Award No. 9392
Docket No. TE-8233

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Roscoe G. Hornbeck, Referee

PARTIES TO DISPUTE:

THE ORDER OF RAILROAD TELEGRAPHERS

SEABOARD AIR LINE RAILROAD COMPANY

STATEMENT OF CLAIM: Claim of the General Committee of The Order of Railroad Telegraphers on the Seaboard Air Line Railroad, that:

1. Carrier is in violation of the agreement between the parties when it combines the work of the manager and first trick operator in "GO" Office Norfolk each Saturday and Sunday, the assigned rest days of the manager, requiring the first trick operator to perform the combined duties of each of such days each week; when it combines the work of the assistant manager and the second operator in "GO" Office, Norfolk, each Saturday and Sunday, the assigned rest days of the assistant manager, requiring the second operator to perform the combined duties on each such day each week, thereby improperly relieving both the manager and assistant manager on their assigned rest days; and,

2. The Carrier shall, beginning 30 days prior to the date of this claim and continuing until the violation is corrected, compensate the occupants of the positions of manager and assistant manager in "GO" Office, Norfolk, for 8 hours at the time and one-half rate for each Saturday and Sunday they are so improperly relieved.

EMPLOYES' STATEMENT OF FACTS: There is an agreement in effect between the parties which by this reference is made a part of this submission.

Prior to September 1, 1949 which was the effective date of the 40 Hour Week Agreement on this property, the Manager's position in "GO" Relay Telegraph Office, Norfolk, Va. was assigned hours 8:00 A. M. to 4:00 P. M. with assigned rest day of Saturday. The Assistant Manager's position was assigned hours 4:00 P. M. to 12:00 M. N. with assigned rest day of Friday. Each position had the rest day relieved by a relief employe who was paid the negotiated rate for Manager and Assistant Manager position.

Beginning on September 1, 1949 the Manager and Assistant Manager positions were not assigned to work either Saturday or Sunday. The Carrier did not continue to relieve the Manager and Assistant Manager positions as it formerly had, but combined the work of the Manager with the first trick operator and combined the work of the Assistant Manager with the second

of August 21, 1954 was reached; however, one of the purposes of the Railway Labor Act is to provide for the prompt and orderly settlement of all disputes involving the interpretation or application of agreements governing rates of pay, rules and working conditions. The delay in the instant case is inexcusable and is certainly not in keeping with the spirit and intent of the Ralway Labor Act. See Award 4941 and the award mentioned therein which were supported in Award 7074, holding that the appeal was not taken in a reasonable time.

Again, without receding or in any way deviating from the position manifested herein on the merits of the case, there is certainly no sound basis for contending that claimants should be allowed the time and one-half rate requested in Item 2 of Statement of Claim because your Board has consistently held in a long line of awards that:

> "The contractual right to perform work is not the equivalent of work performed in so far as the overtime rules is concerned. The penalty for work lost is the rate which an employe could have received if the work had been regularly assigned and he had performed it. Award 5200. See Awards 3876, 3890, 3910, 4037, 4046, 4179, 4292, 5117, 5943, 6521 and numerous others holding that pro rata rate was proper."

Carrier contends that the issue herein was disposed of in Award 6184 in favor of the Respondent and should not again be made the subject for reconsideration because that award, pursuant to Section 3, First (m) of the Railway Labor Act became final and binding on both parties on April 30, 1953.

Carrier affirmatively states that all data used herein has been discussed with or is well known to the Organization's General Chairman.

(Exhibits not reproduced.)

OPINION OF BOARD: The "Carrier asserts that this claim is barred from consideration on its merits by reason of Petitioner's dilatory tactics and failure to take affirmative action toward final disposition of the claim within a reasonable time, and by Petitioner's failure to observe the time limit requirement in Article V of the August 21, 1954 National Agreement which was effective January 1, 1955".

Carrier's highest officer designated to handle the Claim on the property denied it on July 2, 1953. Thus, it is claimed that under Section 2 of the aforesaid Article V of the cited agreement, the ex parte submission was required to be filed with the Board on or before January 1, 1956; that it was not filed until January 26, 1956.

The question presented is not new. We passed on it recently in Award No. 9219 and held that the filing of notice of an intention to appeal with the Board, if within time, meets the intendment of the cited Agreement.

The notice in this appeal was filed with the Board on December 29, 1955, which is sufficient compliance with the Section and Article of the Agreement invoked.

Many awards of this Board conform to the holding in 9219. Among them are Award Nos. 7850, 8660 and 8764.

Coming then to the merits of the Claim.

On April 30, 1953 in Award 6184, this Board passed on and denied a Claim of the Organization against this same Respondent. The operational facts at the station of the Carrier here involved were identical with those of the instant appeal, but the Claimants were different. In this submission (6184) it was asserted that in violation of the controlling Agreement proper assignments of Claimants rest days had not been made and that by reason thereof they had been denied their assignments, as the regular incumbents of the positions, Telegraph-Operators.

The Organization says that Award 6184 was improperly decided but assuming it to be correct, it can be differentiated on the facts from the instant submission, in that the employes involved in the cited Award were of the same class and within the same seniority district, but that here the employes involved are of different classes.

In the cited Award, it was properly stated that "it should be understood that such employes must be of the same class and within the same seniority District".

