

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

David Dolnick, Referee

PARTIES TO DISPUTE:**TRANSPORTATION-COMMUNICATION EMPLOYES UNION
(FORMERLY THE ORDER OF RAILROAD TELEGRAPHERS)****ERIE-LACKAWANNA RAILROAD COMPANY****STATEMENT OF CLAIM:** Claim of the General Committee of The Order of Railroad Telegraphers on the Erie Railroad, that:

1. The Carrier violates the terms of an agreement between the parties hereto when it failed to call J. A. Horey, regular occupant of the Agent-Operator's position at Addison, New York, and/or his successor, to perform rest day service on his position commencing Saturday, May 23 and Sunday, May 24, 1959, and each Saturday and Sunday thereafter, thereby suspending him from his (their) assignment on these days.

2. The Carrier shall, because of the violation set out above, compensate J. A. Horey, or his successor, a day's pay (8 hours) at the time and one-half rate for each Saturday and Sunday commencing July 18 and 19, 1959, sixty (60) days prior to the date on which the claim was filed in accordance with the provisions of paragraph 3 of Rule 36, until the violations as set forth herein are corrected.

EMPLOYEES' STATEMENT OF FACTS: There is in evidence an agreement by and between the parties to this dispute, effective March 1, 1957, and as otherwise amended.

At page 43 of said agreement is listed the position existing at Addison, New York, on the effective date of the agreement. The listing reads:

LOCATION	OFFICE	POSITION	NO OF POSITIONS	RATE
Addison	DI	AO	1	\$2.146

The record of this case shows that pursuant to the provisions of the national 40-Hour Week Agreement effective September 1, 1949 (now Rule 10 of the current agreement) that service and duties necessary to the carrier's operation at Addison, New York, as performed by the occupant of the Agent-Operator position on that date required a 7-day position. That the work week on this position was Monday thru Friday, Saturday and Sunday rest days. That the rest days of this position were incorporated into a regular rest day relief position as prescribed by Rule 10, paragraph (e) of the current agreement.

In addition to the Agent-Operator, there is a clerk employed seven days per week and since May 23, 1959 he is the sole occupant employed on Saturdays and Sundays. By reason of his being the sole employe on Saturday and Sunday he must perform the duties of the Agent-Operator.

As testimony that the clerk is performing the work of a Telephoner or Operator; on June 21 at 7:10 A. M. clerk Dinniny asked dispatcher how train No. 9 was running. The reply was that No. 9 hit a man at Fisherville, still there, will be late. At 9:50 A.M. Dinniny reported 99-Eng 707 just by Addison with a wheel blazing on north side about 25 cars back, whereupon the dispatcher had the Operator at HO tower notify 99 by radio-telephone.

At 1:53 P.M. on June 28, 1959 Dinniny reported the Turn train Eng. 1222 Condr. Green just by Addison and left an "AO" report for car switched at Rathbone.

At 9:10 A.M. on Aug. 16, 1959 Dinniny called dispatcher and reported that carman was there to fix two cripples, was told that they were in QZ west siding. At 10:12 A.M. Dinniny ask how No. 2 was and reply was that they were still in Hornell. At 10:22 A. M. Carman reported at Rathbone that Prr 102456 set out at Rathbone for Hot Journal was repaired and ready for Elmira shop, and to place 30 mile speed limit on train handling car. Rathbone station is under the jurisdiction of the Agent at Addison.

There are four passenger trains daily that stop at Addison to discharge and take on passengers, mail and express. In addition to being the ticket and freight agent for the Carrier, Mr. Horey is Agent for the Railway Express Co.

There is a local freight train which does the switching at Addison daily under the direction of the Agent."

OPINION OF BOARD: Prior to May 23, 1959, the work force at Addison, New York consisted of an Agent-Operator who was scheduled to work Monday through Friday with rest days on Saturday and Sunday; a Clerk who was scheduled to work Saturday through Wednesday, with rest days on Thursday and Friday; a relief Agent-Operator who filled that position on the Saturday and Sunday rest days of the regular Agent-Operator; a relief Clerk who filled the clerical position on the Thursday and Friday rest days of the regular Clerk.

