

**Award No. 9776**

**Docket No. TE-8457**

**NATIONAL RAILROAD ADJUSTMENT BOARD**

**THIRD DIVISION**

**Raymond E. LaDriere, Referee**

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**PARTIES TO DISPUTE:**

**THE ORDER OF RAILROAD TELEGRAPHERS  
SOUTHERN RAILWAY COMPANY**

**STATEMENT OF CLAIM:** Claim of the General Committee of The Order of Railroad Telegraphers on the Southern Railway, that the Carrier violated the agreement between the parties signatory thereto, when:

(1) It improperly assigned rest days of Sunday and Monday to the 5-day position occupied by H. P. McNeeley, printer-operator, "GM" Relay Office, Washington, D. C., and

(2) Beginning with Monday, May 26, 1952, effective date of this improper assignment, and continuing until corrected, claimant H. P. McNeeley shall be compensated:

(a) For the difference between the pro rata rate paid and the time and one-half rate for work performed on Saturday, a rest day, and

(b) Eight hours at the straight time rate account suspended from the Monday assignment of his properly constituted position.

**EMPLOYEES' STATEMENT OF FACTS:** The Agreements between the parties to this dispute are by reference thereto made a part of this submission.

The claim arises out of Carrier's unilateral assignment of an improper work week and rest days on the position occupied by Claimant H. P. McNeeley, Printer-Operator in "GM" Relay Office, Washington, D. C., beginning with Monday, May 26, 1952, and on a continuing basis, or until a properly constituted position is made in accordance with the terms of the 40-Hour Week Agreement.

Printer-Operator H. P. McNeeley, Claimant in this dispute, holds one of three Printer-Operator positions in "GM" telegraph office Washington, D. C. The work-week and rest days of all of the Printer-Operator positions are as follows:

	<b>Work-Week</b>	<b>Rest Days</b>
Printer-Operator	Monday-Friday	Saturday-Sunday
Printer-Operator	Monday-Friday	Saturday-Sunday
Printer-Operator	Tuesday-Saturday	Sunday-Monday

In the absence of a specific rule to the contrary, a carrier may exercise its fundamental right to schedule work and make working assignments."

Also, see Awards 6691 and 6969, denying claims of other telegraphers employed in Carrier's Washington telegraph office, here involved.

On the basis of these awards, claim should be denied. They definitely negative the Brotherhood's contention.

### CONCLUSION

Carrier has proven that all positions in its Telegraph Office in Washington to which telegraphers are entitled are seven-day positions within the meaning of agreement rules; therefore, employees' rest days may be any two days.

Claimant McNeely is assigned a work week of forty hours, consisting of five days of eight hours each, with two consecutive rest days, namely, Sunday and Monday, in accordance with agreement rules, which assignment he applied for.

The agreement not having been violated and claim not being supported by the effective agreement, or by the principles of prior Board awards, the Board cannot do other than make a denial award if the claim is not dismissed as here requested and is decided on the merits.

All relevant facts disclosed by the record have been made known to employee representatives.

Carrier, not having seen the Brotherhood's submission, reserves the right, after doing so, to present any additional facts and argument which may be necessary.

**OPINION OF BOARD:** We are met at the outset by Carrier's objection that, according to a number of awards, this claim should be barred because of delay. The record shows that the events complained of occurred May 26, 1952, claim was filed July 24, 1952 and was finally denied on December 4, 1952. Next was the receipt of the notice of appeal to this Board dated December 29, 1955, about three years after the denial of claim.

It should not be overlooked, however, that the National Agreement of August 21, 1954, effective January 1, 1955, which set up a general nine month limitation for appeals to this Board, expressly provided a twelve month limitation after its effective date for all claims and grievances theretofore finally denied. This one was filed within such twelve month period and therefore the matter is before us for consideration on the merits. Award 9574—Johnson; Award 7593—Larkin; Award 7959—Lynch.

This claim arises out of the readjustment of work under the 40-Hour Week agreement, effective September 1, 1949.

The Employees assert that the Carrier improperly assigned rest days of Sunday and Monday "to the 5-day position" of H. P. McNeely, Printer-Operator, GM Relay office, Washington, D. C., that therefore Claimant should be allowed the difference between straight time and time and one-half for work performed on Saturdays, an assigned work day, and eight hours not worked at the straight

time rate on Mondays, an assigned rest day, in addition to the pay for forty straight time hours worked and paid for each week.

The Carrier contends that McNeeley and the others in the GM Relay office occupy seven-day positions with five-day work week, two rest days and two men on regular relief assignments under Rule 4 (e).

The question then appears to be—was McNeeley's position (as distinguished from his work week) one of five days or more than five days—because if it was either six or seven days there has been no violation by Carrier in assigning McNeeley rest days on Sunday and Monday. See Rule 4 (a), (b), (c) and (d) on pages 2 and 3 of the Agreement.

