Award No. 5235
Docket No. TE-5135

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Robert O. Boyd, Referee

PARTIES TO DISPUTE:

THE ORDER OF RAILROAD TELEGRAPHERS

THE NEW YORK CENTRAL RAILROAD, BUFFALO AND EAST

STATEMENT OF CLAIM: Claim of the General Committee of The Order of Railroad Telegraphers on the New York Central Railroad (Buffalo and East) that

(a) The carrier was unjustified in requiring the agent-telegrapher at Hillsdale, New York, to regularly perform eleven hours service Monday through Saturday, and ten hours and forty-five minutes each Sunday, March 24 to May 31, 1949, inclusive, in order to make possible a reduction in the force at Hillsdale station; and

(b) The carrier violated the terms of the Telegraphers' Agreement and letter of understanding when it unilaterally declared abolished the position of telegrapher-clerk at Hillsdale, New York, September 25 to October 27, 1949, inclusive, and worked the position on a reduced work week, requiring employes not covered by the Telegraphers' Agreement to perform duties belonging to the telegrapher-clerk position.

(c) In consequence of this improper action the carrier shall now be required to compensate claimant F. A. Glynn, who held the position of telegrapher-clerk at Hillsdale before and after the dates shown in this claim, for all loss of wages, plus travel time and waiting time and other necessary actual expenses that were incurred; and

(d) All other employes who may have been adversely affected as a result of this contrary action on the part of the carrier, shall be paid any wage loss sustained, plus travel and waiting time and any other expenses incurred.

EMPLOYES' STATEMENT OF FACTS: An agreement by and between the parties herein referred to as the Telegraphers' Agreement, bearing effective date of July 1, 1948, as amended September 1, 1949, is in evidence; copies thereof are on file with the National Railroad Adjustment Board.

Hillsdale, New York, is a station located on the single track portion of the Harlem Division, 108 miles from New York City.

Prior to March 24, 1949, the regularly assigned force working under the Telegraphers' Agreement at this station was:

Agent-telegrapher	Hours	7:00 A. M., to 3:00 P. M.
Telegrapher-clerk	Hours	3:00 P. M., to 11:00 P. M.

Each of these positions worked seven days a week.

at Hillsdale on September 25. They further allege that employes not covered by the Telegraphers' Agreement were required to perform duties belonging to the Telegrapher-Clerk position.

Carrier has previously shown that there is nothing in the Telegraphers' Agreement that prohibits abolishing positions. Insofar as the so-called "letter of understanding" is concerned, Carrier assumes this is one of the letters in the exchange of correspondence referred to in Principal Point 2. It has no bearing on the question at issue, which antedates the exchange of correspondence.

The contention that employes outside the scope of the Agreement were required to perform duties belonging to the Telegrapher-Clerk position was not included in the claim presented to the Carrier and no evidence was presented that would support this contention, which the Employes have now advanced in their Statement of Claim.

There is no compensation due Claimant F. A. Glynn as claimed in Section (c) or any other employes as claimed in Section (d), and no compensation required under any rule of the Telegraphers' Agreement in consequence of abolishing position of Telegrapher-Clerk at Hillsdale and resultant displacements.

5. ARTICLES 2, 4 AND 9 SPECIFICALLY CITED BY THE EMPLOYES DO NOT SUPPORT THEIR CLAIM.

The Employes have charged the Carrier with violation of Articles 2, 4 and 9.

Article 2 is the Basic Day Rule and provides that eight consecutive hours, exclusive of a meal hour shown in Article 7 (a), shall constitute a day's work at one-shift offices. Article 7 (a) provides for allowance of 60 consecutive minutes, without pay, to employes at one-shift offices, and allowance of 20 minutes for meal during a specified period of time without deduction in pay where two or more shifts are worked. Articles 2 and 7 (a) were strictly complied with prior to, during and subsequent to the periods of time the position of Telegrapher-Clerk at Hillsdale was abolished.

