

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Edward F. Carter, Referee

PARTIES TO DISPUTE:

THE ORDER OF RAILROAD TELEGRAPHERS
HUDSON & MANHATTAN RAILROAD COMPANY

STATEMENT OF CLAIM: Claim of the General Committee of The Order of Railroad Telegraphers on the Hudson and Manhattan Railroad Company that:

1. The carrier has violated and continues to violate the rules of the Telegraphers' Agreement when it declared and continues to declare the 2:30 P. M. to 12 Midnight train clerk position at Hoboken Terminal to be a six-day position, viz., Monday through Saturday, and has assigned and continues to assign on Sundays, this train clerk's duties to employees not covered by the Telegraphers' Agreement.
2. So long as train clerk duties are in evidence at Hoboken Terminal on Sundays that work shall be performed by a train clerk, and the position shall be designated as a seven-day position; and,
3. For each and every Sunday train clerk duties at Hoboken Terminal have been or may be transferred from the train clerk position to a person not covered by the Telegraphers' Agreement, the incumbent of the train clerk position shall be paid nine (9) hours and thirty (30) minutes at time and one-half rate on the basis that said incumbent was and is entitled to work on the rest day assigned to the position in preference to persons not under the Telegraphers' Agreement.

EMPLOYEES' STATEMENT OF FACTS: An agreement by and between the parties, hereinafter referred to as the Telegraphers' Agreement, last revised January 17, 1945, as to rules and May 22, 1946 as to rates of pay, is in evidence; copies thereof are on file with the National Railroad Adjustment Board.

Effective January 17, 1946, the parties hereto entered into an agreement which, primarily, provides that "one regular relief day each calendar week shall be designated and assigned by the Company to each position."

At Hoboken Terminal the train clerk position, assigned hours generally, 2:30 P. M. to 12 Midnight, has been assigned Sunday as a relief or rest day. Instead of putting this relief day into a regular relief position or protecting it from the extra list, the Carrier requires or permits a person (a train dispatcher) not covered by the Telegraphers' Agreement to perform train clerk duties on Sundays—duties regularly assigned to and performed by a train clerk Monday through Saturday.

The Carrier emphasizes that it is a rapid transit railroad of the subway type handling mass transportation; that its train operations and schedule requirements are those used by typical rapid transit railroads; that its physical characteristics, operating conditions, equipment and methods of operation are peculiarly unique and are not at all comparable with steam railroad equipment and methods of operation.

III

The provisions contained in the current Agreement between the Carrier and the Organization which establish the invalidity of the claims herein are hereinafter set forth.

POSITION OF CARRIER: The Carrier's practice of using a Dispatcher at Hoboken between 3:00 P. M. and 11:00 P. M. on Sundays, without the use of a Train Clerk in conjunction with such Dispatcher's tour of duty, has maintained for over thirty years. The Carrier has required, in connection with such Dispatcher's tour of duty, that the Dispatcher covering same keep a record of the time of departure and arrival of trains; numbers of the cars in the makeup of trains; names of Motormen and Conductors crewing trains, etc. There have always been tours of duty with an admixture of work which encompasses the performance of work by Train Clerks in the Train Dispatcher's category, and the performance of work by Dispatchers in the Train Clerk's category. No protests heretofore have been made by the Organization that Train Clerks were entitled to such tours of duty. The present protest is for no other purpose than to set aside a practice which our records show has maintained for many years and a practice heretofore accepted and recognized by the Organization.

Inasmuch as the Organization has accepted and recognized such practice without protest over a long period of time, it follows that such practice has acquired the status of and has the same effect as a rule of acquiescence to the admixture of work as above delineated.

In support of the foregoing statements, and to show there has been conscious acquiescence to the foregoing practice, paragraph 4 of Article II contained in the current Agreement between the Carrier and the Organization is quoted below:

"The rate of Train Clerks shall be two (2) cents per hour in addition to the above basic rate for the actual time that Train Clerks shall be on duty at terminals during periods of the day not covered by a Train Dispatcher's tour at such terminal."

Obviously, it is the desire of the Organization to create a new Train Clerk's tour of duty, and in such connection it is the Carrier's position that the creation of such new tour of duty should be by the process of negotiations and not by the assertion of time claims, as in the instant case, which time claims cover a non-existent tour of duty and are based on a specious contention that Train Clerks are deprived of work.

The Carrier, therefore, respectfully submits that claimants are not entitled to any recovery herein; that your Board is without jurisdiction to adjudicate such claims and should deny the same in their entirety.

(Exhibits not reproduced.)

