Award No. 6001
Docket No. TE-5926

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Carroll R. Daugherty, Referee

PARTIES TO DISPUTE:

THE ORDER OF RAILROAD TELEGRAPHERS

UNION PACIFIC RAILROAD COMPANY, EASTERN DISTRICT

STATEMENT OF CLAIM: Claim of the General Committee of The Order of Railroad Telegraphers on the Union Pacific Railroad Company, (Eastern District); that,

A. The Carrier violated the provisions of the agreement between the parties to this dispute when:

1. the duties of the agent and the telegrapher-clerk at South Torrington, Wyoming, were combined on the assigned rest days of the telegrapher-clerk, Saturday and Sunday, and the agent required to perform the duties of the combined positions on such rest days; and,

2. the duties of the agent and the telegrapher-clerk at South Torrington, Wyoming, were combined on Monday, the assigned rest day of the agent, and the telegrapher-clerk required to perform the duties of the combined positions on such rest days; and,

B. 1. beginning September 3, 1949, and continuing until the violation is corrected the carrier shall compensate the senior available extra telegrapher who has not had 40 hours' work in his work week for eight hours at straight time rate or if no such telegrapher is available then the Carrier shall compensate the occupant of the telegrapher-clerk's position at South Torrington for eight hours at the time and one-half rate for each day the agent is used to perform the services of the telegrapher-clerk on the assigned rest days of the telegrapher-clerk; and,

2. the Carrier shall compensate the senior available extra telegrapher who has not had 40 hours' work in his work week, for eight hours at the straight time rate or if no such telegrapher is available, then shall compensate the occupant of the position of agent at South Torrington for eight hours at time and one-half for each day the telegrapher-clerk is used to perform the duties of the agent on the assigned rest day of the agent, beginning with Monday, September 12, 1949, and continuing until the violation cited herein is corrected.

EMPLOYES' STATEMENT OF FACTS: At South Torrington, Wyoming, there has existed for many years a position classified as agent, a monthly rated position, the duties being of a supervisory nature, plus certain station work of a routine nature without the requirement of handling telegraphic

under which the employes at 'Bringhurst' worked. Tricks two and three at 'Bringhurst' were restored fifteen days after they were abolished. This may indicate that the Carrier exercised poor judgment when the tricks were abolished, but it does not furnish a basis for a holding that the Agreement was violated."

CONCLUSION: There is no merit to the claim because:

1. The demands represent a make-work proposition which was not contemplated by the 40-Hour Week Agreement.

2. The demand for the assignment of additional positions which are not required is contrary to the economic policy as set forth by various governmental agencies.

3. The demand to establish relief positions not necessary is contrary to the testimony presented by the Presidents of the various labor organizations when their demands were heard before the President's Emergency Board, and as later reviewed by that Board in issuing interpretations in connection with the award.

4. The National Vacation Agreement permits employes remaining on duty to absorb up to 25 per cent of the work load of a vacationing employe. Rest days are similar in principle to vacation days and there is no prohibition to those employes remaining on duty absorbing certain work of employes who are not working because of their rest days.

5. It is a managerial prerogative to abolish positions when the work thereon does not justify their existence.

6. Board awards recognize it is permissible to require employes to perform more than one class of work on the rest days of other employes.

Claim should therefore be declined in its entirety.

(Exhibits not reproduced).

OPINION OF BOARD: In this case the material facts are not in dispute. (1) At South Torrington, Wyoming, the Carrier operates a so-called "two-man" station seven days a week. On the normal or day tricks there are two seven-day positions—that of Agent or Agent-Telegrapher and that of Telegrapher-Clerk. Both positions are filled by members of the Organization, and these employes hold rights on the same seniority roster. The Agent position is monthly rated; that of Telegrapher-Clerk is hourly rated. (2) Before the forty-hour week became effective on September 1, 1949, the Agent position required seven days of work per week and under the rule then effective had no assigned rest day. The Telegrapher-Clerk position had one asigned rest day (usually Sunday); and work on such day was usually performed not by a relief employe but by the regular incumbent on a call and overtime basis. (3) On and after the forty hour week went into effect, the Agent position was assigned one day of rest, Monday. At the same time (except as noted in (4) below) the other position was given two rest days, Saturday and Sunday. Under these arrangements the Carrier had the incumbent of the Agent position perform certain of the duties of the Telegrapher-Clerk position on the rest days assigned to the latter, and had the incum- of the Telegrapher-Clerk position perform certain of the duties of the Agent position on the rest day of the latter. In other words, no relief or extra men were employed on the position's respective rest days, nor were the incumbents called on their respective rest days to perform at overtime rates any necessary work of their respective positions. The incumbents worked alone on both positions as shown above. (4) From January 1, 1950, through Sep-

tember 15, 1950, the Telegrapher-Clerk position was abolished, all the duties of the station being performed by the incumbent of the Agent position.

