraphers' Agreement to change the starting time of such positions without conference or agreement with the representatives of the Employes; however, it was also recognized that such change might, in itself, create some confusion and result in some misunderstanding on the part of the employes who were on duty at the time the change was made effective. It was distinctly understood between the parties that if the employes affected were notified of the changes in starting time in the manner required by Rule 3, Paragraph (b), of the Telegraphers' Agreement, there would be no claims resulting from the changes in starting time. It was definitely understood that claims, such as described in the Committee's ex parte Statement of Claim, would be without basis under the provisions of Item 3 of the Memorandum of Agreement previously quoted herein.

A presentation of this claim to this Board is obviously an attempt on the part of the Committee to set aside the Memorandum of Agreement signed at St. Louis, Missouri, on July 28, 1949, quoted above.

The contentions of the Committee should be dismissed and the claim denied.

OPINION OF BOARD: The claim in this case is for one day's pay at the time and one-half rate. The facts not disputed involve a unique situation.

Claimant is the regularly assigned third trick telegrapher at North Kansas City, Missouri. Prior to September 1, 1949, he was assigned to work from 12:00 midnight to 8:00 A.M., Saturday through Thursday, with Friday as his assigned rest day. Effective Thursday, September 1, 1949, the five day work week agreement between the carrier and the organization went into effect. Effective September 1, 1949, claimant's work week was changed and claimant was assigned to work from 11:00 P.M. to 7:00 A.M., Saturday through Wednesday, with Thursday and Friday the assigned weekly rest days.

Claimant worked from 12:00 midnight, August 31, to 7:00 A.M., September 1st. His claim for compensation for this period for 8 hours at the time and one-half rate was denied by the carrier.

The carrier justifies its refusal to pay the claim on the basis of paragraphs 2 and 3 of an agreement between the parties made July 28, 1949, which reads as follows:

> "2. Effective September 1, 1949, the starting time for employes assigned to work in continuous service will, if practicable, be as follows:
>
> First Shift—7:00 A.M. to 3:00 P.M.
>
> Second Shift—3:00 P.M. to 11:00 P.M.
>
> Third Shift—11:00 P.M. to 7:00 A.M.
>
> "3. When the starting time of an employe is change to conform with the provisions of Items 1 and 2 hereof, the employe involved will not be entitled to additional compensation for time

worked in excess of eight (8) hours on any day as the result of the change in his starting time, nor will an employe who goes on duty at 12:00 o'clock midnight on August 31, 1949, or 12:01 A.M., September 1, 1949, and who again goes on duty prior to 12:00 o'clock midnight on September 1, 1949, be entitled to two (2) days' pay on that date."

The agreement was designed to take care of two situations: (1) time worked in excess of eight hours on any day as the result of the change in starting time, and (2) reporting for duty twice during the period from 12:00 midnight on August 31, 1949, to 12:00 midnight on September 1, 1949.

The agreement was obviously intended by the parties to cover special situations arising from the change-over in time. It did not, however, cover the problem here involved. The claimant finished out his work week by working the shift beginning 12:00 midnight, August 31. This shift fell on Thursday, which under the old agreement was the last working day of the claimant's work week but which under the 40-hour agreement between the parties beginning September 1, 1949, was a rest day for the claimant. In the absence of a specific agreement to the contrary, the provisions of the 40-hour agreement would entitle the claimant to compensation for 7 hours at time and one-half rate.

Carrier also attempts to justify non-payment by referring to the fact that its payroll shows that compensation was paid claimant or a relief operator for the third trick throughout August and September. This part of the argument belongs in the area of legerdemain. What carrier obviously overlooks is that by virtue of the institution of the 40-hour agreement on September 1, 1949, claimant gained an extra rest day in his last work week. This may not have been the intent of the carrier or for that matter of the parties, but we cannot indulge in conjecture as to their intent in the face of the clear and unequivocal language of the 40-hour agreement.

Accordingly we will sustain the claim to the extent of allowing the claim for the time actually worked, 7 hours at the rate of time and one-half.

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

The Carrier violated its 40-hour agreement with the Organization.

AWARD

Claim sustained in accordance with the Opinion.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: A. I. Tummon
Acting Secretary

Dated at Chicago, Illinois, this 29th day of October, 1951.