Award No. 6519
Docket No. TE-6349

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

William M. Leiserson, Referee

PARTIES TO DISPUTE:

THE ORDER OF RAILROAD TELEGRAPHERS

MISSOURI PACIFIC RAILROAD COMPANY

STATEMENT OF CLAIM: Claim of the General Committee of The Order of Railroad Telegraphers on the Missouri Pacific Railroad that:

(1) The Carrier violated the Agreement between the parties when in changing the assigned rest days of E. J. Coad, Concordia, Kansas, it permitted him to work only three days in his work week beginning July 20, 1950, and

(2) Carrier shall now compensate the claimant Coad for two additional days at the straight time rate.

EMPLOYES' STATEMENT OF FACTS: Prior to July 22, 1950, claimant E. J. Coad held regular asignment as second trick telegrapher at Concordia, Kansas, with hours 2:00 P. M. to 10:00 P. M., rest days Tuesdays and Wednesdays. On that date (July 22, 1950) carrier issued the following instructions:

"Atchison Kansas 140 pm July 22 1950

"Dodson and Operators

Concordia

Account hours of service effective date change swing position to work first Beloit Saturday, Sunday and Monday 2nd trick Concordia, Tuesday and Wednesday off, Thursday and Friday first trick Concordia.

C. A. H.

140 pm."

NOTE: C. A. H. is Mr. C. A. Hughes, Trainmaster at Atchison.

This message changed the rest days of claimant Coad "effective date" (July 22, 1950), from Tuesdays and Wednesdays to Sundays and Mondays, which caused him to be off on Sunday July 23rd and Monday July 24th, instead of Tuesday July 25 and Wednesday, July 26th. Thus, he was forced to suspend work on the fourth and fifth days of his "work week" which had begun on Thursday, July 20th. See calendar for month of July reproduced herein.

It is clear from this chart that in each of the two weeks shown the claimant worked five days and had two consecutive rest days in actual service just the same as he would have had if his rest days had not been changed. It is also clear that weeks subsequent to July 26, 1950 would work out exactly the same way, and that this claimant simply did not suffer any loss whatever. He only had his rest days shifted within his work week.

Rule 8—Section 2 (a), although not cited by the Employes, provides for the establishment of a work week of 40 hours, consisting of five days of eight hours each, with two consecutive days off in each seven. This rule was fully complied with because in each week in any way connected with the dispute, the claimant had just what the rule specifies—five days of eight hours each and two consecutive rest days. The rule does not say that the five days must be consecutive.

Your attention is directed to Third Division Award No. 5854 made on July 18, 1952 with Referee Carroll R. Daugherty, assisting the Board in rendering a decision on the same issue as the one here before you. The following is quoted from the opinion of that award:

> "Thus, when the Agreement and its relevant rules are considered as a whole, we are led to the conclusion that the Carrier's position in this case is the correct one. In other words, in respect to the facts and arguments developed in this case, we think that the guaranteed 'week' of work and pay mentioned in Rule 65½ should be defined as the 'work week' mentioned and delineated in Rule 48½ (i). So defined, Geiger's work week contained the same number of days after the change in rest days as before; and his pay for such work week was not reduced."

By application of the principle of this award to the service of this claimant as outlined in the above chart it is readily seen that his work week contained the same number of work days after the change in rest days as before; and his pay for such week was not reduced.

But this is not all. Even if you should consider the work week as the calendar week for purposes of this rule, as contended by the Employes in Award 5854, the claimant in this case now before your Board would have the same number of work days per week after the change in rest days as before.

No matter how the work weeks are figured in this dispute there is always apparent the fact that the claimant just did not lose any time. There is no Agreement basis for paying him for work not done or time not lost.

(Exhibits not reproduced.)

OPINION OF BOARD: Claimant held a regular relief assignment working Thursday through Monday, with assigned rest days on Tuesday and Wednesday. On July 22, 1950, the third day of his work-week, telegraphic instructions ordered a change in his assignment without giving the 72 hours notice required by the working agreement between the parties.

"Under these instructions (says the Carrier) the assignment of the rest day relief telegrapher became:

"Thursday	—	First Trick, Concordia
Friday	—	First Trick, Concordia
Saturday	—	First Trick, Beloit
Sunday	—	Second Trick, Concordia
Monday	—	Second Trick, Concordia
Tuesday	—	Rest Day
Wednesday	—	Rest Day."

It will be noted that no change in rest days is indicated here, and the telegraphic instructions were "to work . . . Sunday and Monday second trick Concordia, Tuesday and Wednesday off." The only change indicated is that the claimant would work the first trick on Thursday and Friday instead of the second trick as he had been doing. Otherwise the regular relief assignment would remain as before, the work-week beginning on Thursday and ending Monday, with Tuesday and Wednesday as rest days.

