Award No. 9119
Docket No. TE-8323

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Thomas C. Begley, Referee

PARTIES TO DISPUTE:

THE ORDER OF RAILROAD TELEGRAPHERS

MAINE CENTRAL RAILROAD COMPANY
PORTLAND TERMINAL COMPANY

STATEMENT OF CLAIM: Claim of the General Committee of The Order of Railroad Telegraphers on the Maine Central Railroad (Portland Terminal), that:

1. Carrier violates the Telegraphers' Agreement on each and every Saturday night, commencing at 10:00 P. M. and continuing until 6:00 A. M. (Sunday) when it blanks the third shift of Clerk-Telegrapher at Waterville Yard, (Waterville, Maine) and transfers the work of such position to Tower "A", Waterville, Maine.

2. Because of such violation, Carrier shall pay to the senior idle extra employe on Portland Division Seniority District, who had not worked 40 hours during the week, for eight (8) hours at the pro rata rate on each Saturday, beginning June 11, 1955 (at 10.00 P. M.) and continuing until such violation practice is discontinued.

3. If no extra employe was (is) available on any date then the Carrier shall pay to T. A. McDonald, the regular incumbent, third shift Waterville Yard, compensation at the rate of time and one-half standard rate of such position, for each and every day and date he was denied right to perform work of his position.

EMPLOYES' STATEMENT OF FACTS: There is in full force and effect, a collective bargaining agreement between Maine Central Railroad Company (Portland Terminal Company), hereinafter referred to as Carrier or Management and The Order of Railroad Telegraphers, hereinafter referred to as Employes or Telegraphers. The agreement was effective January 1, 1951 and has been amended in some respects. The agreement, as amended, is on file with this Board and is, in its entirety, by reference incorporated in this submission as though set out herein word for word.

The Carrier has not, in effect, transferred work, as claimed by the Employes. The Telegrapher-Towermen at Tower "A", as well as the Telegraphers at Waterville Yard, are used for train order work and message work by Train Dispatchers, as occasion arises. There is nothing in the Agreement, in practice, or in assignment of work which would restrict the Train Dispatcher in any manner.

What the Employes are undertaking to procure from your Board in the instant claim is in every way contrary to the intent of the Forty-Hour Week Agreement, as recommended by the Emergency Board and as negotiated by the Committees.

The number of Employes needed to care for service requirements is the prerogative of Management, subject to the provisions of the Agreement covering Employes involved. The Agreement covering Telegraphers on this property contains no such restrictions, provided of course, the Employes used are Employes within the scope of the Agreement and in the same seniority district, which is true in the instant case.

Many Awards of the Third Division, and to name but a few—6001, 6184, 6602, 6948, 7073—support the position of the Carrier.

This claim should be declined by your Board in its entirety and the Carrier respectfully so requests.

(Exhibits not reproduced.)

OPINION OF BOARD: The Employes state that the Carrier violated their Agreement on each and every Saturday from December 8, 1951, when it blanked the third shift of the Clerk Telegrapher at Waterville Yard, and transferred the work of that position to Tower "A", Waterville, Maine. However, the claim before the Board dates from June 11, 1955.

The Employes state that on November 23, 1951, a conference was held between the Carrier and Employe representatives for the purpose of discussing the changes to be made at Tower "A" and Waterville Yard. At this conference agreement was reached on all points except the Carrier's proposal to transfer the work of the third shift "Clerk Telegrapher" position at Waterville Yard on Saturdays to the occupant of the position of "Towerman at Tower A".

The Employes state that the Carrier violated Article 10 of the effective Agreement.

The Carrier states that the parties conducted a joint check and found that certain work performed by the Towerman-Telegrapher at Tower "A" on the third trick on Saturday night would have been performed at the Yard Office if an operator had been on duty at that point; that the Towerman-Telegrapher at Tower "A" spent only sixty-six (66) minutes of his eight (8) hour assignment in performing work which would have possibly been performed at Waterville Yard; that some of the work which was included in the sixty-six (66) minute figure is train order and message work which is handled through Tower "A", just as much as, or more, than it is through the Yard Office; that train service is lighter on Saturday at Waterville than it is on other days; that it combined the telegrapher work at Waterville

so that the on-duty Telegrapher at Tower "A" could perform all the work between 10:00 P. M. and 6:00 A. M. on Saturday night and, inasmuch as all the work arises at Waterville, and the telegraphers at Waterville Yard and Tower "A" are of the same class, craft and seniority district, there is no rule in the Agreement to prevent the Carrier from having the work performed in this manner. Tower "A" is within a mile's distance from Waterville Yard.

