Award No. 5736
Docket No. TE-5770

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Livingston Smith, Referee

PARTIES TO DISPUTE:

THE ORDER OF RAILROAD TELEGRAPHERS

THE NEW YORK CENTRAL RAILROAD COMPANY
(West of Buffalo)

STATEMENT OF CLAIM: Claim of the General Committee of The Order of Railroad Telegraphers on The New York Central Railroad Company (Line West of Buffalo) that the Carrier violates the provisions of the agreement between the parties, when:

1. It combines the work of the first clerk-operator with the work of the agent-operator at Ladd, Illinois each Monday, beginning with the first Monday after September 1, 1949, requiring the agent-operator to perform the combined duties of both positions on this day each week subsequently, and

2. Beginning with the first day such violation of the agreement was inaugurated by the Carrier and continuing until corrected, the Carrier shall

   (a) Compensate the senior available extra employe for eight (8) hours at the straight time rate for each day such violation was permitted by the Carrier, except if any such day be a holiday the compensation for that holiday shall be at the time and one-half rate, or

   (b) If no extra employe available on any day the violation exists, then the Carrier shall compensate the occupant of the position of first clerk-operator for eight (8) hours for each day the violation exists, at the time and one-half rate.

EMPLOYES' STATEMENT OF FACTS: There is an agreement in effect between the parties effective November 1, 1950, containing the rules upon which this claim is based including the rules changed and made effective because of the inauguration of the 40-hour week.

The 40-hour week was placed in effect September 1, 1949 and coincident therewith the violation cited in the Statement of Claim began to run on instructions of the Carrier, continuing uninterrupted from that date henceforth. The violation still exists.

The work week, assigned working days and assigned rest days for the two positions at Ladd, made effective September 1, 1949, was: Agent-Operator work week Monday through Sunday. Working days Monday, Tuesday, Wednesday, Thursday, Friday. Rest days Saturday and Sunday. This is a five-

CONCLUSION

The foregoing evidence demonstrates conclusively the lack of any merit in the position of the organization in this dispute, and this Board is respectfully urged to deny this claim.

All the facts and arguments herein presented have been made known to the employes in the handling of this case locally.

(Exhibits not reproduced).

OPINION OF BOARD: The locale of this dispute is Ladd, Illinois. The office in question has among other employes an agent-operator, who since the inauguration of the five-day week has worked Monday through Friday, with Saturday and Sunday as rest days. The freight house is closed on Saturday and Sunday. Clerk-operator positions are occupied 3 tricks daily, 7 days weekly, however each individual clerk-operator works 5 days, with 2 days of rest.

The practice instituted by the Respondent which forms the basis of this claim consists of permitting or requiring the agent-operator to perform the duties of a clerk-operator on Monday, the assigned day of rest for the said clerk-operator.

The Organization asserts that Article 10, Section 1 (a), (b), (d) and (e), Article 13 (a) as well as paragraph VI of the Supplement to Decision 5 of the Forty-Hour Week Committee, contractually prohibit the use of an agent-operator to perform the work of a clerk-telegrapher on such employes or positions assigned day of rest.

"ARTICLE 10—Section 1.

"NOTE: The expressions 'positions' and 'work' used in this Article 10 refer to service, duties, or operations necessary to be performed the specified number of days per week, and not to the work week of individual employes.

"(a) General

The carrier will establish for all employes subject to the exceptions contained in this agreement a work week of 40 hours, consisting of 5 days of 8 hours each, with 2 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 which follows:

"(b) 5-day Positions

On positions the duties of which can reasonably be met in 5 days, the days off will be Saturday and Sunday.

"(d) 7-day Positions

On positions which have been filled 7 days per week, any 2 consecutive days may be the rest days with the presumption in favor of Saturday and Sunday.

"(e) Regular Relief Assignments

1. All possible regular relief assignments with 5 days of work and 2 consecutive rest days will be established to do the work neces-

sary on rest days of assignments in 6 or 7-day service or combinations thereof, or to perform relief work on certain days and such types of other work on other days as may be assigned under the Telegraphers' Agreement. Assignments for regular relief positions may on different days include different starting times, duties and work locations for employes of the same class in the same seniority district, provided they take the starting time, duties and work locations of the employes or employes whom they are relieving.

6. Work on rest days not covered by regular relief assignments may be performed by qualified extra men if available who will be paid rates applicable to respective positions relieved.

"Article 13

(a) Regularly assigned employes will not be required to perform service on other than their regular positions except in emergencies.* * *

"Supplement to Decision 5, paragraph VI:

While it is the intent of this rule that where practicable, employes will be relieved on their rest days, it is understood that an employe may be required to work on his rest days subject to the provisions herein set forth with respect to pay for work performed on such rest days."

It is contended that existing rules prior to the five-day week Agreement contractually prohibited the practice here complained of and that the principle had been carried forward to the presently effective Agreement, to the end that rest day work when not assigned to the occupant of relief positions or extra men belongs to, and can be performed only by the employe regularly assigned thereto.

The Respondent took the position that the assignment of rest day work of clerk-telegrapher to the agent operator under the circumstances herein present was in the interest of sound operating principles and in no manner contravened any rule of the Agreement.

It was asserted that no rule of the Agreement prohibited the assignment of duties of one classification coming within the scope of the Agreement to the occupant of another classification, likewise thereunder, particularly if lines of seniority, within the seniority district, were recognized and respected.

Respondent contends that all relief positions possible have been created and filled; that it is both impracticable and economically prohibitive to assign available extra men to the Monday relief day work in question; and that the performance of this work by the regular occupant of the position violates both the letter and intent of the 40-hour Week Agreement and the applicable rule negotiated by the parties to effectuate such Agreement.

