Award No. 896
Docket No. TE-829

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Dozier A. DeVane, Referee

PARTIES TO DISPUTE:

THE ORDER OF RAILROAD TELEGRAPHERS

GRAND CENTRAL TERMINAL COMPANY

STATEMENT OF CLAIM: "Claim of the General Committee of The Order of Railroad Telegraphers on Grand Central Terminal Company, New York City, that the carrier is violating the Telegraphers' Agreement in assigning Leverman F. J. McCarthy regularly to perform ten and one-half hours service daily in Signal Station 'U' in the Grand Central Terminal in order to make possible a reduction in the force of levermen in the Signal Station under the guise of abolishing positions by transferring to other employes; and that positions of levermen existing before the change was made shall be restored to their former status, the employes affected restored to their former positions and compensated for any wage loss suffered by reason of the improper changes."

EMPLOYES' STATEMENT OF FACTS: "At Signal Station 'U', a subterranean station, prior to November 12, 1937, the regularly assigned force working under Telegraphers' Agreement was as follows:

1st Trick	Director R. J. O'Brien	hours	7:25	A. M. to	3:25	P. M.
	Leverman F. J. McCarthy	"	7:05	A. M. to	3:05	P. M.
	Leverman S. E. Cerrachio	"	7:25	A. M. to	3:25	P. M.
	Telegrapher N. N. Gee	"	7:30	A. M. to	3:30	P. M.
2nd Trick	Director C. T. Botts	hours	3:25	P. M. to	11:25	P. M.
	Leverman R. W. Sloat	"	3:05	P. M. to	11:05	P. M.
	Leverman John Phelan	"	3:25	P. M. to	11:25	P. M.
	Telegrapher E. L. Post	"	3:30	P. M. to	11:30	P. M.
3rd Trick	Director H. E. Buckhout	hours	11:25	P. M. to	7:25	A. M.
	Leverman G. W. Millar	"	11:25	P. M. to	7:25	A. M.
	No telegrapher assigned.					

"On November 12, 1937, the position held by Leverman Sloat on the second trick was declared abolished by the carrier. The carrier permitted Sloat to displace Cerrachio, leverman on first trick in Signal Station 'U.'

"On November 15, 1937, the position held by Leverman McCarthy on the first trick was declared abolished by the carrier, and concurrently an allegedly new position of leverman on the first trick was created with hours 7:50 A. M. to 3:50 P. M. and required the incumbent of the alleged newly created position to work two and one-half hours overtime regularly each day. This alleged newly created position was bid in and assigned to Leverman McCarthy.

"Rule 2-(a) of Telegraphers' Agreement, provides:

'Eight consecutive hours, exclusive of the meal hour, shall constitute a day's work, except where two or more shifts are worked, eight consecutive hours with no allowance for meals shall constitute a day's work.'"

on any day free of time and one-half overtime compensation it does not place any general limitation on the hours that may be worked per day.

"In its entirety the claim of the Telegraphers in this case is unfounded and unwarranted. It actually is a request for new and additional provisions in the guise of a request for an interpretation of clearly inapplicable rules of the agreement; consequently, the claim should properly be dismissed.

"The carrier's presentation is, as it necessarily must be, based on the single paragraph contained in Secretary Johnson's letter. When the carrier's representatives have had opportunity to study the employes' ex parte submission, proper answer thereto will be prepared and submitted at the hearing."

OPINION OF BOARD: Signal Station "U" located at 57th Street and Park Avenue New York City is a railroad facility requiring continuous attendance. For many years prior to November 12, 1937, two levermen were assigned to the first trick, two to the second and one to the third. Effective as of that day one leverman position on the second trick was abolished and the hours of service of one leverman position on the first trick were changed from 7:05 A. M.—3:05 P. M. to 7:50 A. M.—6:20 P. M. Upon protest from the Local Chairman of the Brotherhood, Carrier, effective November 14, 1937, changed the assigned hours stated above to show an eight hour assignment from 7:50 A. M. to 3:50 P. M. The change in the assigned hours of the first trick leverman position was accomplished by the abolition of the position carrying assigned hours 7:05 A. M. to 3:05 P. M. and the creation of a new position with the later assigned hours. On November 19, 1937, this new position was awarded to F. J. McCarthy.

