Award No. 10 30

Docket No. TE-9. 50

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION
(Supplemental)

Levi M. Hall, Referee

PARTIES TO DISPUTE:

THE ORDER OF RAILROAD TELEGRAPHERS

UNION PACIFIC RAILROAD COMPANY (NORTHWESTERN DISTRICT)

STATEMENT OF CLAIM: Claim of the General Committee of The Order of Railroad Telegraphers on the Union Pacific Railroad (South Central and Northwestern Districts), that:

1. Carrier violated the Agreement when it failed and refused to compensate T. L. Abrahamson at the time and one-half rate, for services performed on the 28th day of September, 1955, at Walla Walla, Washington.

2. Carrier will be required to compensate T. L. Abrahamson for the difference between the pro rata rate, which was paid, and time and one-half pro rata rate, which should have been paid, for services rendered on September 28, 1955, at Walla Walla, Washington.

EMPLOYES' STATEMENT OF FACTS: There is in full force and effect a collective bargaining Agreement entered into by and between Union Pacific Railroad Company (South Central and Northwestern Districts), 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, 1952. The Agreement, as amended, is on file with this Division and is, by reference, made a part hereof as though set out herein word for word.

The dispute was handled on the property in the usual manner through the highest officer designated by Management, and failed of adjustment. The dispute involves interpretation of the collective bargaining Agreement and is, under the provisions of the Railway Labor Act, as amended, referable to this Division for award.

The facts are as follows:

On September 22, 1955, T. L. Abrahamson, an extra telegrapher, was assigned to relieve incumbent second shift ticket-clerk-telegrapher at Walla Walla. The assigned hours were 4:00 P. M. to 12 Midnight; assigned rest days Tuesday and Wednesday. Pro rata rate was $1.925 per hour.

In **Award No. 7320** (Referee Carter) which followed, a claim arising on this same Carrier was settled. The claim in that case involved an employe of a different craft but the factual situations, confronting problems and agreement provisions involved in **Award No. 7320** are all identically the same as here. We invite the Board's review of the existing parallel.

In **Award No. 7320**, a clerical employe whose work week prior to Monday, March 29, 1954, was Thursday to Monday with Tuesday and Wednesday as rest days was, after the required notice, given different rest days and a new work week effective Monday, March 29, 1954. Thereafter, the work week ran from Monday to Friday with rest days Saturday and Sunday.

The change in work week, which resulted from the change in rest days, had the effect of requiring Claimant to work consecutively for nine days from Thursday, March 25, 1954, to Friday, April 2, 1954. The Organization claimed payment at overtime rate for the time worked on the sixth and seventh days. The Carrier pointed out, however, that four of the nine days worked consecutively fell within the old work week of the assignment and five days within the new; that since Claimant, notwithstanding the work program which because of the change extended over a nine-day period, did not work more than five days or forty hours in any work week, and that Claimant did not therefore qualify for overtime payment for the sixth and seventh consecutive days worked.

The Board's findings in **Award No. 7320** are wholly in principle with its earlier **Awards Nos. 5854, 5998** and **6281.** The Division in **Award No. 7320** once again found the work week to be controlling and entered a denial award founded on the premise that the Carrier, in changing the assigned rest days of Claimant's prior assigned work week, concurrently changed the work week so that Claimant, although he worked nine days consecutively, did not work more than five days or forty hours in a work week.

The Rule involved in **Award No. 7320** (Rule 41(j) of the agreement effective February 1, 1952, between the Carrier and the Clerks' Organization) and Rule 24(c) of the telegraphers' agreement here involved, although in different contracts, have common origin and read the same. Since the fact situation in both cases are likewise the same, the decision of the Board in **Award No. 7320** should be controlling here and the claim in this docket should be denied.

Under the clear language of the agreement provisions involved and the precedents laid down by the Division, Claimant would be entitled to payment of overtime for Wednesday, September 28, 1955, only if work on that day exceeded five days or forty hours in a work week. The record shows conclusively that Abrahamson did not, however, work in excess of forty hours or five days **in any work week.**

He is not, therefore, entitled to the overtime payment sought.

All data used in this Response to Notice of Ex Parte Submission are of record in correspondence and/or have been discussed in conference with the Organization's representatives.

(Exhibits not reproduced.)

OPINION OF BOARD: This dispute arose when the rest days of a telegrapher were changed from Tuesday and Wednesday of each week to Monday

and Tuesday and this is a claim for time and a half for work performed on Wednesday, September 28th, 1955, which was the second rest day of the assignment commencing Thursday, September 22nd before the change of rest days by the Carrier. There is no dispute on the facts.

Article 5, Rule 29 (8) (k) in the instant Agreement is identical to Rule 9 (l) involved in Award 10497. Article 4, Rule 24 (c) here is identical to Rule 4 (c and d) therein construed. The principle involved is the same. There is nothing in this case that would require a different decision.

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: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 18th day of April 1962.

