Award No. 11439
Docket No. TE-9869

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

David Dolnick, Referee

PARTIES TO DISPUTE:

THE ORDER OF RAILROAD TELEGRAPHERS

THE COLORADO AND SOUTHERN RAILWAY COMPANY

STATEMENT OF CLAIM: Claim of the General Committee of The Order of Railroad Telegraphers on the Colorado and Southern Railway, that:

1. Carrier violated the agreement between the parties when it unilaterally changed the hours of service of the Ticket Agent Telegrapher at Walsenburg Ticket Office from 8:00 A. M. — 4:00 P. M. to 10:00 A. M. — 6:00 P. M. causing the occupant of this position Sunday through Thursday, E. W. Edwards and, regular rest day relief No. 4, occupant, G. H. Tucker, to suspend work during regular hours 8:00 A. M. to 10:00 A. M. daily, while being relieved by an employe not regularly assigned to the position of Ticket Agent Telegrapher at Walsenburg Ticket Office.

2. In consequence of these violative acts the Carrier shall be required to compensate Ticket Agent Edwards, or his successor, and Rest Day Relief Ticket Agent Telegrapher Tucker, or his successor, for two hours each day at the rate of time and one-half, commencing April 16, 1957, in addition to their regular daily rate of pay, and continuing until this violation is corrected.

3. Carrier further violated the agreement when it required Agent Telegrapher L. A. Maes, regularly assigned as Agent Telegrapher at Walsenburg Freight Office, to suspend work during his regular hours at Walsenburg Freight Office from 8:00 A. M. to 10:00 A. M. each day Monday through Friday in order to work at the Ticket Office where he has no assignment.

4. Carrier shall now be required to compensate Agent Telegrapher Maes, or his successor, for two hours at the pro rata rate of pay in addition to his regular rate of pay, commencing April 16, 1957 and continuing each work day until this violation is corrected.

EMPLOYES' STATEMENT OF FACTS: All copies of the agreements in effect between the parties are before your Board and the rules contained therein are applicable to this dispute as though set forth word for word.

All data herein and herewith submitted has, in substance, been made known to the duly authorized representatives of the Employes on the property.

(Exhibits not reproduced.)

OPINION OF BOARD: Carrier first contends that the claim should be denied because it was originally submitted seventy-nine days after the occurrence, that it was later withdrawn, and that a revised claim was filed ninety-six days after the date the Petitioner alleges the violation occurred, "but actually one hundred and seventy days after the occurrence . . ." This is in violation of the Time Limit Rule contained in Article V, Appendix 3 of the Agreement which, more specifically, is the Agreement of August 21, 1954. Section 1(a) of that Agreement says, in part:

> "All claims or grievances must be presented in writing by or on behalf of the employe involved, to the officer of the Carrier authorized to receive same, within 60 days from the date of the occurrence on which the claim or grievance is based . . ."

Section 3 of the same Agreement says, in part:

> "A claim may be filed at any time for an alleged continuing violation of any agreement and all rights of the claimant or claimants involved thereby shall, under the rule, be fully protected by the filing of one claim or grievance based thereon as long as such alleged violation, if found to be such, continues. However, no monetary claim shall be allowed retroactively for more than 60 days prior to the filing thereof. . . ."

On March 15, 1957 Petitioner presented a claim on behalf of Agent, L. A. Maes for violation of Rule 11-m, which violation allegedly occurred on March 10, 1957. On March 18, 1957 Carrier replied that "there certainly has been no violation of our agreement in reassigning the work at Walsenburg." Carrier's Superintendent concluded that letter by saying: "Unless you can point out to me where our current agreement has been violated, it will be necessary to refuse to pay any claims which may arise under the present set-up at Walsenburg." After additional correspondence between the same parties, Petitioner advised Carrier on June 12, 1957 that the claims are withdrawn "with the distinct understanding that this does not establish a precedent or prejudice our position on the rules of the current agreement."

In a letter date June 14, 1957 from Petitioner's Local Chairman to Carrier's Superintendent, the claim was presented in its present form. This claim is for compensation for alleged violation of the Agreement commencing April 15, 1957, sixty (60) days prior to the filing of the claim. The claim was disallowed by Carrier's Superintendent in a letter dated June 21, 1957. It was declined on the merits. No Time Limits or violation of Article V of the August 21, 1954 Agreement was raised in that letter. It was first raised on appeal in the letter of Mr. R. D. Wolfe, Assistant to the Vice President, under date of July 16, 1957. On further appeal, the highest officer of the Carrier wrote to Petitioner's General Chairman under date of July 23, 1957, in part, as follows:

> "In short, this claim being based on theory alone, the only conclusion to properly be drawn is that were the claim not barred under the Time Limit Rule it would be invalid owing to the absence of merit therein. Such being the case, if you are not disposed to accept the inevitable and close the file in the matter, the claim must be, and hereby is, declined."

On December 19, 1956 Carrier issued instructions changing hours of service of the Agent-Telegrapher, the Ticket-Agent-Telegrapher and Telegraphers on the second and third tricks, effective December 26, 1956. The claim alleges that this change of hours of service is in violation of the Agreement. If there was a violation of the Agreement then the violation is a continuing one and the claim is properly filed under Section 3 of Article V of the August 21, 1954 Agreement. It is not a revised claim as the Carrier contends. The claim must be decided on the merits.

