Award No. 9759
Docket No. CL-9234

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Raymond E. LaDriere, Referee

PARTIES TO DISPUTE:

BROTHERHOOD OF RAILWAY AND STEAMSHIP CLERKS, FREIGHT HANDLERS, EXPRESS AND STATION EMPLOYES

CHICAGO, ROCK ISLAND AND PACIFIC RAILROAD COMPANY

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood that:

a. Carrier violated the controlling Agreement between the parties, when, effective December 9, 1955, they removed clerical work from the Yard Clerks at Liberal, Kansas, five days per week, Monday through Friday, and assigned the making of the 50 reports to the Agent-Operator at Morse, Texas. The Yard Clerks at Liberal, Kansas, continued to make the 50 reports on Saturdays, Sundays, and Holidays.

b. The violation was in effect for the following dates: December 9, 12, 13, 14, 15, 16, 19, 20, 21, 22, 23, 27, 28, 29 and 30, 1955, and January 4 and 5, 1956, a total of seventeen (17) days.

c. That the Carrier be directed by appropriate order to pay Yard Clerk Sidney S. Keene, thirty (30) minutes overtime each date of this claim, as shown in paragraph (b), at the rate of $330.54 per month.

EMPLOYES STATEMENT OF FACTS: Effective December 9, 1955, clerical work of preparing the 50 report was transferred from the Yard Clerk at Liberal, Kansas, to the Agent-Operator at Morse, Texas, five (5) days per week, Monday through Friday. The Yard Clerk at Liberal, Kansas, continued to prepare the 50 report on Saturdays, Sundays and Holidays each week.

The distance between Liberal, Kansas and Morse, Texas is 77.9 miles.

S. S. Keene, Yard Clerk, filed claim on December 9, 1955, as follows:

"Mr. R. T. Lindsey - Agent Liberal, Kansas, Dec. 9, 1955

Please allow me 30 minutes overtime today Dec. 9th, account Telegraph Operator at Morse being used to make 50 reports on loads in on 998 that come out of Etter and Sheerin, these loads have heretofore been reported on 50 report by Yard Clerks at Liberal and I understand will still be reported on Saturday and Sunday by Clerks

It is hereby affirmed that all of the foregoing is, in substance, known to the Organization's representatives.

(EXHIBITS NOT REPRODUCED)

OPINION OF BOARD: Prior to December 9, 1955, the Yard Clerk at Liberal, Kansas, made report No. 50, but after that date this work, for five days of each week Monday through Friday, was assigned to the Agent-Telegrapher at Morse, Texas. Later the order was rescinded and the work returned to Liberal, but for the seventeen days involved, thirty minutes overtime each day is claimed by the Yard Clerk at Liberal, Kansas.

The Carrier opposes the claim on the ground (1) that this Board has no jurisdiction in the absence of the Telegraphers; (2) that the agreement was not violated by it; (3) that the work was in the nature of floating work not arising at any particular station but which could be performed at any; (4) that no loss of pay was sustained by claimant; and (5) that any event recovery cannot be had for overtime. These points will be discussed as the opinion progresses.

In the first place, on the question of whether the Telegraphers should be a party and should participate in this claim, the record shows that notice was duly given to that organization, which has however failed to appear, although it did inform the Secretary of this Division that it was not involved in the dispute. Since it appears that due notice has been given, and even acknowledged, the matter is now properly at issue and our determination will be binding upon the parties.

As to whether a violation exists, there are a number of awards to the effect that a telegrapher with telegraphic duties to perform may properly perform clerical work which is incidental to or in proximity to his telegraphic work to such an extent as to fill out the telegraphic assignment. (Awards 9459, 4288, 4355, 4477, 4492, 4559 and 4998.)

But in this situation in which the work was moved to a telegrapher seventy-nine miles away, the test of whether it was "incidental to" or "in proximity to" his telegraphic work is not complied with or fulfilled. See Award 615 as limited by Award 636 (Swacker) and Award 4288 — Carter, where it was said that "it was never intended that a telegrapher might be severed from his post and sent to an unrelated location to fill out his time, or that clerical work might be taken from a clerical position at an unrelated point and brought to a telegrapher to be performed by him". See also Award 5024-Parker, Award 8798-Daugherty, Award 9440-Bernstein and awards cited therein.

While it is true that the record shows that the report in question could have been made up at Morse Junction or Liberal because the cars pass through each place, it should not be overlooked that the work in question has been lodged with the office at Liberal for a long period of time (though the record did not disclose the exact date) and has become as much a part of the clerical duties incident to that office as if the work originated in that locality.

The Carrier is correct in asserting that no loss of pay was suffered by anybody, but this same point was dealt with by Referee Wenke (Award 6063) where it was said that the claim is primarily to enforce the scope of the agreement and not for work performed, that if the scope has been violated then a penalty is imposed to the extent of the work lost; that this is done to maintain the integrity of the agreement and that as to who gets the penalty is but an

incident to the claim and not a matter in which the Carrier is concerned. This view has been followed in a great number of awards one of the most recent of which is Award 9545 by Referee Bernstein.