CARRIER MEMBERS' DISSENT TO **AWARD 10530, DOCKET TE-9350**

The stated basis of the decision by the majority in this award is that the principle involved is allegedly the same as in **Award 10497** and that there is allegedly nothing in this case which would require a different decision than in that award. Actually, however, there is a very real and material distinction between the facts in this docket and those in **Award 10497**, to the extent that an application of the very same principles which were followed in arriving at a sustaining award in that case required a denial award under the materially differing factual circumstances presented in this docket.

In this present case the claim for overtime compensation arose from the fact that the Claimant, while filling a regular assignment, had worked on what would otherwise have been one of his expected rest days if it had not been for the exercise by the Carrier of its undisputed right to change rest days and work weeks of that assignment. Differing from many of the other situations previously considered by this Division, however, the change in rest days and workweek in this case was made effective on the first workday of the new workweek in literal compliance with the Agreement.

In the claim resulting in **Award 10497**, upon which the majority bases its decision, the change in rest days had been made effective on a day other than the first workday of the new workweek and the claim was sustained by adoption of the language and principle of prior **Award 9962**, which also involved a case where the change in rest days had been made on a day other than the first workday of the new workweek. The principle expressed and followed in **Award 9962** was, in turn, premised upon prior awards which, with one exception, also involved changes in days being made effective on other than the first workday of the new workweek and were themselves premised upon the principles set forth in the first of those awards thus referred to, namely **Award 7319**, which was decided with Referee Edward F. Carter.

The principles upon which **Award 10497**, as well as the others relied upon, are purported to be based are thus derived from the decision in **Award 7319**. That award sustained a claim for punitive overtime in a case where, again contrary to the situation here, the change of rest days was made effective on other than the first workday of the new workweek. Moreover, the fact that in that case the change in rest days had been made on other than the first workday of the new workweek was not a minor distinction without a difference. It was, in fact, that particular factual distinction which formed the stated basis for the sustaining award in **Award 7319**.

The decision in **Award 7319** did not in any way dispute or question that a claim for overtime compensation would be without merit where, as here, there had been an **effective**, prior change in workweek as the result of an exercise by the Carrier of its right to change rest days of an assignment. Rather its entire basis was that there could be no effective change in workweek on other than the first workday of the new workweek under the provisions of a rule therein involved identical to Rule 29 (i), which was relied on by both parties and discussed extensively in this docket, but for some reason is not even referred to by the majority in this award.

Rule 29 (i), as well as the rule upon which **Award 7319** was based, both specifically provided that:

> "The term 'work week' for regularly assigned employes shall mean a week beginning on the first day on which the assignment is bulletined to work, * * *."

The sustaining decison in **Award 7319** was based upon the conclusion that under these provisions "the change in work weeks could not take place until the new work week began," and that "it is the first day of the new work week which controls the applicable rules." Because, in that case, the change in rest days was made on a day other than the first workday of the new workweek, it was the conclusion in **Award 7319** that the claim had merit because the new workweek could not commence until the first workday of that new workweek.

The principle which controlled the decision in **Award 7319** was thus that whether or not an employe on a regular assignment is entitled to punitive overtime compensation where he works in excess of five days as the result of a change in his rest days depends entirely on whether or not the change was made effective on other than the first workday of the new workweek.

This was further confirmed in **Award 7320**, also rendered by Referee Carter, and involved both this same Carrier as well as a factual situation essentially the same as that presented in the instant claim, where the change in rest days was made effective on the first workday of the new workweek. Under those circumstances, essentially the same as those presented here, **Award 7320** found that the same principles as those applied in **Award 7319** required not a sustaining award, but a denial award. These same principles were then also followed in **Award No. 7719**, with Referee H. Raymond Cluster, in denying a similar claim for overtime compensation where, as here, the change in rest days was made effective with the first workday of the new workweek.

The only decision which has sustained such a claim for overtime pay where the rest days were changed effective with the first workday of the new workweek was **Award 9548**, with Referee William E. Grady, which itself indicated no basis for such decision other than a reference to the "teaching" of several prior awards, including **Awards 7319, 7320 and 7719,** the principles which actually also required a denial award under those circumstances. This was pointed out in the Carrier Members' Dissent to that Award.

It is apparent, therefore, that the majority in this present award, as well as in **Award 9548**, has failed to recognize that the very principles upon which it purports to rely to sustain this present claim are those which arise from the companion decisions in **Awards 7319 and 7320**, and that under those very principles the claim in this present docket should have been denied.

It may well be that confusion has resulted in these cases from the rendering of conflicting awards with which we have not always agreed. Where, however, even the sustaining awards upon which the decision purports to be premised were based upon principles which would require a denial award under the particular factual situation present in this case, the failure of the majority to recognize and apply the basic reasoning of the very awards upon

which it relies is inexcusable and can only further obscure an already confused situation.

For these reasons we dissent.

/s/ **O. B. Sayers**
O. B. Sayers

/s/ **G. L. Naylor**
G. L. Naylor

/s/ **R. E. Black**
R. E. Black

/s/ **R. A. De Rossett**
R. A. De Rossett

/s/ **W. F. Euker**
W. F. Euker