Subject only to the distinction sought to be drawn from the facts in this submission the Award 6184 is dispositive of the Claim, if it is sound.

We defer consideration of Award 6184 until later and immediately consider whether or not the Manager and Assistant Manager, Claimant of the "GO" Office, Norfolk, Virginia are of a different Class than the Operators who served during their assigned work days at the "GO" Office on the rest days of the Manager and Assistant Manager.

There is no dispute that all of the employes involved were in the same seniority District. All were Telegraphers and covered by the same working Agreement with the Carrier. All were qualified to do the work of the Operators, and, in fact, the Manager and Assistant Manager at times did the work of the Operators. Whether or not the reverse was true was mainly for the Carrier to determine.

The Scope Rule of the Agreement makes no mention by title of Manager or Assistant Manager. The nearest approach to these titles is Agent and Assistant Agent who duties would correspond closely to those of Manager and Assistant Manager. In the Wage Scale prior to those found in the current Agreement and in the Scope Rule in the subsequent agreement of January 1, 1959, Manager and Assistant Manager are named along with other Telegraphers under various combination titles.

The Bulletin asking bids on the position of Manager at the "GO" Office, was addressed to "All Agents, Agent Operators, Operators and Extra Operators, Va. Div." It further provided, "Applicant must be qualified Morse and Teletype Operator with ability to supervise personnel and handle all details incident to managing "GO" Telegraph Office". Thus, subject to the right of the Carrier to decide as to the special fitness of the bidders for the position of Manager, it was open to practically all Telegraphers without differentiation as to Class.

Without more than appears in this record, in view of the fact that the parties did not see fit to make separate classification of the various designated

employes among the Telegraphers Craft, by any written evidence thereof, and it does not appear that the selection among such employes was restricted other than as was permissible in sound procedural practice, we may not hold that two classes of employes are involved in this submission.

The Organization relies on Rule 3 of the Agreement to support the Claim. It provides:

> "Where existing payroll classification does not conform to Rule 1 (the Scope Rule), employes performing service in the classes specified therein shall be classed in accordance therewith."

In the Wage Scale of the Carrier appears this note:

> "Rates of pay for employes covered by this agreement are shown below solely for the purpose of fixing rates of pay for occupation shown therein."

Rule 3 appears to be a rule for payroll classification only.

We have examined most of the awards cited by the parties. Of those cited by the Organization some are based on assignments wherein it was held that the employes involved were of a different class or from a different district. The following differ in fact or inference drawn from facts and may be distinguished from Award 6184. Awards 3979, 4728, 4815, 6689, 6946. Others support the basis of the claim. Awards 5475, 6019, 6688, 6690, 8531 and 8563.

Many Awards are cited by the Carrier. These and others support its position, 6184, 6602, 6946, 7073, 7316, 8136.

Award 6946, Referee Carter is well considered and helpful. It discusses, at length, the conditions under which the work of the Carrier may be staggered among its employes. It is said:

> "It will be noted that the staggering of work weeks is an integral part of Article III, Section 6. * * * It is plain that the right to stagger work weeks to meet carriers' operational requirements was of equal importance with the establishment of the 40 hour work week itself. * * * We have repeatedly held, and correctly we think, that the assignment of regular relief positions and of work on unassigned days is not a condition precedent to the staggering of work weeks."

We realize that there is irreconcilable conflict in the Awards of this Board on the issues here, particularly as to the holding in Award 6184.

We are satisfied to follow Award 6184, which was the second issue disposed of as heretofore, is completely dispositive of the Claim.

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 not violated.

AWARD

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 10th day of May, 1960.

DISSENT TO AWARD 9392, DOCKET TE-8233

The majority here has compounded error by extending the erroneous theory of awards such as 6184 and 6949 to an entirely distinct factual situation. In those cases the referees were dealing with positions which were of like nature and to that extent susceptible of "staggering", although we must note and emphasize the fact that the 40-hour week rules make no provisions for staggering positions, or work, or employes.

In the present case, however, the positions said to have been "staggered" were of different kinds, segregated by rules of the agreement. The position of Manager is a seven-day position while the position of first shift operator is a five-day position, not represented or filled at all on Mondays and Tuesdays. The occupant of the first shift operator position relieves the Manager and fills that position on Saturdays and Sundays but the occupant of the position of Manager does not relieve the operator or fill the position of operator on Mondays and Tuesdays, or any other day. The same is true as between the position of Assistant Manager and the position of operator on the second shift.

But the majority here says that the two first shift positions and the two second shift positions were "staggered". I thoroughly disagree with that idea. Two things, to be staggered, must be of the same kind and equally overlapped. Obviously there can be no such thing as a one-way "staggering" of anything, be it bricks, positions, or work weeks. An award based upon such a ridiculous theory is itself equally ridiculous.

This Division has held that even if the rules permit the staggering of positions or employes the positions must be of the same kind, that is, both must be either six—or seven—day positions. Awards 8286, 8531, 8563. These awards were cited to the Referee, but apparently were ignored.

Failure of the majority to apply either the tenets of common sense or the pertinent holdings of our previous awards has resulted in grave error, robbing

the employes of benefits for which they bargained in good faith, and thus tending to pervert the purposes for which this Board was created.

For all of these reasons, I consider Award 9392 to be improper, and I hereby register my dissent thereto.

J. W. Whitehouse,

Labor Member.