The Claimant asks for "overtime" but the true yardstick to be followed is "The rate which the occupant of the regular position to whom it belonged would have received if he had performed the work." Award 3371-Tipton; 3375-Tipton, 3271-Wenke, 3814-Douglas, 4037-Parker and Awards cited therein.

As there is no showing in the record that the making of report No. 50 was overtime work, either before its transfer to Morse Junction or since its return to Liberal, it would naturally follow that straight time or pro rata rate will govern.

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 violated the Agreement.

AWARD

Claim sustained to the extent set forth herein.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 16th day of December 1960.

DISSENT TO AWARD NUMBER 9759, DOCKET NUMBER CL-9234

Award 9759 is correct in observing that the particular station work involved here could have been performed at either Morse Junction or Liberal. On that recognition alone the claim should have been denied because, in its managerial capacity, the Carrier has retained the right to direct the manner of rendition of its service and to determine when and where service shall be performed, except to the extent, if any, it has specifically bound itself otherwise by Agreement. The pertinent Agreements here do not bind the Carrier in respect of where or by whom the disputed work shall be performed.

Furthermore, the Agreements do not freeze the particular work involved here to a given office on the premise that, by having performed it for a long period of time, it has become incident to that office. This Board has no authority to so freeze it in the absence of an Agreement rule so providing.

Since it is admitted that no loss of pay was suffered and the claim is for a penalty, and since no penalty is expressly contained in the Agreements, the following from Award 5186 (Boyd) is pertinent:

> "It must be conceded that the Agreement does not contain a specific provision for a penalty in case of nonperformance of the obligation imposed * * *. It is also well established by the precedents of previous awards that the Board will not impose a penalty where none has been specified in the Agreement. This is a sound doctrine."

Award 9759 is in error and we dissent. Carrier Members' dissent to Award 9545 is also made a part of this dissent, by reference.

/s/ J. F. Mullen

/s/ R. A. Carroll

/s/ P. C. Carter

/s/ W. H. Castle

/s/ D. S. Dugan

LABOR MEMBER'S REPLY TO CARRIER MEMBERS' DISSENT TO AWARD NO. 9759, DOCKET NO. CL-9234

In the first two paragraphs of the Dissent, the Dissenters attempt to justify the transfer of work from one agreement to another because it could be physically performed at a remote location. They admit, however, that such transfer could not be made where Carrier specifically bound itself otherwise by agreement. The Board so held when it adopted Award 9759 and the well documented opinion of Board shows the reasons why the Agreement was violated in this instance. Consequently, the Dissent does nothing more than show the Dissenters disappointment in their failure to becloud the issue and hereby secure a denial award.

That the Dissenters' assertions are entirely lacking in merit is manifested by the obvious attempt to mislead in the third paragraph by quoting out of context from Award 5186. A review of that Award will show that the Employes' claims were sustained, as follows:

> "FINDINGS: * * *
>
> That the Carrier on and after July 30, 1947, failed to perform its obligation under Article 8, Section 10 of the Agreement of June 1, 1943; that it continues to violate said Section with respect to certain Maintainer headquarters; that on and after July 30, 1947, certain unnamed employes furnished for their headquarters, by their own labor and expense, water and other facilities required under the Agreement of June 1, 1943, to be furnished by the Carrier; **that by reason of the Carrier's breach of the Agreement the specific employes who furnished water and other facilities for the headquarters specified in the joint submission of July 30, 1947, are entitled to recover compensation from the Carrier at their pro rata rates on the minute basis for such services so performed** and until the facilities were or shall be installed; that this matter be referred to the parties on the property to determine the employes actually affected and the extent of their time devoted

before and after their assigned hours in supplying facilities, if any, enumerated in Article 8, Section 10 for their respective headquarters." (Emphasis ours)

It is surprising that the Dissenters would expose themselves in such a manner in view of the Board's further holdings in Award 5186 following the paragraph quoted by them. The Board ruled:

> "It is a well established principle that if a party to an Agreement fails to perform that which he has undertaken to perform and such nonperformance results in a loss to the other contracting party, then the aggrieved may require the nonperforming party to compensate him for the loss suffered by reason of the breach. By the terms of the Railway Labor Act, this Board is authorized to consider disputes arising out of grievances or interpretations of Agreements between the parties and to make an award. **The Board would fail in its objective of settling disputes if there is not implied in the broad purposes of the Act the authority of the Board to enforce its awards by an appropriate finding of damages, if any exist, and directing the payment thereof.** (Emphasis ours)

It should also be noted that the Dissenters studiously avoided quoting the preceding paragraph in full, nor, did they indicate in their quotes that there was other language contained therein. The sentence left out modified and changed that portion quoted by the Dissenters. The balance of the paragraph after "This is sound doctrine.", reads:

> "But it does not necessarily follow that where no penalty has been provided, this Board is helpless and without authority to make an award which will tend to enforce compliance with the terms of the contract."

For numerous authorities that have consistently rejected similar contentions as those expressed here, see my 'Answers' to Carrier Members' 'Dissent' and 'Reply' to Award 9546.

A review of Award 9759 will show that the author spent a great deal of time and research on the subject confronting him, that his decision is well documented and supported by prior Awards of this Division. It is capable of standing on its own merits and nothing the Dissenters may assert will have any effect thereon.

/s/ J. B. Haines

J. B. Haines
Labor Member