Article 4 is the Overtime Rule and provides for payment on the actual minute basis at time and one-half rate for (a) time worked in excess of eight hours, exclusive of the meal period as provided in Article 7 (a), on any day, and for (b) continuous service after regular working hours. Article 4 was strictly complied with prior to, during and subsequent to the periods of time the position of Telegrapher-Clerk at Hillsdale was abolished.

Article 9 is the Suspension of Work—Absorbing Overtime Rule and provides that employes will not be required to suspend work during regular hours or to absorb overtime. No employe involved in this dispute has been required to suspend work during regular hours or to absorb overtime.

CONCLUSION.

The issue in this dispute resolves on the question as to whether the Carrier violated the provisions of the Telegraphers' Agreement when it abolished the position of Telegrapher-Clerk at Hillsdale, N. Y. from March 24 to May 31, 1949, inclusive, and from September 25 to October 27, 1949, inclusive.

The evidence herein presented conclusively shows that the position of the Employes is not sustained by any of the rules of the Telegraphers' Agreement and the claim must, therefore, be denied.

(Exhibits not reproduced.)

OPINION OF BOARD: In the case before us the Carrier had two positions at Hillsdale, the Agent-Telegrapher with assigned hours 7:00 A. M. to

3:00 P. M., and the Telegrapher-Clerk with assigned hours from 3:00 P. M. to 11:00 P. M., seven days a week. It abolished the position of Telegrapher-Clerk and changed the assigned hours of the Agent-Telegrapher so that he, the Agent, was on duty and performed the work formerly done by the Telegrapher-Clerk for four and one-half hours of his shift. During the period of March 24 to May 31, 1949, inclusive, the Agent-Telegrapher was instructed to work from 7:30 A. M. to 7:30 P. M., six days a week, and from 7:30 A. M. to 7:15 P. M. on Sundays. He thus was required to work regularly three hours' overtime, six days a week, and two and three-quarters hours' overtime on Sundays.

The issue here is whether a position is in fact abolished when the Carrier assigns a substantial part of the work of that position to another employe to be performed on overtime. There is no argument but what a position may be abolished when the work ceases. But here, in light of the fact that the Agent-Telegrapher was required to work overtime for three hours daily within the former assigned hours of the Telegrapher-Clerk, we must conclude that the work of the latter position had not ceased when the position was abolished, but in fact remained in substantial amount. Such work, however, was performed by an emplove under the Telegraphers' Agreement, and we are not here concerned with the question presented when the work remaining in an abolished position is performed by someone not covered by the Agreement, or where a negotiated position has been abolished and work remains.

It is contended by the Carrier that there is no provision of the Agreement that prohibits it from requiring an employe to work overtime. This is true; likewise, there is no provision of the contract that authorizes the Carrier to assign positions with hours in excess of eight, exclusive of meal time. When the Agent-Telegrapher was instructed to work 7:30 A. M. to 7:30 P. M. daily except Sunday, and on Sunday, 7:30 A. M. to 7:15 P. M., there was no limit fixed as to the duration of such assignment. Although he was paid in accordance with the Agreement, he was, nevertheless, on a regular work day of eleven hours. Such regular work day was not contemplated when Article 2 was adopted. These regular hours in excess of eight were necessary to accomplish the work remaining on the position of Telegrapher-Clerk. Article 9 of the Agreement provides that employes will not be required to suspend work during regular hours. In effect, however, this is what happened to the claimant, Telegrapher-Clerk, when he was removed from his position and the work normally performed by him during his regular hours was performed during overtime hours by another employe. We have concluded, therefore, that the contract does not support the Carrier in its contention that a position may be abolished and a substantial portion of the work of such position regularly assigned to another to be performed during overtime hours, as was attempted here. The occupant of the position should be compensated for the amount he would have earned had he remained on the job for the period of March 24 to May 31, less his other earnings.

Like a chain reaction, a number of other employes were affected under the rules by such improper suspension, and they should be compensated for any loss of earnings and travel expenses incurred in taking up and returning from any new position during this same period.

