

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Edward F. Carter, Referee

PARTIES TO DISPUTE:

THE ORDER OF RAILROAD TELEGRAPHERS

THE MINNEAPOLIS & ST. LOUIS RAILWAY COMPANY

STATEMENT OF CLAIM: Claim of the General Committee of The Order of Railroad Telegraphers on The Minneapolis and St. Louis Railway Company that:

(1) The Carrier violated the terms of the Agreement between the parties when it established non-consecutive rest days on September 1, 1949 for the occupants of the positions of: 2nd Telegrapher, Marshalltown; 1st Telegrapher, Mason City; 2nd Telegrapher, Mason City; Agent-Telegrapher, Morton; 2nd Telegrapher, Watertown; and

(2) The Carrier shall compensate the occupants of such positions beginning September 1, 1949 and continuing until the assignments were corrected to provide for consecutive rest days as set forth below with respect to the occupant of each of the positions referred to in paragraph 1:

(a) Marshalltown, 2nd Telegrapher, September 1st, 1949—7 day position. Assigned rest days, Sunday and Friday—relieved on both Sunday and Friday by assigned relief employes. Days worked Saturday—Monday—Tuesday—Wednesday—Thursday. This assignment violates the Agreement.

December 17, 1949—7 day position, assigned rest days Saturday and Sunday—relieved on both days by regular assigned relief employes. Days worked—Monday—Tuesday—Wednesday—Thursday and Friday. This is a proper assignment.

The days of the week involved in the claim for this employe are Friday at straight time and Saturday, the difference between pro rata paid and time and one-half earned. Time limits of claim, September 1, 1949 to December 17, 1949, on which latter date the violation was corrected.

(b) Mason City—First Telegrapher.

Effective September 1, 1949—6 day position, assigned rest days Sunday and Thursday. Relieved on Thursday by assigned relief employe. Position not worked Sunday. Days worked Monday, Tuesday, Wednesday, Friday, Saturday. This assignment violates the agreement.

June 3, 1950—7 day position. Assigned rest days, Sunday and Monday. Relieved by assigned relief employe Sunday and Monday. Days worked Tuesday, Wednesday, Thursday, Friday, Saturday. This is a proper assignment.

The days of the week involved for this employe are Thursday for eight hours at straight time rate and the difference between the eight hours at the straight time rate paid the claimant for service on either Saturday or Monday, but not both, and the time and one-half rate on either of these days account assigned a rest day of Tuesday in violation of the Agreement and not assigned a rest day of either Saturday or Monday, such failure to so assign on one of these days being in violation of the Agreement.

The time limit on the claim is from September 1, 1949 to June 3, 1950 on which latter date the violation was corrected.

(c) Mason City, 2nd Telegrapher.

Effective September 1, 1949—6 day position. Assigned rest days, Sunday and Tuesday. Relieved on Tuesday by assigned relief employe. Position not worked Sunday. Days worked Monday, Wednesday, Thursday, Friday, Saturday. This assignment violates the Agreement.

June 3, 1950—7 day position, assigned rest days Tuesday and Wednesday. Relieved by assigned relief employe. Days worked—Thursday, Friday, Saturday, Sunday, Monday. This is a proper assignment.

The days involved in the claim for this employe are Tuesday, eight hours at the straight time rate and the difference between the eight hours at straight time rate paid the claimant for service on either Saturday or Monday (but not both) and the time and one-half rate for either of these days account assigned rest day of Wednesday in violation of the Agreement and not assigned a rest day of either Saturday or Monday, such failure to so assign being a violation of the Agreement. The time limit of the claim is from September 1, 1949 to June 3, 1950 on which latter date the violation was corrected.

(d) Watertown—2nd Telegrapher.

September 1, 1949—6 day position assigned rest days, Sunday and Thursday. Relieved by an assigned relief employe on Thursday. Position not worked on Sunday. Days worked Monday, Tuesday, Wednesday, Friday, Saturday. This assignment violates the Agreement.

June 3, 1950—5 day position, assigned rest days, Saturday and Sunday with one call on Saturday. Position not worked on Sunday. Days worked, Monday, Tuesday, Wednesday, Thursday, Friday. This is a proper assignment.

The days of the week involved for this employe are Thursday, eight hours at the straight time rate and the difference between the eight hours at straight time rate paid the claimant for service on either Saturday or Monday, (but not both), and the time and one-half rate on either of these days account being assigned a rest day of Wednesday in violation of the Agreement and not being assigned a rest day of either Saturday or Monday, such failure to so assign being a violation of the Agreement. The time limit on this claim is from September 1, 1949 to June 3, 1950 on which latter date the violation ceased.