Effective as of May 23, 1959, the position of the Agent-Operator was reduced from a seven day week assignment to a five day week. The regular incumbent Agent-Operator continued to work from Monday through Friday. No relief Agent-Operator was assigned to work on the Saturday and Sunday rest days. Thereafter, Carrier required a Clerk to perform some, if not all, of the duties previously done by the relief Agent-Operator on Saturday and Sunday.

Petitioner first presented the claim to Carrier's Chief Dispatcher on September 5, 1959. Since this is a continuing claim, Petitioner seeks compensation "for each Saturday and Sunday commencing July 18 and 19, 1959, sixty (60) days prior to the date on which the claim was filed in accordance

with the provisions of paragraph 3 of Rule 36, until violations as set forth herein are corrected." The claim is properly before this Division in accordance with the provisions of said Rule 36.

The September 5, 1959 letter set out specific details of the work performed by the Clerk on various Saturdays and Sundays and points out that this work had previously been performed by a relief Agent-Operator. In addition, it recites the duties of said relief Agent-Operator which have been assumed by a Clerk. This letter also contains the following:

"Since the duties on Saturday and Sunday of the Agent-Operator at Addison coincide in every detail with the duties performed on other days of the week, and since these duties include the sale of tickets and the receiving, delivering and forwarding of freight and collections for the same; the management of the trains that switch and place cars, at his direction, for the territory under his jurisdiction, it is established beyond doubt, that if the office remains open on Saturday and Sunday, it requires the services of the Agent-Operator, the same as every other day of the week."

Not having received a reply thereto, Petitioner wrote again on October 27, 1959. The Chief Dispatcher denied receiving the letter of September 5, 1959, declined the claim and said:

"Service of Agent-Operator is not required Saturday and Sunday and Position Suspended these days Each week."

On December 7, 1959, Carrier's Superintendent declined the claim and wrote, in part, as follows:

"Without prejudice to our position that the claim has not been filed in accordance with Rule 36, it is our position that there has been no violation of any rule of the Telegraphers' Agreement in reducing the Agent's work week at Addison from 7 to 5 days beginning July 18, 1959. This action is not in violation of Rule 10 of the 40 hour work week agreement nor is it in violation of Rule 3 of the Telegraphers' Agreement since there is no requirement for an Agent at Addison on Saturday and Sunday with the present level of business at that station."

In response to Petitioner's appeal to Carrier's highest officer and after a conference, that officer wrote:

"During discussion of this claim in conference your attention was directed to the fact that this claim was filed on local level beginning with the date of July 18 and 19, 1959, not May 23, 1959 as stated in your letter. Also your attention was directed to the fact that the work performed by this clerk on Saturdays and Sundays was the same work that this clerk performs during the week. Thus, it cannot possibly be considered as work belonging exclusively to the claimant.

Furthermore, it was pointed out to you that there was absolutely no need for a supervisor to be on duty along with the clerk.

As a matter of information we told you that this clerk's position is now not being worked on Saturday and Sunday due to decrease in business.

For the foregoing reasons the claim is without merit and is denied."

Petitioner contends that under Rule 10 (m) of the Agreement work required on the incumbent's rest days, that is not made a part of a relief assignment, "must be assigned to any employe who holds rights under the agreement which covers the position regardless of whether the particular kind of work involved 'belongs exclusively' to the members of the craft covered." That rule reads:

"Where work is required by the carrier to be performed on a day which is not a part of any assignment, it may be performed by an available extra or unassigned employe who will otherwise not have 40 hours work that week; in all other cases by the regular employe."

Carrier disagrees and argues that this Rule "only refers to work within the scope of the Agreement and in no manner expands the Scope Rule. Unless the Petitioner can prove, which it has not done, that the work complained of is the exclusive work of telegraphers, Rule 10 (m) has no application."

These divergent views are not without reason. The Awards of this Division hold both ways. There is a direct conflict in the application of the principles urged by the parties. For example: Award 12896 says:

"We have no quarrel with the rule that, when Carrier requires the work of an Agent to be performed on the rest days of the employe, the work must be assigned to (1) a regular relief employe under the Telegraphers' Agreement; (2) an available extra Telegrapher; or (3) the regular incumbent when the work is assigned to an employe outside the Agreement.