The claim is also for the period of September 25 to October 28, 1949. But here the situation was handled differently. The hours of the Agent were adjusted to a regular eight hour shift, no excessive overtime is shown to have been performed in order to do the work of the Telegrapher-Clerk, the station was closed on Saturday and part of Sunday, the rest days for the Agent, and for the work on Sunday an employe from the extra list was called. The Agent, working a regular eight hour shift, 7:30 A. M. to 4:30 P. M., with an hour for lunch, performed the work required by the Carrier on Mondays through Fridays, which work was formerly performed by two. Under such circumstances the Carrier could and had a right to abolish one position. When such position was abolished, the former occupant had no right superior to that of an extra man to perform occasional work on Sunday. While the Carrier may not abolish a position while the work remains,

likewise it need not establish an assigned position until the volume of work warrants, but may use an employe from the extra list. The hours worked on Sunday by the extra man are comparable, but not identical, to the hours of the former position of Telegrapher-Clerk when it was a seven-day position. But with work remaining for only one day a week, the Carrier was not required to establish—or maintain—a regular position to which the guarantee rule would apply, but properly gave the work to an extra man.

The Petitioner asserts that the same duties performed by the extra man on Sunday, hours 4:00 P. M. to 12:00 Midnight, remained during the week and that this is established by the fact that after October 29, the Telegrapher-Clerk position was restored and claimant performed such duties during his regular assignment. We believe there is a difference between work which might be done, but is not; and work which remained and was performed by others either by extensive overtime or by someone not under the Agreement. This points up our conclusion here that the Carrier violated the Agreement during the period of March 24 to May 31, 1941, inclusive; but did not violate the Agreement, as charged, during the period of September 25 to October 27, 1949, inclusive.

There is a contention made by Petitioner that the employes were denied work of selling tickets where the passengers boarding trains at Hillsdale, when the station was closed, paid cash fares to the train conductor. There is no provision of the contract giving the employes under the Telegraphers' Agreement the right to require all passengers to purchase tickets before boarding trains. On the other hand, it is customary for train crews to collect cash fares when tickets have not been purchased. We cannot find, therefore, that there has been a violation of the Scope Rule in this respect.

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

That both parties to this dispute waived oral hearing thereon;

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

The Carrier violated the Agreement when it abolished the position of Telegrapher-Clerk at Hillsdale during the period of March 24 to May 31, 1949, inclusive.

AWARD

Claim (a) sustained.

Claim (b) denied.

Claims (c) and (d) sustained in accordance with the Opinion and Findings.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: A. I. Tummon
Acting Secretary

Dated at Chicago, Illinois, this 28th day of February, 1951.

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

INTERPRETATION NO. 1 TO AWARD NO. 5235
DOCKET NO. TE-5135

NAME OF ORGANIZATION: The Order of Railroad Telegraphers.

NAME OF CARRIER: The New York Central Railroad, Buffalo and East.

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 its meaning and application, as provided for in Section 3 First (m), of the Railway Labor Act, approved June 21, 1934, the following interpretation is made:

The Order of Railroad Telegraphers has requested an interpretation of Award 5235. The Carrier has settled all of the claims allowed by the terms of the Award except payment claimed by Glynn, Grovesteen and Grant for loss of earnings caused by the delay between the time each was displaced until each had exercised his rights to a job. The Carrier has also declined to pay a claim presented on behalf of W. R. Lind, now deceased, for travel time, expenses and differences in rate.

The specific question raised by the request for interpretation is: Does the Award contemplate the payment of loss of earnings when such loss was caused by a delay by the claimants in exercising their rights upon being displaced.

The facts are not in dispute. Claimant Glynn held the position which the Carrier abolished, which act precipitated the claim presented in Docket TE-5135. Glynn received notice on March 21, 1949, his job was abolished effective March 24. He exercised his displacement rights on April 2, effective April 5.