The record shows that the occupant of the new position was thereafter required to work overtime whenever his services were needed and generally when he was not worked overtime an extra leverman was assigned to full eight hours' service on the second trick.

Briefly summarized the claim is that carrier violated the agreement when it abolished the second trick leverman position and transferred the work of the position, which still remained, to other employes. As the language of the claim resulted in some confusion as to the issues involved, it is desirable to point out certain matters not involved in the claim. No claim is made by Petitioner that the work in question was transferred to employes not covered by the agreement or not eligible to perform the work. No claim is made by carrier that it has the right under the agreement to abolish a position and distribute the work of the position to other employes covered by the agreement where there is sufficient work to justify the continuance of the position. The ultimate question that must be decided is whether sufficient work still remained to warrant the continuance of the position or had diminished sufficiently to justify its abolition.

The claim presents two preliminary questions that must be disposed of before the ultimate question is considered. The first is the contention of Petitioner that carrier violated the agreement "in assigning Leverman F. J. McCarthy regularly to perform ten and one-half hours service daily in Signal Station 'U' in the Grand Central Terminal in order to make possible a reduction in the force * * *." It is this part of the claim that has caused most of the confusion as to the issues involved in this case. Without doubt, it squarely raised the question, as suggested by carrier, whether the prevailing agreement prohibits carrier working employes more than eight hours per day except in cases of emergency.

Rules 2 and 9 are the only rules which in any way deal with the question. Rule 2 provides:

"Hours of Service, Overtime and Calls.

"(a) Eight consecutive hours, exclusive of the meal hour, shall constitute a day's work, except, where two or more shifts are worked, eight consecutive hours with no allowance for meals shall constitute a day's work.

"(b) Overtime shall be computed at the rate of time and one-half time. Time worked in excess of eight hours on any day will be considered overtime and paid on the actual minute basis.

"(c) When notified or called to work outside of established hours, employes will be paid a minimum allowance of two hours at overtime rate.

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

Rule 9 deals with relief days and vacations and has no relation to this question.

It is clear that Rule 2 does not prohibit employes working, or the carrier from requiring employes to work, more than eight hours per day. The rule contains none of the attributes of the hours-of-service law and that law is in no way involved in the claim. The only restriction to be found in the agreement against working employes more than eight hours is the penalty provision of Rule 2 and this provision is in no sense a prohibition against working employes more than eight hours per day. If there were ambiguity in the language or meaning of the rule (which there is not) past practices of the parties are sufficient to remove all doubt as to its meaning. The record in this case shows that ever since the agreement has been in effect between the parties, it has been the practice of employes to work overtime and considerable overtime work is done on this property.

Rule 2 had its genesis in Supplement 13 to General Order 27, promulgated by the United States Railroad Administration, which Supplement established the basic eight hour day. Our attention has been called to no decision by any agency clothed with authority to interpret said Supplement or similar rules thereafter incorporated in collective bargaining agreements between carriers and the Railroad Brotherhoods which sustains the contention that any such rules limit employes to eight hours work per day. On the other hand, cases carrying a clear implication to the contrary were cited (See Interpretation 4 to Supplement No. 13 to General Order No. 27, Question and Answer 23; United States Railroad Labor Board Decisions 1422, 2662 and 3279). Moreover cases are continuously being brought to this Board involving claims of employes for overtime and in a recent decision of this Board it was suggested that carrier might overcome a troublesome situation then under consideration by working some of its employes overtime (See Award 604).

The Board holds that the prevailing agreement does not prohibit the carrier from working employes more than eight hours per day.

The agreement in this case lists the positions that were in existence when the agreement was negotiated which includes two second trick levermen positions. The Brotherhood's second contention is that having negotiated these positions into the agreement the only way any one of them could be abolished would be by negotiation—that is to say, having negotiated the positions into the agreement they have to be negotiated out. It is too well settled by numerous decisions of the Board to be any longer open to doubt, that carriers are free to abolish a position when sufficient work no longer exists to warrant the continuance of the position. (See Award 601)

This brings us to the question as to whether sufficient work still remained to warrant the continuance of the position or had so diminished as to justify its abolition. We have already pointed out that when the position of second trick leverman was abolished the hours of duty of one first trick

leverman were changed so as to require him to work forty-five minutes of the time theretofore covered by the assigned hours of the abolished position. In addition this first trick leverman was also required to work overtime whenever his services were needed. The record shows that the employe who bid in the first trick leverman position when the hours of work were changed as above indicated actually worked two and one-half hours' or more overtime on two hundred and thirty (230) days between November 15, 1937 and October 31, 1938, inclusive. The record does not show the number of days other employes on first trick positions worked overtime during this period. Undoubtedly, overtime work was performed by other first trick employes during the period. The record also shows that during the same period two levermen worked the second trick on one hundred and twenty-one (121) days.