OPINION OF BOARD: At Hoboken Terminal, the Carrier has established a train clerk position with assigned hours 2:30 P. M. to midnight, Monday through Saturday. The record shows that the duties of the position exist on Sunday. The Sunday work of the position is assigned to a train dispatcher, a position not under the Telegraphers' Agreement. On January 17, 1946, an agreement for a rest-day program was adopted. This agreement provides that as to positions necessary to continuous operation of the railroad one rest day each week will be assigned. Rest days are to be assigned in the following manner: (1) regular relief positions will be

established, bulletined and filled; (2) regular relief positions will be assigned six days per week; (3) rest days that cannot be worked as a part of a regular relief position, will be protected by extra employees; and (4) an employee required to work on his assigned rest day will be compensated at the time and one-half rate.

It is the contention of the Organization that the train clerk position involved is a seven-day position and, the rest day work not having been assigned to a regular relief position or protected by an extra employee, it belongs to the regular occupant of the train clerk position at the contract rate of time and one-half.

It is the contention of the Carrier that the Sunday work of this position has been assigned to a train dispatcher for many years, including the time that the current agreement has been in force, without objection by the Organization. It is contended that the practice thus followed does not constitute a violation of the applicable agreement.

The evidence shows that the train clerk position here involved is a seven day position. Under the agreement a rest day must be assigned. Not having assigned the rest day to a regular relief position or to an extra man if that was possible, the work belongs to the occupant of the position.

The contention of the Carrier that a long established practice decreed a contrary result is not tenable. The provisions of the contract supersede a practice incompatible therewith. The fact that a practice was mutually continued by the parties after the contract became effective, has the effect of estopping the parties from the collection of penalties because of the contract violation resulting therefrom, but it does not estop either party from insisting upon compliance with the contract and the collection of penalties after demand for compliance has been made, to-wit, August 1, 1946.

The Organization claims that the occupant of the position is entitled to be compensated at the time and one-half rate. This is correct. The rate of the position for Sunday work is the time and one-half rate except where a day other than Sunday is assigned as the rest day. Section 1, current Agreement, effective January 17, 1946. This claim not being within the exception, the claim is properly allowable at the contract rate of the position, to-wit, time and one-half.

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 Employees involved in this dispute are respectively carrier and employees 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 as charged.

AWARD

Claim sustained from and after August 1, 1946.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: A. I. Tummon
Acting Secretary

Dated at Chicago, Illinois, this 12th day of July, 1948.

DISSENT TO AWARD 3979—DOCKET TE-3958

This Award, by its reference to certain provisions of a supplementary Agreement of January 17, 1946 and by its assertion, contrary to facts of record, that the train clerk position here involved is a seven day position, proceeds thereupon to change the intent of the parties in respect to the scope of the Schedule Agreement effective May 24, 1938 as, applying to the circumstances of this dispute, it had been understood by them upon its negotiation and had been continued thereafter for eight years without protest or request for a change. Those circumstances, by unrefuted statement of record, are:

- (1) The Schedule Agreement, with a scope rule evidenced only by a title page reference to the "Employment, Rates of Pay, Hours of Service, Rules and Working Conditions of Towermen and Train Clerks," was entered into by the parties with full knowledge on the part of both that the work now protested had been and then was being performed by the Train Dispatcher on Sundays.
- (2) That work had been thus performed, without protest, for 30 years, 8 years of which was since negotiation of this first Agreement with the Order of Railroad Telegraphers.
- (3) The petitioner, one party to the Agreement, had acquiesced for 8 years under its Agreement before it asked the other party to the Agreement, the Carrier, to change the meaning of their Agreement as applied to the circumstances of this case.
- (4) Contrary to the statement in the Opinion of Board that the "train clerk position here involved is a seven-day position," the record for those 30 years and until this first request for a change, was that the Dispatcher had performed these duties on Sunday without the use of a train clerk and that the involved train clerk position in effect both prior to and subsequent to the effective date, May 24, 1938, of the first Agreement with the petitioning Organization, was a six-day position and not a seven-day position.

The understanding of the parties and hence the meaning of their Agreement are represented in its application to those facts. Not until 8 years of acquiescence under their Agreement did one party, the petitioner, change its opinion and allege that the Agreement had a meaning directly contrary to those facts of 30 years existence and of 8 years of understanding under the Agreement.

This Award concurs in the contrary view of the changed opinion of but one party to the Agreement. As shown by this record that had not been the intent of the parties,—the necessary element which gives the meaning of the contract. The Award gives a result contrary to that intent, and consequently is in error in its application in this case.

(Signed) C. C. COOK.