But this is not at all what happened in the present case. After the above statement of what the claimant's assignment "became", (emphasis added), the Carrier goes on to say:

> "The instructions changed his rest days to Sunday and Monday. He worked Thursday, Friday and Saturday, July 20, 21 and 22, 1950 of his prior assigned work-week, and on account of the change in rest days he was off Sunday and Monday, July 23 and 24, 1950, which would have been work days for him if his rest days had not been changed. He makes claim for these two days alleged to have been lost on account of the change in rest days."

These are the facts in the case, and plainly they have no relation to what the claimant's assignment was supposed to have become after it was changed. If the Management had followed the instructions as written in the telegram and as the Carrier says it understood them, the claimant would have worked Sunday and Monday, and the present case would not be here.

What actually happened was that the Carrier changed the assignment from a work-week beginning Thursday to one beginning Tuesday, and the first day claimant worked on the new assignment was Tuesday, July 25, so that his rest days would be the following Sunday and Monday, July 30 and 31. Had he been given the required 72 hours notice on Saturday, July 22, he would have completed the five work-days of his old assignment by working Sunday and Monday as usual. He could then have started on the new assignment the following day, and there would have been no problem. By making the change effective on date of the telegram, the Carrier required the claimant to take the rest days of the new assignment during the work week of his old assignment, although these rest days were not due until a week later after he would have worked the five work-days of the new assignment. It turned the Tuesday to Monday assignment around by putting the two rest days in front of the five work-days instead of after them, and thereby caused claimant to lose two work-days the previous week.

Thus it becomes plain why the Carrier argues as if the new assignment were still from Thursday to Wednesday. It contends that all it did was to change these rest days to Sunday and Monday during the week from Thursday, July 20 to Wednesday, July 26. But Tuesday, the 25th, was the first work-day of the new assignment, and claimant was not entitled to its rest days until he had completed five days work of this assignment. By requiring him to take the rest days of the new assignment in advance of the work-days, the Carrier not only violated the 72-hour notice rule, which it admits, but also the "Beginning of Work Week" rule (8, Section 2, (i)). This rule says a work-week begins "on the first day on which the assignment is bulletined **to work.**" (emphasis added) It does not permit a work-week to begin on a rest day. By requiring claimant to start resting on Sunday and Monday, and then continue to work the Tuesday through Saturday position, it clearly started him on the rest days of the new assignment. In this way the assignment was turned around, and would remain turned around as long as the claimant occupied the position.

The Carrier states that this was necessary to avoid a violation of the Hours of Service law. It does not say that violation of its contract with the employes is authorized in order to avoid law violations; it claims only "extenuating circumstances". We do not find the circumstances extenuating. If it was so important not to work the Sunday and Monday work-days of claimant's June 20-26 assignment in order to avoid violating the law, the

least the Carrier could have done was to pay him for the two days he had a contractual right to work. The only reason the case is here is because it does not want to pay for the two days.

As to this, the Carrier argues that claimant really did not lose any pay. The argument is fallacious, because it assumes that the new assignment remained Thursday through Wednesday including the rest days. But the Tuesday and Wednesday, July 25 and 26, were no longer part of the work-week beginning July 20. They had become the first two days of claimant's new assignment. To count them as still days under the old assignment, as the Carrier does, is to count them twice, once in the week beginning July 20, and again in the week beginning July 25. The same two days cannot be in two different weeks at the same time. Its argument is based on this error in arithmetic.

By requiring claimant to take two rest days before he began the Tuesday through Saturday assignment, he lost those two days so long as he continues on this assignment. Until he gets paid for them, he will not have an assignment beginning with five work-days and ending with two rest days. His weekly assignment will continue to be from Sunday through Saturday, with the rest days preceding the work days.

The violation is clear, and the claim must 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 Agreement was violated.

AWARD

Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: (Sgd.) A. Ivan Tummon
Secretary

Dated at Chicago, Illinois, this 24th day of March, 1954.

DISSENT TO AWARD NO. 6519, DOCKET NO. TE-6349

The Opinion of the Referee makes it appear that the Carrier slyly and with malice aforethought attempted to confuse the facts and mislead the Board and that such a result was only prevented by the keen analysis of the facts which resulted in the award in this case.

The truth of the matter is that no confusion exists in the record and only a cursory and careless perusal of the record could have led the Referee to think that it did exist.

It will be noted that in the second paragraph of the Opinion, the Referee quotes from the Carrier's submission as follows:

> "Under these instructions (says the Carrier) the assignment of the rest day relief telegrapher became:—."