Prior to December 26, 1956, the assigned hours of the Telegrapher force at Walsenburg were as follows:

Agent-Telegrapher

8:00 A. M. to 5:00 P. M. (1 hour lunch)

Ticket Agent-Telegrapher

7:00 A. M. to 3:00 P. M. (20 minutes lunch)

Second Trick Telegrapher

3:00 P. M. to 11:00 P. M. (20 minutes lunch)

Third Trick Telegrapher

11:00 P. M. to 7:00 A. M. (20 minutes lunch)

Effective December 26, 1956, the assigned hours for the same force became as follows:

Agent-Telegrapher

8:00 A. M. to 4:00 P. M. (20 minutes lunch)

Ticket Agent-Telegrapher

10:00 A. M. to 6:00 P. M. (20 minutes lunch)

Second Trick Telegrapher

6:00 P. M. to 2:00 A. M. (20 minutes lunch)

Third Trick Telegrapher

12 midnight to 8:00 A. M. (20 minutes lunch)

Claimant Maes, Agent-Telegrapher, held an assignment in the freight office and the other three telegraphers worked in the passenger ticket office handling passenger and communication work. Effective December 26, 1956, Carrier directed Claimant, Maes, the Agent-Telegrapher, who was assigned to the freight office, to work every assigned work day in the ticket office from 8:00 A. M. to 10:00 A. M. and the other six hours in the freight office.

Claimant Maes' position was in the freight office, not in the passenger ticket office. He was the only Telegrapher in the freight office. Rule 4 of the Agreement guarantees an employe "one day's pay within each twenty-four

(24) hours, according to the position occupied or to which entitled . . ." (Emphasis ours.)

Rule 10 says:

> "Employes will not be required to suspend work during regular hours or to absorb overtime."

Rule 7(a) reads:

> "Where but one shift is worked, employes will be assigned and allowed sixty (60) consecutive minutes between the ending of the fourth and the ending of the sixth hour after starting their tour of duty for meal period."

Carrier contends that it had every right to change the assignments under Rule 6. This Rule, in part says:

> "(a) Regular assignments shall have a fixed starting time established by bulletin, and the regular starting time shall not be changed without at least thirty-six (36) hours' advance notice to the employes affected."

The Carrier had every right to change the starting time of the employes' assignments. Thus, the Carrier had a right to change the starting time of the Ticket-Agent-Telegrapher and the Telegraphers. But that is not what happened in this dispute. The Carrier actually suspended work for two hours each working day of Agent-Telegrapher Maes in violation of Rule 10. Furthermore, Claimant Maes was entitled to eight hours pay for each day of work in his position. Maes' position was that of Agent-Telegrapher in the Freight House and not as Ticket-Agent-Telegrapher in the passenger ticket office. The latter was a separate and distinct position. Claimant Maes' work in the passenger ticket office had no connection with and was separate and apart from his duties in his regular position. He is entitled to additional compensation as requested in his claim. The suspension of work for two hours each day for Claimant Maes and his assignment to the passenger ticket office was in violation of the Agreement.

The requirement that Maes work two hours each day in the passenger ticket office, which we hold is contrary to the terms of the Agreement, deprived the senior Ticket-Agent-Telegrapher and the regular rest day relief Telegrapher from working those two hours. Since overtime work was required between 8:00 A. M. and 10:00 A. M. it belonged to these employes.

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 Carrier violated the Agreement.

AWARD

Claim is sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 27th day of May 1963.

DISSENT TO AWARD 11439, DOCKET TE-9869

The majority in this Award is in error in its holding that Agent-Telegrapher Maes suspended work for two hours each day in violation of Rule 10. What happened was that effective December 26, 1956 the duties of this employe were changed in that he was directed as of that date to work two (2) hours of his work day in the Ticket Office, and the remaining six (6) in the Freight Office. The work involved was work within the scope of the Telegraphers' craft and in the same seniority district and was properly assignable to Claimant Maes.

The majority says "Furthermore, Claimant Maes was entitled to eight hours pay for each day of work in his position." implying that he was denied this and yet there is no showing in the record that Carrier ever failed to compensate him eight hours of pay for every day worked.

The Award further is in error in its holding that "Since overtime work was required between 8:00 A.M. and 10:00 A.M. it belonged to these employes." (The Ticket Agent-Telegraphers and the regular rest day relief Telegrapher.) The hours referred to were not overtime ones but were rather a part of a regular assignment, viz., that of Claimant Maes 8:00 A.M. to 4:00 P.M.

For these reasons, we must register our dissent to Award 11439.