The Employes contend that the Carrier violated Article 10 of the Agreement, and particularly Article 10(k).

Article 10 was incorporated into the Agreement of this Carrier and Organization after the National 40-Hour Week Agreement had been adopted.

The question to be decided by this Board is whether or not the Carrier may stagger the work which remains to be performed on an unassigned day and assign it to an employe at another location. This question of staggering work that remains to be performed on an unassigned day has been discussed in Award 6946. On the basis of the reasoning of that Award, the Carrier had the right to combine the remaining work of the third shift at Waterville Yard with the work at Tower "A" arising between 10:00 P. M. and 6:00 A. M. on Saturday night, as the telegraphers at Waterville Yard and Tower "A" are both of the same class and craft and both in the same seniority district and are carried on the same seniority roster, and the Towerman-Telegrapher at Tower "A" is qualified to perform the work of the Clerk Telegrapher at Waterville Yard.

As stated in Award 8003, the distance between Waterville Yard and Tower "A" is no barrier in performing this work within the Towerman-Telegrapher's duty at Tower "A".

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 Employe involved in this dispute are respectively carrier and employe 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 Article 10 of the effective Agreement.

AWARD

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of the THIRD DIVISION

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 11th day of December, 1959.

DISSENT TO AWARD 9119, DOCKET TE-8323.

This award is so obviously contrived to sustain the action of the Carrier without regard for either the facts or the rules that a dissent is required in order to maintain some semblance of sanity in our deliberations.

In the very first paragraph of his opinion the Referee apparently seeks to create an impression, detrimental to the employes' position, that nothing was done about the Carrier's action from its inception on December 8, 1951 to June 11, 1955. As a matter of fact, however, the record shows that a claim was filed immediately, and resulted in full payment by the Carrier because of its failure to render a decision within the time prescribed by the parties' agreement. That payment covered the period December 8, 1951 to August 16, 1952.

On the following Saturday, August 23, 1952 another claim, identical to the first, was filed. It, too, was defaulted by the Carrier and paid in the same manner for the period ending on January 10, 1953.

The very next Saturday, January 17, the Employes filed still another identical claim, but this time they failed to observe some portion of the time limit rule during its handling, and thereby lost it. Then, the present claim was filed.

Of course, the handling given the first three claims did not have any bearing on what the true intent of the rest day rules require in such a situation, but it does show that the case was active from the very beginning.

The chief error of this award, however, is its failure to give effect to the rest day rules, as they have previously been applied by many awards to comparable factual situations.

Awards of this Board, legion in number, and so well known that individual citation is unnecessary, have indisputably established the principle that work of a position on its rest days must be assigned in the first instance to a regular relief employe if there be one and he is available; secondly, to an extra or "spare" employe if one with the necessary qualifications is available; or, thirdly, if neither a relief nor extra employe is available, to the regular employe (who works the position on his work days) on an overtime basis.

These awards hold that since these three methods of assigning rest day work are available to the carriers and clearly required by the rules, no other method may be employed without incurring liability to one of the employes who should have been used to perform the work.

This principle was not changed by adoption of the 40-hour week rules. A large number of our awards have specifically so held. See, for example, Awards 5271, 5475, 6019.

Some awards, it is true, have held that the right to stagger work weeks, *spelled out in the 40-hour week rules but previously existing by necessary* inference, gives a carrier a right to combine the work of two separate, but like, positions—under the same agreement, in the same office— so that on the rest day or days of each position the employe assigned to one of them performs the rest day work of the other, respectively. Such a device is called "staggering" by these awards.