(e) Morton—Agent-Telegrapher.

September 1, 1949—6 day position. Assigned rest days Wednesday and Sunday. Relieved by assigned employe Wednesday. Position not worked Sunday. Days worked, Monday, Tuesday, Thursday, Friday, Saturday. This assignment violates the agreement.

June 3, 1950—6 day position. Assigned rest days—Sunday and Monday. Relieved by assigned relief employe Monday. Position not worked on Sunday. Days worked Tuesday, Wednesday, Thursday, Friday, Saturday. This is a proper assignment.

The days of the week involved for this employe are Wednesday for eight hours at the straight time rate and the difference between the eight hours at straight time rate paid the claimant for services on either Saturday or Monday, (but not both), and the time and one-half rate on either of these days account assigned rest day of Wednesday in violation of the Agreement and not assigned a rest day of either Saturday or Monday, such failure to so assign being a violation of the Agreement.

The time limit on this claim is from September 1, 1949 to June 3, 1950 on which latter date the violation was corrected.

EMPLOYEES' STATEMENT OF FACTS: There is an agreement in effect between the parties dated August 1, 1939 supplemented or amended on July 25, 1949 to conform to that certain agreement dated Chicago, Illinois, March 19, 1949, placing in effect a forty hour work week with rules bearing thereon and becoming effective September 1, 1949.

In making the transition to the forty hour work week on September 1, 1949, the carrier assigned non-consecutive rest days to the employes referred to in the Statement of Claim. The carrier took this action without regard to the protest of the employes and without regard to the requirements of the effective agreement.

POSITION OF EMPLOYEES: The rule of the agreement upon which this claim is prosecuted is revised Article 9, signed July 25, 1949, Section 1, paragraph (g)—**Non-consecutive Rest Days:**

"The typical work week is to be one with two consecutive days off, and it is the carriers' obligation to grant this. Therefore, when an operating problem is met which may affect the consecutiveness of the rest days of positions or assignments covered by paragraphs

(c), (d) and (e), the following procedure shall be used:

- (1) All possible regular relief positions shall be established pursuant to Article 9, Section 1, paragraph (e).
- (2) Possible use of rest days other than Saturday and Sunday, by agreement or in accordance with other provisions of this Article 9.
- (3) Efforts will be made by the parties to agree on the accumulation of rest time and the granting of longer consecutive rest periods.
- (4) Other suitable or practicable plans which may be suggested by either of the parties shall be considered and efforts made to come to an agreement thereon.
- (5) If the foregoing does not solve the problem, then some of the relief or extra men may be given nonconsecutive rest days.
- (6) If after all the foregoing has been done there still remains service which can only be performed by requiring employes to work in excess of five days per week, the number of regular assignments necessary to avoid this may be made with two nonconsecutive days off.
- (7) The least desirable solution of the problem would be to work some regular employes on the sixth or seventh days at over-time rates and thus withhold work from additional relief men.
- (8) If the parties are in disagreement over the necessity of splitting the rest days on any such assignments, the carrier may nevertheless put the assignments into effect subject to the right of

OPINION OF BOARD: This dispute involves a claim that the agreement placing the 40 hour week in effect was violated when Carrier assigned non-consecutive rest days to the claimants referred to in the statement of claim. The controlling rules provide:

"The Carrier will establish, effective September 1, 1949 for all employees, subject to the exceptions contained in this Article 9, a work week of 40 hours, consisting of five days of eight hours each, with two consecutive days off in each seven; the work weeks may be staggered in accordance with the Carrier's operational requirements; so far as practicable the days off shall be Saturday and Sunday. The foregoing work week rule is subject to the provisions of this Article 9 which follows:"

(Article 9, Sec. 1, Paragraph (a) General Agreement effective September 1, 1949.)

"The typical work week is to be one with two consecutive days off, and it is the carrier's obligation to grant this. Therefore, when an operating problem is met which may affect the consecutiveness of the rest days of positions or assignments covered by paragraphs (c), (d) and (e), the following procedure shall be used:

(1) All possible regular relief positions shall be established pursuant to Article 9, Section 1, Paragraph (e).

(2) Possible use of rest days other than Saturday and Sunday, by agreement or in accordance with other provisions of this Article 9.

(3) Efforts will be made by the parties to agree on the accumulation of rest time and the granting of longer consecutive rest periods.

(4) Other suitable or practicable plans which may be suggested by either of the parties shall be considered and efforts made to come to an agreement thereon.

(5) If the foregoing does not solve the problem, then some of the relief or extra men may be given non-consecutive rest days.