The plain meaning of the rule, as stated by this Board in Award 6232—Stone, (quoting Award 5555—Carter) "is that a position is a five, six or seven day position, if the service, duties, or operations necessary to be performed are necessary to be done five, six or seven days a week, as the case may be".

The burden of establishing facts sufficient to require or permit the allowance of a claim is upon him who seeks its allowance. Award 6698—Donaldson and others cited therein. See also Award 5555—Carter, hereinafter referred to and Award 6001—Daugherty.

Instead of collecting the facts bearing on whether we are dealing with a five, six or seven day week, and presenting them to the Board, the parties have mostly confined themselves to argument; hence it has been necessary for us to painstakingly read and reread a number of times all of the eighty-four pages in the record so as to be sure that any item bearing on the issue has not escaped us. A discussion of these facts will follow.

In Carrier's submission at page 2 is set out a table showing the names (including McNeeley) of those working at the GM Relay, the position of each, hours of assignment and work weeks. The list includes nine, one a relief assignment to the Wire chiefs, and eight others including Wire chiefs, two telegrapher-printer operators and three "Printer Operators" one of which is McNeeley who is assigned from 8:30 A. M. to 4:30 P. M., Tuesdays through Saturdays with days of rest Sunday and Monday. All are members of the Telegraphers and covered by the Agreement and all except the Wire chief who sometimes makes tests of the wire, are engaged in the same general character of work.

The table referred to shows that on the midnight shift one person was required for each of seven days; that on the 8:00 A. M. trick four were used (with slight and immaterial staggering of hours) Monday through Friday, on Saturday two worked and on Sunday only one on this shift; the 4 to 12:00 shift used two employes Monday through Friday and one on Saturday and Sunday.

It is obvious therefore that on each day Monday through Friday seven men were needed to work all three tricks, on Saturday four were used and on Sunday three.

Employes submit a letter dated August 22, 1952, from Superintendent of Communications Whitfield, as bearing on the 5-day issue in the case. In it Whitfield intimated that McNeeley is "assigned Tuesday to Saturday under the provisions of Rule 4 (f)". In the same letter, however, next paragraph, he says:

"As you know, the operation at 'GM' Telegraph Office has always been a seven day operation, \* \* \*."

and in the succeeding paragraph he makes the statement, which has not been contradicted, that "Printer Operator service is required in the office on Saturdays" (indicating at least a six-day position) and in both instances insists that the assignment of the rest days to McNeeley as made was permissible.

Employees have made statements in the record casting doubt on their 5-day position claim and lending support to the 6-day position theory. For instance, in their submission (p. 13) it is said "it goes without saying that the Carrier was clearly aware that the operational requirements at 'GM' Relay needed a six-day Printer Operator assignment".

Also, that there is nothing in the Rule (4) "Which would permit the Carrier to cover an assignment on which service, duties or operations are necessary to be performed six days per week, as in the instant case. \* \* \*".

Again, "\* \* \* for rest days other than Saturday and Sunday which were to take care of the service, duties and operations necessary to be performed in six or seven day service or combination thereof. This is the type of operation we are looking at in 'GM' Relay office, Washington, D. C."

In Employee's statement at the hearing, p. 2, it was said:

"It is one thing to assert that there is printer-operator service, duties and operations to be performed seven days per week in 'GM' office when in reality there is no printer-operator service, duties or operations performed on Sunday at all in this office. \* \* \* the nature of the service, duties and operations performed by Claimant McNeely as a printer-operator in 'GM' Office, is such that they are not required to be performed seven days per week. \* \* \* all of the positions in 'GM' office cannot be denominated as seven day positions \* \* \*. Carrier's seven day operational theory is predicated, no doubt, on the operation of the entire facility at 'GM' and not on the basis that \* \* \* printer-operator' work was such as to require employees on a seven day basis. \* \* \*"

In Employee's Reply to Carrier's statement, it was asserted that "Claimant's position is, therefore, not a seven day position"; on page 2, that the "nature of the service, duties, and operations performed by Claimant McNeeley as a printer-operator in 'GM' office is such that they are not required to be performed seven days per week—and the class of work assigned to printer-operators is not performed seven days per week"; that though it is "undenied that communication service is performed in 'GM' office 'seven days a week', \* \* \* printer-operator service, duties and operations do not come within the stipulations required of a seven day position". On page 5, it is said "\* \* \* no Sunday assignment of a printer-clerk's position was necessary. In fact, insofar as the records show, none had ever been assigned on Sunday."

In its reply to Employee's statement at hearing, the Carrier said:

"While the ORT alleges that the claimant occupies a five-day position, it ignores the indisputable fact that communications, service, duties, or operations are necessary to be performed, and are performed, in the 'GM' Communications Office seven days a week, although it acknowledges that they are performed six days a week. \* \* \*

\* \* \* \* \*

It is significant that, while arguing that the claimant occupies a five-day position and that printer operator work is not performed on Sundays, the ORT recognizes that such work is performed six days a week."

