

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Ernest M. Tipton, Referee

PARTIES TO DISPUTE:

THE ORDER OF RAILROAD TELEGRAPHERS

THE ATCHISON, TOPEKA & SANTA FE RAILWAY
COMPANY

STATEMENT OF CLAIM: "Claim of the General Committee of The Order of Railroad Telegraphers on the Atchison, Topeka and Santa Fe Railway that (a) the carrier violates the Agreement when on Sundays and/or holidays it dispenses with the service of a telegrapher-clerk at Moline, Kansas, and requires train service employes, not covered by the agreement, to handle mail, baggage and express, depot to train and vice versa, such duties being assigned to and performed by the telegrapher-clerk on week days, and, (b) the telegrapher-clerk be compensated in accordance with the rules of the Agreement on each occasion train service employes perform on Sundays and/or holidays, a part of the duties assigned to and performed by the telegrapher-clerk on week-days."

EMPLOYES' STATEMENT OF FACTS: "An Agreement bearing date of February 5, 1924 as to rules and August 1, 1937, as to rates of pay is in effect between the parties to this dispute.

"Prior to April 17, 1938 the second trick telegrapher-clerk at Moline, Kansas was assigned to work regular week-day hours on holidays and was given a call each Sunday to meet train No. 14 performing the usual week-day duties in connection therewith which includes the handling of mail, baggage, and express depot to train and vice versa. Beginning with April 17, 1938 these Sunday calls were discontinued, likewise were holiday assignments on November 24, 1938, December 26, 1938 and January 2, 1939 and train service employes on train No. 14 are required to unload from their train and place in the station any mail, baggage and/or express consigned to Moline on that train. Likewise, any mail, baggage and/or express lined up to leave Moline on train No. 14 is secured from the station and placed on the train by the same train service employes.

"Train No. 14 is due to arrive and depart Moline at 10:20 P. M. daily. Employes subject to the Telegraphers' Schedule at Moline, Kansas, which is located on the Southern Kansas Division, have been assigned since April 17, 1938 as follows:

POSITION		ASSIGNED HOURS	
No.	Occupation	Week-days	Sundays
1360	Agent-telegrapher	8:00 A.M.— 4:00 P.M.	11:00 A.M.—1:00 P.M.
1365	Telegrapher-Clerk	4:00 P.M.—12:00 P.M.	None
1370	Telegrapher-Clerk	12:00 P.M.— 8:00 A.M.	3:30 A.M.—5:30 A.M."

"Time worked on Sundays and the following holidays, namely: New Year's Day, Washington's Birthday, Decoration Day, Fourth of July, Labor Day, Thanksgiving Day, Christmas Day (provided when any of the above holidays fall on Sunday, the day observed by the State, Nation, or by proclamation, shall be considered the holiday), shall be paid for at the regular hourly rate, when the entire number of hours constituting the regular week-day assignment are worked.

"When notified or called to work on Sundays and the above specified holidays, a less number of hours than constitute a day's work within the limits of the regular week-day assignment, employees shall be paid a minimum allowance of two (2) hours at overtime rate for two (2) hours' work or less, and at the regular hourly rate after the second hour of each tour of duty. Time worked before or after the limits of the regular week-day assignment shall be paid for in accordance with overtime and call rules."

"Paragraphs (e-1), (e-2) and (e-3) of the revised Telegraphers' Schedule effective December 1, 1938, copy of which is on file with the Board, are word for word identical with those rules quoted above.

"A great share of the activities of the Carrier must be carried on during every hour of every day in the year and for that reason there are some employees whose assignments contemplate that they shall work every hour of their assignment on every day in the year unless excused from such service when proper relief can be obtained. Despite this condition the employees requested and there was negotiated into the Schedule by mutual consent the first of the three rules quoted above, which provided that employees covered by the provisions of the Telegraphers' Agreement would be relieved of such activities as it was possible to do on Sundays and holidays.