In essence the Organization here contends that the Carrier's action constitutes a combining of positions which is prohibited by the intent and meaning of the Forty-Hour Week Agreement of March 19, 1949, and of the specific rules in the Parties' collective bargaining agreement which incorporated the terms of the general Forty-Hour Week Agreement, the intent of the parties signatory thereto, and the intent of the Government Boards whose work produced that Agreement.

In support of its contention the Organization relies mainly on certain portions of Rules 29 and 30, quoted in full in the Organization's statement of position. Specifically Rule 29 (e) (1) and (6) and Rule 30, Section 1, VI, are cited to support the Organization's contention that, in respect to getting the work of seven-day positions done on the rest days assigned to those positions, the Carrier has only three alternatives under the Parties' agreement: (1) use of a man on a regular relief assignment; (2) use of an extra or furloughed man; or (3) use of the position's regular incumbent on the rest days at the time-and-half rate of pay. Nothing in the agreement, says the Organization, permits the Carrier to combine, as it did here, the duties of two positions that were separately bulletined and worked, as those in the instant case were. Moreover, the Organization asserts, on this point the introduction of the 40-hour week made no difference; the combining of positions, as in this case, is prohibited now as it was before September 1, 1949.

The Organization attempts to bolster its case by citing a number of awards, notably 5271—5275, dealing with the same issue and involving the same Organization.

The Carrier contends that nothing in the Parties' agreement forbids the action it took at South Torrington. The Carrier argues it is free to operate as it sees fit unless it has agreed with the Organization to specific restrictions on its prerogatives. Furthermore, says the Carrier, the intent of the members of the Emergency Board that recommended the 40-hour week for the railroads and the intent of these same men who acted as arbitrators in respect to the Forty-Hour Week Agreement and the meaning of that Agreement's terms was to allow the carriers as much flexibility as possible in their operations and to reduce as much as possible the costs of introducing the shorter workweek. This intent was expressed not only in so many words but also in the Agreement's provisions such as the one permitting the staggering of work-weeks. The Carrier's action in this case is said to be wholly within such meaning and intent. And, in fact, the testimony of the representatives of this and other Organizations before the Forty-Hour Week Emergency Board shows that such action was anticipated and assented to by the organizations.

In further support of its position the Carrier contends that the duties of the two South Torrington positions are fewer and much less burdensome on Saturday through Monday than on the other days of the week; no claim under Rule 58 was ever made by the affected employes that their duties were onerous on the days they worked alone at the station; both men are covered by the same Scope Rule, and there is no provision in the agreement prohibiting either employe from performing some of the other's duties from time to time; Rule 29 (e) (1) on Regular Relief Assignments does not require such assignments if they are unnecesary, i.e., if there is no necessary work for a relief man to perform; and the awards cited by the Organization were erroneous in reasoning and conclusions, having been overturned by subsequent awards, particularly 5364, 5545 and 5555-5557.

In developing our decision on this case the first point to be made clear is that our ruling is based solely on our interpretation of the Order of Railroad Telegrapher's agreement with the Union Pacific Railroad Company as

it applies to the facts of this case. In other words, we are not here presuming to lay down a ruling applicable to all agreements and cases in the industry or even on this Carrier.

Second, although the arguments before and the findings by the Emergency Board on the Forty-Hour Week dispute and the subsequent Board of Arbitration are significant in judging the intent and meaning of the relevant portions of the Parties' agreement in respect to the instant case, our main concern must be to give a fair and reasonable construction of these portions as they are written; the language of the agreement is of paramount importance.

Third, it is the obligation of the Organization to establish that a reasonable interpretation of the agreement's appropriate provision supports their claim and contentions.

Fourth, although we believe that an agreement between a carrier and an organization represents a mutual undertaking to observe the spirit as well as the letter of the agreement, and that harmonious, cooperative union-mnagement relations involve considerably more than mere observance of the letter of the agreement (e.g., it involves consultation between the parties on each side's problems affecting the other, even when the problems are not specifically covered by the agreement), we hold also to the view that, from the standpoint of strict construction of an agreement's terms, management's rights and prerogatives vis-a-vis a labor organization and its members with whom it has dealings remain unimpaired except in so far as these rights have been restricted or removed by government or have been voluntarily limited or relinquished by agreement with the organization. In a word, a carrier is free to act in respect to its employes unless the specific provisions or the general intent and meaning of an agreement restrict or prohibit the exercise of such freedom.