And on page 3,

"Communications employees in the 'GM' Communications Office classified as 'Printer Operator' send and receive communications of record by operating teletype machines. Communications employees in that same office classified as 'Wire Chief', or as 'Assistant Wire Chief', also send and receive communications of record by operating teletype machines, in addition to their other duties. Teletype machines are operated in the 'GM' Communications Office twenty-four hours a day, seven days a week."

On page 4:

"\* \* \* the ORT's statement 'that insofar as printer-operator work is concerned, there is no Sunday assignment of the regular week day hours' is wholly untrue. Printer operator work is performed both day and night, in fact over the entire twenty-four hour period, on Sundays the same as on all other days of the week. All communications employees who perform printer operator work are simply not called Printer Operators. Some are designed as Wire Chief and Assistant Wire Chief."

After further denials of statements made by Employees, the Carrier said (P. 4):

"The type of work performed by Claimant McNeeley as Printer Operator, i.e., as operator of a teletype machine, is necessary to be performed, and is performed, twenty-four hours a day, seven days a week"

In Employee's Reply to Carrier's Rebuttal, after more denials and further argument, substantially all of which has been covered above, it was said (P. 4):

"If there are six days of printer-operator's work in 'GM', and the records bear this out, then Carrier has failed to give any consideration to the stipulations of Rule 4 (e)."

On the question as to whether it is sufficient that the operations of Carrier are performed seven days a week—as distinguished from performance by the individual Claimant, it is interesting to read Award 6232-Stone, in which this Board held on this very point:

"It is not sufficient that Carrier's operations are performed seven days a week. It must appear that the operations in which Claimant is engaged are necessary to be performed seven days a week, and it does so appear."

Award 6184—Wenke, evidently involved a situation very much like the present one. It had to do with the "GM" Relay telegraph office in Norfolk, Va., where, as here, approximately eight or nine people were employed, but only two were claimants. All were members of the Telegraphers and covered by the Agreement. The work weeks had been staggered. Claimant at first asserted the five day week but later abandoned this and the case proceeded on the theory

that all were occupying the seven day positions, the Board stating that "they perform work that is required on seven days of the week in order to meet Carrier's service requirements, although the volume thereof varies throughout the week". See Award 6001—Dougherty; and Award 1669, Second Division. This last is another point of similarity with the matter before us. It will be recalled that in our case the work is done by seven men on each of the first five days of the week, by four on Saturday and by three on Sunday,—but there is obviously work to be done in each twenty-four hour period.

Award 5555—Carter, is another case involving the question as to whether or not the duties of the positions concerned could reasonably be met in five days of each week or, on the other hand, whether or not the nature of the work is such that employees will be needed six days each week. The Board then considered in detail the evidence available on that subject and held:

"We think the evidence is sufficient to sustain the Carrier in its conclusion that the nature of the work is such that employees are needed six days each week. The burden rests upon the Employees to show, in order to maintain their claim, that the duties of Claimants' positions could reasonably be met in five days. This burden has not been met in the record here presented. We hold, therefore, that the positions here involved are six day positions \* \* \* and the Carrier may properly stagger the assignments or employees by fixing the rest days as Saturday and Sunday, or Sunday and Monday, in accordance with its work needs."

Award 6232—Stone shows this Board's determination of another situation similar to the one before us at this time. The Claimant was given a work week assignment Sunday to Thursday inclusive with rest days Friday and Saturday. Relief was provided on Friday but not Saturday the seventh day. Claimant then asserted it was a six day position and rest days could only be Saturday and Sunday or Sunday and Monday and claimed damages accrued. In holding that it was a seven day position this Board said:

"\* \* \* the nature of the work is not such that employees will be needed only six days each week, but apparently the amount of the work is such that Carrier finds it unnecessary to relieve both rest days of every employee, although the service, duties and operations which Claimant performs are necessary to be performed seven days each week."

Of unusual interest is Award No. 6969—Carter. Claim was filed July 23, 1952, one day before and which has to do with the same parties and with the same "GM" Relay Telegraph office in Washington as we are concerned with in the instant case. The Employees stated that there were "nine positions within the agreement, viz., three seven day positions and six five day positions". In its opinion the Board said:

"At its 'GM' relay office in Washington, D. C., Carrier has established three wire chief assignments around the clock on a **seven-day** basis. It also established one telegrapher-printer operator and three printer operator assignments on **six day** positions, three of which worked Monday through Friday and one (McNeeley) Tuesday through Saturday \* \* \*." (Emphasis and parenthesis ours.)

So that the positions now claimed by Employees to be five day positions were held by the Board on April 29, 1955 to be six day positions, including that of McNeeley.

#### Conclusion

It is evident from the above that though there may be some difficulty in determining whether McNeeley occupies a seven day position, as Carrier contends, or a six day position as this Board has heretofore held, and as Claimant has just about conceded herein,—one thing is abundantly clear and that is that Employees have failed to prove that it is a five day position and therefore the claim should be denied.

**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 Employee involved in this dispute are respectively Carrier and Employee 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 30th day of January, 1961.