D. S. Dugan

P. C. Carter

W. H. Castle

T. F. Strunck

G. C. White

Serial No. 214

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Interpretation No. 1 to Award No. 11439

Docket No. TE-9869

Name of Organization:

THE ORDER OF RAILROAD TELEGRAPHERS

Name of Carrier:

THE COLORADO AND SOUTHERN RAILWAY COMPANY

Upon application of the representatives of the Employes involved in the above Award, that this Division interpret the same in the light of the dispute between the parties as to the meaning and application, as provided for in Section 3, First (m) of the Railway Labor Act, as approved June 21, 1934, the following interpretation is made:

The Award sustained the claim and held that each named Claimant "or his successor" be compensated as set out in items 2 and 4 of the Statement of Claim from April 16, 1957, "and continuing until this violation is corrected."

Claimants, E. W. Edwards and G. H. Tucker, were paid two hours at time and one-half the regular rate for each day they each actually worked the job of Ticket Agent from April 16, 1957 to December 31, 1958, and Claimant, L. A. Maes, was paid two hours at the pro rata rate for each day he actually worked the job of Agent-Telegrapher from April 16, 1957 to December 31, 1958. The Carrier did not pay employes who succeeded Claimants when they occupied the involved positions during the period of violation.

Employes have submitted the following questions:

"1. Does the Award sustaining Parts 1 and 2 of the claim require payment of two hours at time and one-half rate to the successors of Ticket Agent Edwards and Rest Day Relief Ticket Agent Tucker, i.e., employes who relieved Edwards and Tucker for vacations and other purposes and who succeeded as regular assignees to the position?

2. Does this payment of two hours at the time and one-half rate to Edwards, Tucker or successors continue to June 30, 1962, when the position of ticket-agent at Walsenburg was discontinued?

3. Does the Award sustaining Parts 3 and 4 of the claim require payment of two hours at pro rata rate to the successors of Agent-Telegrapher Maes, i.e., employes who relieved him for vacations or other purposes?

4. Does this payment to Maes (who remained as the regular assigned occupant of the position of agent-telegrapher), or successor, continue to June 30, 1962, when he was no longer required to work two hours at the ticket office?"

The intent of "or his successor" as used in the Statement of Claim is clear and meaningful. The use of the word "or" instead of "and" is not such a defect as to obscure the true and real intent of the claim. Claimants and, in their absence, their successors, are entitled to compensation for each day that Claimants or, in their absence, their successors, actually worked the involved positions from April 16, 1957, until the violation is corrected. The answer to questions 1 and 3 is: Yes.

An award providing for compensation "until this violation is corrected" is, at first glance, clear and unambiguous. Certainly, the parties should be able to agree when the violation has ceased. But it is not so clear and it is not so unambiguous when the parties fail to agree on the date when the violation was corrected. This is particularly true when the Organization representing the Claimants presents the question to the Board for interpretation.

It is the purpose of the Railway Labor Act and of this Board to effectuate a finality of disputes presented for disposition. It will serve no good purpose to return the issue to the parties because the date on which the Carrier corrected the violation is allegedly easily ascertainable. The fact is that such date has not been ascertained and is in dispute. It is a further fact that the award as it now exists is not clear and unambiguous because such date is not agreed upon. For this reason, the Board has the right to clarify the award to make certain the date when the violation was corrected.

Upon the entire record, it is clear that the violation was corrected on December 31, 1958. The answer, therefore, to questions 2 and 4 is: No.

Referee David Dolnick, who sat with the Division as a member when Award No. 11439 was adopted, also participated with the Division in making this interpretation.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 29th day of July 1965.

DISSENT TO INTERPRETATION NO. 1 TO AWARD NO. 11439, DOCKET NO. TE-9869

This Board has consistently adhered to the principle that it will not, in the guise of interpretation, modify an award or make a new one based on facts and arguments which were not considered when the award was rendered.

The subject interpretation appears to violate that principle and is, therefore, improper.

Award 11439 was adopted by a majority consisting of the Referee and Labor Members, with the Carrier Members dissenting. But the interpretation

was adopted by a majority composed of the Referee and Carrier Members. These facts alone are sufficient to make it evident that the interpretation — in part, at least — is not in consonance with the award as rendered.

That part of the interpretation relating to the intent of the award with respect to payment to the successors of the named claimants does, of course, resolve a question inherent in the claim that was before us when the award was made. Therefore, it conforms to the requirements of the Railway Labor Act pertaining to our function of interpreting awards. I have no fault to find with this portion of the interpretation.

But when the present majority considered — and purportedly decided — the question of when the violation ceased, it went beyond both the facts and the contentions of the parties presented by the record in Docket TE-9869. Thus, it left the confines of interpretation and violated the principle referred to above. The result has no validity.

And, to make a bad action worse, the purported decision is itself improper even if the question were properly before us. The violation was found to lie in requiring the occupant of one regular position, the "Agent-Telegrapher", to perform work of another regular position, the "Ticket Agent Telegrapher" in order to avoid the payment of overtime or otherwise properly protecting the service requirements. This violation obviously could not be corrected by merely moving the "Agent Telegrapher" into the same office that housed the position of "Ticket Agent Telegrapher". The violation continued as long as Maes or his successors continued to perform the work of Edwards and Tucker or their successors.

So, if the present majority felt obliged to answer the questions it posed as Nos. 2 and 4, the answer should have been "Yes", not "No".

For the reasons and to the extent indicated, I dissent.

J. W. Whitehouse
Labor Member