However, before Claimant can benefit by this rule he has the burden of establishing that the work assigned to an employe outside of the Telegraphers' Agreement must have been work belonging exclusively to the Agent * * *

Likewise, Award 13197 says:

"Turning to the applicability of Rule 41 (i), it is clear that the right of Organization members to work on a day which is not a part of any regular assignment is conditioned upon a showing that the disputed work is within their exclusive jurisdiction."

While Awards 12047, 9944, 6857, 6251 and 5662 generally adhere to the principle in the two Awards previously quoted, the conclusions reached are based upon factual and circumstantial factors which are distinguishable from those in the claim under consideration.

On the other hand, Award 14379 reviews the genesis of the principle urged by the Petitioner. It cites Award 6689 with Referee William M. Leiser-son who was one of those who drafted the 40 hour week rule containing the provision for unassigned days. In Award 6689, this Division said:

"* * * if it is not practicable to maintain a regular relief assignment at all, the Carrier may leave work on rest days go unassigned. But if it does this, work is still reserved to the regularly assigned

employees, except that extra employees may have priority under a specified condition * * *

Thus the Carrier had a contractual obligation in converting to the 5-day week to have its necessary rest day work in Murphysboro seniority district performed either by a regular relief telegrapher, or by a qualified extra employe, or by a telegrapher holding a regular bulletined assignment * * *"

Continuing, Award 6689 says:

"We think, since the telegrapher assignments here involved were preserved to the occupants and they could not be displaced as a result of the reduction to a 5-day week, Carrier could not transfer the duties of the regular relief assignment to others than telegraphers who were entitled by the Agreement to perform those duties."

Award 14379 held that, as long as the duties of the position remained, Carrier was obliged to assign the work to employes of the craft that had performed that work, as required by the unassigned work rule.

Carrier's position in the dispute involved in Award 13354 was identical with its position in this case. There, too, it argued that the work performed on the rest days was not the exclusive work of the Agent-Operator. Since some agency work was performed on the rest day, Carrier was obliged to assign an Agent-Operator as required by the unassigned work day rule.

In Award 13824 we said:

"The defense, advanced by Carrier, is that the Scope Rule of the Agreement is general in nature; and, therefore, the Organization bears the burden of proving that the truck on Section 22 had been operated exclusively by Claimant. We find the defense to be without merit.

Rule 24 (k) is specific and prevails over any general Rule in the Agreement."

Rule 24 (k) is verbatim with Rule 10 (m). See Awards 14191 and 14029 affirming this principle.

There is no serious question that an employe not covered by the Telegraphers' Agreement had performed work on the rest days mentioned in the claim, work which had been performed by the relief Agent-Operator before that position was suspended.

We are inclined to accept the principle enunciated in those Awards which hold that Rule 10 (m) is specific and prevails over any general Rule, including the Scope Rule. Under this holding, the question whether the work belongs exclusively to the Agent-Operator becomes irrelevant because it is not a factor essential to the determination of the dispute. This, we believe, is the sounder, the more cogent and the more decisive principle relating to all of the factors concerning the 40 hour workweek and the related work rule on unassigned workdays.

Carrier urges that the appropriate penalty is the pro rata rate and not the time and one-half rate requested by the Claimant. It is true that this

Board, with the same Referee, has held that the preponderance of Awards hold that the appropriate penalty is the pro-rata rate where the Claimant has performed no work. But a re-examination of the conflicting Awards justifies further consideration of this principle as it applies to this claim.

Claimant works forty (40) hours during his regularly assigned five day workweek. If Carrier had called him on his rest days to work the position he would have been compensated at the rate of time and one-half. The Agreement so provides. Claimant, therefore, is entitled to receive the amount he would have received had he worked on his rest days. See Awards 13824, 14029 and 14071.

FINDINGS: The Third Division of the Adjustment Board, upon the whole record and all the evidence, finds and holds:

That the parties waived oral hearing;

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

Items 1 and 2 of the claim are sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 29th day of July 1966.