Rule 9 gives to employes sixty-six days off with pay. This allows one day off in seven and fourteen days absence for vacation or other reasons. The assignment in this case allowed Sunday as the day off. As stated above, the record does not show the number of days the employe assigned to the position worked during this period or the overtime worked by other first trick employes. Therefore, the Board is unable to determine from the record the total hours of overtime and extra work performed during the hours formerly covered by the second trick leverman position after that position was abolished. The hours shown are less than the total actually worked.

The total days on which the position could have been worked during the period in question were three hundred (300) making a total of twenty-four hundred (2400) hours. The number of days (121) on which two leverman worked on the second trick plus the overtime worked by one employe assigned to the first trick leverman position and required to work overtime when needed, plus the overlapping in hours resulting from the change in the assigned hours of one first trick leverman position when the second trick leverman position was abolished gives a total of 1721 hours of extra and overtime work performed during the period theretofore covered by the second trick leverman position. This minimum of extra and overtime work performed represents more than 70% of the total assigned hours of the position. The record further shows that between 1929 and 1937 the decrease in trains handled during the period amounted to 16½%. The relation between the two percentages is striking when consideration is given to the fact that two second trick levermen handled the work from 1929 to 1937.

The Board finds from this record that the work of the second trick period had not diminished sufficiently in November, 1937, to justify the abolition of one of the two second trick positions and holds the Carrier violated the agreement when it abolished the position in dispute in this case, and distributed the work to other employes. What has been said heretofore upon other phases of this dispute should make it clear that this finding in no way limits the right of Carrier to work employes overtime or to abolish positions when work diminishes sufficiently to justify their abolition. The Board finds that upon the record in this case it is shown that the work of the position still remained and upon such a state of facts it was a violation of the agreement to abolish the position and distribute the work to other employes.

Petitioner requests "that positions of levermen existing before the change was made shall be restored to their former status, the employes affected restored to their former positions and compensated for any wage loss suffered by reason of the improper change." It is clear from what has been said above that all this relief cannot be granted. We have already pointed out that Carrier is free to abolish a position when sufficient work no longer exists to warrant the continuance of the position. If conditions have not materially changed from what they were in November, 1937, when the position was abolished, it should be restored. However, the Board has nothing before it showing present day conditions and it is necessary to refer this phase of the dispute back to the parties for a check on the property to determine if need for the position still exists, and if not, when it ceased to exist.

The agreement between the parties in no way limits the right of the Carrier to fix the starting time for positions covered by the agreement and in the absence of any rule on the subject the Board has no authority to direct that the position of first trick leverman be restored to its former status as to starting time.

Carrier will be required to compensate employes affected for wage losses suffered by reason of the improper abolition of the position of second trick leverman in November, 1937. The period for which compensation is due depends upon the fact as to whether need for the position still exists and if not, when it ceased to exist. Carrier is not liable for compensation beyond the time when need for the position ceased to exist and it is not required to now restore the position if need for the position no longer exists.

The nature of the dispute in this case and the limitations placed upon this Board by law makes it impossible for the Board to render a more definite award. It is assumed, however, that the parties will in good faith attempt to settle their differences in conformity with this Opinion. The right is reserved to the parties, or either of them, to resubmit any question about which they may disagree to this Board for determination.

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 Carrier violated the agreement when it abolished second trick leverman position in November, 1937, and case should be remanded to the parties for adjustment on the property as indicated by the Opinion.

AWARD

Claim sustained to the extent stated and case is referred to the parties for adjustment on the property as indicated by the Opinion.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: H. A. Johnson
Secretary

Dated at Chicago, Illinois, this 21st day of July, 1939.