This is followed by a quotation of an assignment showing rest days of Tuesday and Wednesday, effective July 22, 1950. The Referee then, with righteous indignation, points out that this was not the case at all—that actually the Claimant's rest days were changed, effective July 22, 1950, from Tuesday and Wednesday to Sunday and Monday. What the Referee failed to observe was that the assignment from which he quotes on page one of the Opinion was not the assignment of the **Claimant** at all. The quotation referred to above clearly reveals that this was the assignment of the **"rest day relief telegrapher."** The Claimant—as the Carrier's submission clearly shows—was not the "rest day relief telegrapher" but was the regular second trick telegrapher at Concordia. The statement quoted by the Referee was made by the Carrier to show that when the relief telegrapher was assigned to work on Sunday and Monday on the second trick at Concordia there was a concurrent change in the Claimant's assignment so that his **rest days**, after July 22, 1950, were Sunday and Monday. There was no confusion in the record. The Carrier clearly stated the facts concerning Claimant's assignment and the Organization took no exception to them. However, in order that the confusion exhibited by the Opinion may be removed, it may be well to restate the facts. Prior to July 22, 1950, Claimant occupied an assignment as second trick telegrapher at Concordia with work days from Thursday to Monday, inclusive, and rest days of Tuesday and Wednesday. Effective July 22, 1950, the rest days of the assignment were changed to Sunday and Monday. As a result, Claimant worked Thursday, Friday and Saturday, July 20 to 22, inclusive. Since the rest days were changed effective July 22, and were thereafter Sunday and Monday, Claimant did not work Sunday and Monday, July 23 and 24. He then worked the following Tuesday through Saturday, had Sunday and Monday off, etc.

The Referee holds that there has been a violation of the "Beginning of Work Week" Rule (8, Section 2(i)) and that, as a penalty therefor, the Carrier must pay Claimant two days' pay. The Rule in question merely defines the term "work week" as beginning "on the first day on which the assignment is bulletined to work."

The Referee states the violation of this rule as follows:

> "* * * By making the changes effective on date of the telegram, the Carrier required the claimant to take the rest days of the new assignment during the work of his old assignment, although these rest days were not due until a week later after he would have worked the five work-days of the new assignment. It turned the Tuesday to Monday assignment around by putting the two rest days in front of the five work-days instead of after them, and thereby caused claimant to lose two work-days the previous week."

Translated, this means that an **individual** cannot **occupy** an **assignment** unless he does so on the first day of the work week of that assignment—he cannot be permitted to occupy the assignment on its rest days or on any day except the first day of the work week of that assignment—otherwise he would not work a full five days before taking the rest days of the assignment, which is the basic thing producing the violation of the rule in this case, so says the Referee. In other words, he says that the only way in which the Carrier in this case could have avoided a violation of the definition of work week was to start the Claimant on the changed assignment on Tuesday so that he would then have worked five days before taking his rest days—all else is fatal. The reasoning behind this incredible result is as confusing as the language which attempts to express it.

No individual as such has any work week or work days or rest days assigned to him. Work weeks, work days, rest days, etc., are assigned to a job. The individual who occupies that assignment or job is entitled to its characteristics—work week, hours, pay, etc.

When an assignment is bulletined (or changed by proper notice), the work days and rest days are specified—together they make up the work week. An individual who bids in that job or occupies it under other proper circumstances may step into or occupy that assignment at any time, depending upon the circumstances. For instance, if he were awarded a bulletined job having a work week starting on Monday—he would occupy the job on Wednesday for the first time. He would thus work Wednesday, Thursday, and Friday and have Saturday and Sunday off. The Referee—if he followed the reasoning employed in this case—would hold that there was a violation in the hypothetical case just put because he did not work five days before taking his rest days.

The Referee exhibits the confusion under which this award is made when he says that the Carrier turned the work week around by putting the rest days first. The Carrier did not put the rest days first or last. The rest days of the assignment in question, effective July 22, 1950, were Sunday and Monday—and there they remained. Under the definition of "work week", the work week of this assignment commenced on Tuesday. Inevitably, therefore, Sunday and Monday were the sixth and seventh days of that work week. The fact that the Claimant, in effect, left the old assignment on Saturday and entered upon the new assignment on Sunday (one of the rest days) does not mean that the Carrier established a work week with the first two days as rest days. The Carrier simply names, by bulletin usually, the work days and rest days of an assignment. The definition of "work week" then operates to fix the beginning of that work week as the first working day. So it was in this case—the Carrier named the working days as Tuesday through Saturday and the rest days as Sunday and Monday—as long as that designation continued the work week began on Tuesday. What violation of that definition occurred? Obviously none. The Referee has confused the definition of work week with the fact that an individual may enter upon that work week on any one of the seven days comprising it—he is not limited to beginning work on it on the day which marks the beginning of the work week—as the Referee holds here. The work week of an assignment exists independently of the individual who may be occupying it at any particular time. If one occupant leaves an assignment and another enters upon it and does so upon a rest day, this does not mean that the Carrier has turned the work week around or changed it in any way. A work week is not changed to a different one depending upon which of the seven days an occupant may step into it—as the Referee assumes in this case.

Situations identical upon the facts with the one here have been before this Board in three previous awards. In each instance this Board has denied the claims (Awards 5854, 5998, 6211). The Referee has chosen to ignore them. Because of the far-reaching and erroneous basis upon which this award is placed, we dissent.

/s/ C. P. Dugan

/s/ R. M. Butler

/s/ W. H. Castle

/s/ E. T. Horsley

/s/ J. E. Kemp