It is contended by the Carrier that Glynn could have exercised his rights immediately upon being notified that his position was abolished; that the delay in so doing was due entirely to Glynn, that the contract does not support his claim for compensation for ten days between the date his position was abolished and the exercise of his displacement rights.

The Organization asserts payment was authorized when the Board sustained paragraphs (c) and (d) of the claim. Paragraph (c) asserts a claim which reads, in part, as follows: "for loss of wages, plus travel and waiting time and any other expenses incurred." The Award 5235 sustained the claim "in accordance with the opinion and Findings." The pertinent language of the opinion is as follows: "The occupant of the position should be compensated for the amount he would have earned had he remained on the job for the period of March 24 to May 31, less his other earnings."

The Award of lost earnings to Glynn is unequivocal and definite; but the Carrier, in effect, asserts that when Glynn waited ten days before selecting another position and thereby lost earnings, such loss was his own.

The Organization has referred to this as "waiting time," but it is clearly not the "waiting time" contemplated under Article 13 (b). The real claim is for lost earnings, and the Organization cites Article 28 (b) and (c) of the Agreement in justification of the delay. This portion of the Agreement provides as follows:

> (b) An employe displaced in accordance with Paragraph (a) of this Article, shall have choice of positions to which his seniority and qualifications entitle him. In case a position is reestablished within 10 days, the employe last holding the position may again claim it, provided he has not exercised displacement rights.
>
> (c) An employe shall exercise his displacement within 10 days from date he is actually displaced by a senior employe . . ."

The ten days taken by Glynn in exercising his right, were authorized by these provisions of the Agreement. In the situation where a position is properly abolished and an employe elects to take the time allowed under Article 28, no compensation would be due him. Here we have a situation where the Board found that the Carrier breached the Agreement by improperly abolishing a position and ordered the Carrier to compensate the employe for the amount "he would have earned" had the position not been so abolished.

The Carrier, however, asserts that the earnings lost by reason of Glynn's failure to displace another was at his own election and that he should have minimized the loss. That principle is not applicable here. Article 28 not only limits the time within which displacement must be exercised, but it also offers an inducement to an employe to withhold exercising displacement rights if there is a possibility that his former position may be reestablished. Thus, his delay in taking another job was such as could be contemplated under the contract. The loss of earnings which he thereby sustained was directly due to abolishment of the Hillsdale job, and the Award contemplated that Glynn would be compensated, if not otherwise employed during such time. This interpretation of the Award is based solely upon the premise that the Hilsdale job was improperly abolished. We do not intend to imply that compensation is due whenever an employe elects to delay 10 days in exercising his displacement rights.

In the case of Grovesteen and Grant, the situation is somewhat different in that their respective positions were not abolished, but they were each displaced under Article 28 and each delayed exercising his right to a new position. The displacement that Grovesteen and Grant were forced to make were the direct result of the abolishment of Hillsdale job. Under the rule applied by the Carrier when notifying them to make displacement, the affected employe had 10 days within which to look around and find a place.

The rule contemplates that a displaced employe may take some time to find a desirable job available to him and to make his personal arrangements for the transfer. The company could anticipate that an employe would take up to 10 days for such purpose, and we can only speculate that they could have accomplished, in their respective cases, the transfers in a much shorter time. There is nothing in the record to show that these claimants could reasonably have minimized the time. It was time lost, and was such as followed directly from the fact the Carrier had abolished the Hillsdale job. This was the cause for the time lost and such loss of earnings was within the contemplation of the Board when it sustained Claim (d).

Mr. Lind died after he had been displaced and suffered loss but before Award 5235 was made. During his lifetime no claim was ever made by him. Therefore, this portion of the claim as presented by the Organization should be dismissed without prejudice to any rights of the legal representative of the deceased.

Referee Robert O. Boyd, who sat with the Division as a member when Award No. 5235 was adopted, also participated with the Division in making this interpretation.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: (Sgd.) A. Ivan Tummon
Secretary

Dated at Chicago, Illinois, this 15th day of May, 1953.