The general issue in this case, then, is clear: Was the Carrier's action in this case a violation of one or more terms of the Parties' agreement? The specific issue is this: In the light of the circumstances prevailing in and near South Torrington, Wyoming, during the months involved in this case, is the Organization correct in contending that the Carrier was not free to use one rather than two employes Saturday through Monday to perform some of the rest day duties of two positions working seven days each? Do two (or, for that matter, ten) seven-day positions require always two (or ten) men to be working them each day of the week?

We think not. We do not believe that the Organization has here succeeded in sustaining its burden of factual evidence and argument.

The reasons for this decision are as follows: (1) We do not think any rule of the agreement states directly and explicitly that a man working on one position having certain normal duties may not, if qualified and under the same Scope Rule and in the same seniority district, perform on his own regularly assigned work days some of the normal duties of another position when the incumbent of the latter is absent during the latter's rest days. (2) This in itself does not establish the conclusion that the Carrier's action was not violative of the agreement. Such a conclusion would hold only if the agreement did not contain rules saying that the rest days of a seven-day position could be filled **only** in certain ways, one of which was **not** the method chosen by the Carrier. In other words, if the agreement were to say "These are the only measures that may be used to get work done on the rest days of a seven-day position", and if the Carrier's method was not one of these, then the Carrier would be in violation even though its own method were not specifically proscribed. It is necessary therefore to look at the agreement in this light. (3) Consider first, then, Rule 29 (e) (1) as quoted in the Organization's position. For the instant case we construe its language as saying in effect, "Wherever possible, regular relief assignments shall be established to do whatever work is necessary on the rest days of a seven-

day position." We believe that this Rule requires the Carrier to set up a regular relief assignment at South Torrington, Wyoming, to work the rest days of the two seven-day positions—unless it is impossible or impractical to do so. (Perhaps the language is mandatory in part because one of the objectives introducing the 40-hour week was to create jobs for unemployed railroad men.) The record in this case fails to demonstrate whether or not it was possible or practical to establish such a position. Certainly the Organization did not make a showing that a regular relief man could be used for the three days involved at the station. (4) Consider next Rule 29 (e) (6), which says in effect, "Where it is impossible or impractical to establish a regular relief assignment to fill the rest days of the seven-day positions mentioned in Rule 29 (e) (1), such rest-day work may be perfomed by qualified extra or furloughed men, if available." Note that the word "may" and not "shall" is used in the main verb of this Rule. If it does not choose to, the Carrier is not required to use an available, qualified extra man for rest-day work. Accordingly, we need not comb the record for evidence on whether or not such an extra man was available. (5) Rule 30, Section 1, VI, states that an employe **may** be required to work on his rest days. It is implied that this method may be used if the employment of regular relief men is impossible or impractical or if qualified extra men are not available or if the Carrier does not choose to employ the latter. It is to be noted that the language here also is permissive rather than mandatory. (6) These three appear to be the crucial provisions of the agreement which state what the Carrier must or may do to get the necessary work done on the rest days of seven-day positions. The first (on regular relief men) appears to be mandatory. But there is a "loophole" in the word "possible". The other two are clearly permissive; the Carrier is not required to use extra men, nor must it use regular men at overtime rates. We do not find, then, that the Carrier is bound to employ regular relief men under all circumstances. We do not find that it has to turn to the other two alternatives at all if it wishes not to. And we do not find that the agreement—at any one point explicitly or at a combination of the above-mentioned points implicitly—limits the Carrier's alternatives to these three and these alone. We think that if the Parties had meant to achieve such a limitation, they would have said so in their agreement.

There remains the question of past practice. Have the Parties operated in the past at South Torrington, Wyoming, under the 40-hour week so as to demonstrate that they themselves have construed their agreement as limiting the Carrier's alternatives (for having the rest-day work of seven-day positions done) to the three contended for by the Organization? We think not. There is no such showing in the record. On the contrary, the alleged violation began two days after the 40-hour week became effective.

We think this Award is to be distinguished from Award 5967 on two grounds: (1) The latter award appears to be based in part on the premise that a carrier is permitted to do only what the agreement says it may. As stated earlier in the instant opinion, we hold that a carrier is allowed to do anything not prescribed or limited by the agreement or by law. (2) Award 5967 seems to be based in part on the notion that, since the contents of the two positions were different, the incumbent of the first position may not perform any of the duties of the second, and vice versa. For the reasons previously developed in this opinion, we do not here believe that this is a compelling or even persuasive consideration.

Because we can discover in the agreement no direct or explicit prohibition of the Carrier's action in this case and because we do not see how the above-mentioned rules can be construed to proscribe such action implicitly, we hold that the employes claim in this case cannot be sustained.

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 Carrier's action in this case did not violate the Parties' agreement.

AWARD

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: (Sgd.) A. Ivan Tummon
Secretary

Dated at Chicago, Illinois, this 5th day of November, 1952.