(6) If after all the foregoing has been done there still remains service which can only be performed by requiring employees to work in excess of five days per week, the number of regular assignments necessary to avoid this may be made with two non-consecutive days off.

(7) The least desirable solution of the problem would be to work some regular employees on the sixth or seventh days at overtime rates and thus withhold work from additional relief men.

(8) If the parties are in disagreement over the necessity of splitting the rest days on any such assignments, the carrier may nevertheless put the assignments into effect subject to the right of employees to process the dispute as a grievance or claim under the rules agreement, and in such proceedings the burden will be on the carrier to prove that its operational requirements would be impaired if it did not split the rest days in question and that this could be avoided only by working certain employees in excess of five days per week."

(Article 9, Sec. 1, Paragraph (g), Agreement effective September 1, 1949.)

The claims here made involve assignments of telegraphers at Mason City, Watertown, Marshalltown and Morton. The record shows that the Carrier

through various officers attempted to arrange these assignments so that non-consecutive rest days could be avoided. Representatives of the Organization were contacted before and after the effective date of the 40 Hour Work Week Agreement. Carrier asserts that the Organization's General Chairman admitted that non-consecutive rest days could not be avoided in making these assignments. The Organization positively denies this assertion but the fact remains that the Organization has never presented a plan that would eliminate the non-consecutive rest day assignments. The non-consecutive rest day assignments were finally eliminated on December 17, 1949, at Marshalltown and on June 3, 1950, at Mason City, Watertown and Morton by the establishment of a position at Mason City and the assigning of Saturday calls for the telegrapher at Watertown by agreement. The Organization contends that the Carrier should have done this in the first instance and that it is a violation of the agreement in failing to do so.

The determination of the number of employees to be used in the performance of work is the function of management except as limited by agreement. It was not contemplated that the carriers were to increase any class of assignments without regard for operating costs. This is further borne out by the agreement when it provides that the least desirable solution is to work regular assigned employees on their rest days at overtime rates. This simply means that under the provisions of the 40 Hour Work Week Agreement Carrier was obligated to rearrange its assignments to provide for five 8-hour work days per week with two consecutive rest days except that non-consecutive rest days could be assigned as provided by the rules hereinbefore quoted.

It will be noted that the quoted agreement rule provides that when an operating problem is met which may affect the consecutiveness of rest days the procedure set out in Article 9, Section 1, Paragraph (g), is to be followed. The Organization asserts that no operating problem existed and that the rule was not therefore applicable. It is the obligation of the Carrier to operate the railroad to accomplish the purposes of railroad transportation. In so doing, it is required to properly interpret and place in effect all binding collective agreements. When conditions are such that conformance cannot be had with the rules of an agreement, it certainly creates an operating problem. The inability to assign the telegraphers' positions here involved without splitting rest days created an operating problem within the meaning of the rule and brings the exception based thereon into operation.

We are convinced by the record that it was impossible to rearrange the existing assignments and afford consecutive rest days to all employees involved. Neither of the parties to this dispute have been able to show us how it could have been done. Under such circumstances Carrier can assign non-consecutive rest days without penalty.

The Organization asserts that the operating problem was brought about by the Carrier's act in abolishing a telegrapher's position at Mason City. The tenor of the Organization's argument is that Carrier either should not have abolished the position or should have subsequently restored it to avoid the necessity for assigning non-consecutive rest days. The argument is not sound. The 40 Hour Work Week Agreement does not invade the prerogative of management in determining the number of employees required to operate the railroad. It deals solely with those in the employ of the Carrier and the manner in which they shall be assigned. The Carrier is not required by the agreement to increase its forces or pay overtime to provide consecutive rest days, although it may do so, of course, by agreement with the Organization as it eventually did in the present instance.

We think the record shows that the non-consecutive rest days on the assignment at Marshalltown, which were eliminated on December 17, 1949, could have been eliminated on September 1, 1949 and that a violation of the agreement occurred on that position from September 1, 1949 to December 16, 1949. This portion of the claim is sustained for all Fridays during this

period at the straight time rate. The claim for time and one-half rate for the Saturday work performed is denied on the ground that it would be a double penalty. See Awards 5333, 5423. The claims based on the alleged violations at Mason City, Watertown and Morton are denied.

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 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 only to the extent shown by the Opinion.

AWARD

Claim of second trick telegrapher at Marshalltown sustained for each Friday not worked from September 1, 1949 to December 17, 1949, at pro rata rate. Claim of this telegrapher for time and one-half for work performed on Saturdays denied.

Claims of telegraphers assigned at Mason City, Watertown and Morton denied.

NATIONAL RAILROAD ADJUSTMENT BOARD