"We desire particularly to stress that the rules above quoted are simple regulations of what shall be paid when the Carrier elects to work its employees on holidays, that is, only time worked on Sundays and the named holidays is to be paid for. There is no provision that 'if there is work to be performed by the Carrier on a Sunday or holiday which it might perform through telegraph employees it must call telegraph employees.' Again, it is only 'when notified or called' on Sundays or specified holidays that the minimum allowances are owed. There is no provision that 'the Carrier must call telegraph employees to do any work properly performable by them if and when they are on duty.'

"There is one fundamental which must govern the decision in this case. Unless the Carrier has violated an obligation it has assumed in its agreement, this Board has no jurisdiction to sustain the claim. This proposition is too elementary to require argument in support thereof.

"Summarizing, there is no agreement to sustain the employees' claim, and what the Carrier did was both in strict accord with the Carrier's contractual obligations and required thereby. Furthermore, what has been done was in strict accord with long-established practice, which circumstance fortifies the already plain conclusion that the claim must be denied.

"Under the rules of the Board the Carrier has not been permitted to see the position of the employees prior to the time the Board requires this answer to be filed. Under such circumstances, the Carrier reserves the right to make further reply at the time of the hearing."

OPINION OF BOARD: Prior to April 17, 1938, the second trick telegrapher-clerk at Moline, Kansas, was assigned to work regular week-day hours on Sundays and holidays and was given a call each Sunday or holiday to meet Train No. 14 performing the usual week-day duties in connection therewith which includes the handling of mail, baggage and express, depot to train and vice versa. Beginning with April 17, 1938 these Sunday calls were discontinued, likewise were holiday assignments on November 24, 1938, December

26, 1938, and January 2, 1939 and train service employes on train No. 14 are required to unload from their train and place in the station any mail, baggage and/or express consigned to Moline on that train. Likewise, any mail, baggage and/or express lined up to leave Moline on Train No. 14 is secured from the station and placed on the train by the same train service employes.

It has been repeatedly held by this Board that work embraced by the scope rule of an agreement may not properly be removed from such agreement and assigned to employes not subject to its terms.

Beginning with April 17, 1938, on Sundays and holidays, train service employes handled the mail, baggage and express that was handled by second trick telegrapher-clerk at Moline during his week-day assignment. The fact that he did this service on week-days is conclusive proof that this work came within the current agreement and could not be performed by persons without the agreement.

In principle, there is no difference between the facts in this case from those in Award 602 of this Board. They involved the same carrier, the same organization, the same agreement, the same rules and the same issue on the merits. To the same effect are Awards 1082, 1083 and 1084.

This claim was just presented to the carrier on September 4, 1938, therefore reparations will be limited from a period beginning thirty days prior to that date. (See Article V (i) of the agreement.)

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 employe involved in this dispute are respectively carrier and employe 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

Claim will be sustained in conformity with the Opinion.

AWARD

Claim sustained in conformity with the Opinion.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: H. A. Johnson
Secretary

Dated at Chicago, Illinois, this 16th day of December, 1940.

Dissent to Award No. 1273—Docket TE-1140

This award, as shown by the Opinion upon which it is founded, is in error because it rests in principle upon a former award (No. 602) and upon incomplete recognition of the facts of record rather than upon the agreement between the parties and the complete factual situation relating to the question here involved.

The Opinion states, "in principle, there is no difference between the facts in this case from those in Award 602 of this Board." Irrespective of the merits of Award 602, the facts were, it was alleged, that the carrier had

contracted with outside parties to perform certain services. Contrast that situation with the situation here involved of the carrier utilizing the services of employees who by custom and practice had always been required to perform this particular type of service when occasion demanded. Thus arises the error in this award; Award 602 was based on an entirely different set of facts. Whether it was sufficient justification in that case for the decision reached need not here be discussed. Certainly it was not the basis for reaching a conclusion that work under the distinctively different circumstances of the instant case was that which "came within the current agreement" with the Telegraphers.

This lack of distinguishment in citing a previous award as basis for decision coupled with the non-recognition of the complete factual situation naturally leads to this unjustified award. The carrier has exhaustively demonstrated its freedom from any rule violation. There is no need to add to that demonstration.

S/ A. H. JONES
S/ C. C. COOK
S/ R. H. ALLISON
S/ C. P. DUGAN
S/ R. F. RAY