We believe such awards to be entirely erroneous and based upon a misconception concerning the right of carriers to stagger work weeks. This opinion is demonstrably sound, especially in the case of Telegraphers' Agreements: Practically all of these agreements contain a special rest day rule which permits deviation from established methods of assigning rest day work only by agreement, and then only where more than three employes of the same class are employed on the same shift in a single office or tower.

Clearly, then, awards like 6946 are subject to criticism; and certainly they should not be blindly followed in cases that do not involve similar circumstances.

Thus, even if it could properly be said that Award 6946, or others like it, correctly interprets Telegraphers' agreements, it furnishes no sound basis for a denial of the claim in Docket TE-8323. Rather, in my opinion, it refutes such a result. Award 6946 dealt with a case where two like positions (six-day positions) in the same office were filled by two employes so that one of them worked Monday through Friday, performing the work of the other's position on Monday; and the other worked Tuesday through Saturday, performing the work of the first position on Saturday. The station was closed on Sundays. The employes had rest days of Saturday and Sunday, and Sunday and Monday, respectively.

The award held this arrangement to be "staggering" as permitted by the first paragraph of the 40-hour week rule.

(My quarrel with this holding is that it extends the right to stagger work weeks to other subjects not mentioned in the rule. It is "**work weeks**" alone that may be staggered, not "work", "assignments", "jobs", or "employes").

But the "staggering" there envisioned by the referee was a true, though unauthorized, staggering of two like **assignments** so that each employe alternately performed the work of the other's assignment on the rest days of each. Here, to the contrary, there was no such "staggering" of anything (except for a staggering blow to the integrity of the rules). The Carrier simply took work away from the telegraph office at Waterville Yard **one day a week** and required it to be performed in Tower A, some distance away. No work was taken from the tower and required to be performed by the telegrapher at the "Yard" on any day of the week. A rest day relief employe was properly used at the tower on both rest days of the regular incumbent's assignment at that location. A rest day relief employe was also properly used at the "Yard" on one of the claimant's rest days.

Now it must be observed that the one point which Referee Carter emphasized (by bold type) in his Award 6946 was that when rest day rules become applicable under the 40-hour week provisions they have the effect of retaining the former methods of assigning rest day work. After noting the correctness of the principle we have referred to above, he said:

> ". . . We grant, also, that the same provisions relative to rest day work were retained after the advent of the 40 hour week **when rest day rules became applicable under that agreement.** But they did not become applicable until the expedient of staggering work weeks was first applied to meet operational needs. If the work necessary to be performed can be done through the expedi-

ent of staggering work weeks of regularly assigned employe, the necessity for rest day relief assignments does not exist. . . ." (Referee's emphasis.)

In the present case, the rest day rules of the 40-hour week agreement did become applicable, and were properly applied to three of the four rest days here involved. The one remaining day was not "staggered" in any sense. It's work was subject to the same rules as were applicable to that of the other three days. And those rules required assignment of the work in one or another of the three traditional methods, as so clearly indicated by Award 6946 itself.

The present Referee's dependence upon Award 6946 to support his own determination to succor the Carrier thus is seen to be nothing more than ludicrous incomprehension of its meaning.

The Referee was informed of the fact that this Division has rejected carriers' contentions that there can be a one way "staggering" under the 40-hour week rules. His attention was directed to Award 8286, 8531 and 8563 on this point. Apparently he gave them no consideration.

The Referee was also informed of the fact that this Division has previously—and correctly—decided a case that was identical for all practical purposes with the present one.

In Award 6212, Referee Wenke, after coming to the same general conclusion about "staggering" work weeks that was later expressed in Award 6946, went on to say:

> "But this change was not intended to nor does the language used authorize and permit the transferring of work on rest days of seven-day positions from one facility to another at a point, or from one point to another, although in the same seniority district, so what was, in fact, being performed by the employes regularly assigned thereto at any facility or point as seven-day services becomes five-day services."

That reasoning was applied to facts substantially the same as we had here. And since the same rules were involved it should have been applied here.

All of the above points, and many more, were made, in substance, to the Referee during panel argument. His failure to correctly evaluate the facts, and apply the rules to those facts in accordance with long established, sound, and carefully cited principles amounts to nothing less than a palpable disservice to the railroad industry and the public.

J. W. Whitehouse
Labor Member