Respondent asserts that many of the awards of this Board upon which the Organization relies were rendered prior to the creation of five-day positions under the amended applicable rule.

The issue to be here resolved is whether or not the Respondent has the contractual right to combine the duties of another position on rest days are require one employe to absorb the duties of another position or employe on the rest day of said position or employe.

The Board is of the opinion that the practice complained of is improper.

The contention of the Carrier that the awards relied upon by the Organization where rendered prior to the 40-Hour Week Agreement is without merit when considered in light of awards issued by the Board since the effective day of the Agreement. The latter awards perpetuate the principle that work to be performed on rest days belongs to either regularly assigned relief men, extra men, or the regularly assigned occupant of the position, in the order named, depending on their availability. Awards 5271, 5333, 5475.

Award 5364 which is cited by the Respondent was premised on the fact that only a portion of the duties were assumed or combined, and consumed a minimum of time in their performance. The duties assumed here by the agent-operator were, the record indicates, all of the duties of the clerk-operator.

In Award 5475, above mentioned, it was likewise held that it was improper to combine the duties of different classifications, even though both were of the same crafts and covered by the Agreement.

In the main, the same defenses are here relied upon by the Respondent as were asserted by the Carrier involved in Awards 5271, 5272, 5273, 5274, 5275. This Board passed upon similar if not identical facts in these cases and found that the rules there applicable had been violated.

A similar finding is justified in the premises.

In Award 5271, and other awards cited therein it was determined that claimants were entitled to only the straight time or pro rata rate. The claimant here is entitled to no more.

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 the Agreement was violated.

AWARD

Claims sustained at the pro rata rate.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: (Sgd.) A. Ivan Tummon
Acting Secretary

Date at Chicago, Illinois, this 25th day of April, 1952.

DISSENT TO AWARD 5736, DOCKET TE-5770

The majority of the Board has committed grave error in reaching its conclusion in this case. In making its Award, and in rendering its Opinion and Findings, the majority has:

1. Ignored or given improper weight to undisputed evidence;
2. Based its conclusion on Awards which do not constitute proper precedent;
3. Given no effect to the intention of the parties as expressed in their agreement;
4. Done violence to the basic purpose of the National 40-Hour Week Agreement.

The opinion of the majority discloses that the Award sustaining these claims is based entirely upon prior Awards of this Division. There is no evidence that any independent consideration was given to the factual problem presented by this case. So far as appears, no attempt was made to determine the real meaning of the rules involved nor to apply these rules to the particular situation here involved. The majority has confined its ruling, in effect, to a finding that the facts and issues involved in this case have been previously presented to and passed upon by this Board; that its prior conclusions were sound and valid, and that they should control its decision here. None of these things is true.

The Awards so relied upon are the following—

5271 to 5275, inclusive
5333 and
5475

The first four of these (5271 to 5274) were rendered upon facts basically dissimilar to those present here. In those cases the Carrier sought to use a monthly rated employe on the sixth day of his work week to perform work on another job. This difference alone should disqualify these decisions as precedent for the instant Opinion. But there are other reasons why those Awards should not be followed. They are based, like the present case, not primarily on the facts involved or the rules governing, but upon previous Awards of the Division. The Awards there relied upon were old decisions; rendered under rules in effect prior to the 40-Hour Week. (The Board, in its Opinion, cited for authority Awards beginning with 3760 and ending with 4883, of which 3979 and 4192 are typical). These Awards were in each case rendered under the old so-called "continuous operation" rules, which required certain types of jobs to be filled every day of the week and which were construed to prohibit "blanking" of jobs. These rules, carefully and fully identified and distinguished in the record in the present case, were cancelled from the Agreement when the 40-Hour Week rules became effective. They are no longer of any possible relevancy and their continued recognition by this Board in its decisions on cases arising under the revised and altogether different 40-Hour Week rules constitutes gross error.

The rules in effect at the time the present dispute arose do not, like the old rules, require jobs to be filled every day; they permit forces of varying size to be worked on different days; they permit staggering of forces, and they permit individual jobs to be blanked in order to accomplish this. All of these things this Board has recognized and approved. See Awards 5247, 5589 and 5590, all cited in this docket. Why the Board has chosen to disregard these current and pertinent decisions and make a finding in accordance with obsolete and inapplicable Awards is beyond comprehension.

Finally, Awards 5271 to 5274 are based upon findings of fact that cannot be made in the present case. The Board there found that "there is no showing that it was not possible" to establish relief assignments. It also found that there was no showing that it was impracticable to assign extra men. In the present case both of these things were shown by undisputed evidence.

Award 5275 involved similar facts and is subject to all of the other infirmities mentioned above. Like its companion cases, it is based on a

finding that the Carrier failed to show that an effort had been made to comply with the rule requiring the establishment of "all possible" relief assignments. By inference, if the Board had there been concerned with a situation where, as here, all possible relief assignments had been made, its decision would have permitted the Carrier to perform the work in some other manner.

The only other Awards cited in 5271-5275 were 5117 and 5195. While rendered on the 40-Hour Week rules, neither constituted proper authority for the purpose for which used. Each involved a situation where both craft and seniority lines were violated in the assignment of work. This same thing is true of one of the other Awards relied upon in the instant case. Award 5333, referred to by the majority as authority for its finding, involved facts where an employe in one seniority class was used to relieve an employe in another class, and the Opinion was rendered exclusively on a finding that this was improper. On the agreed facts of the present case all employes were worked within the limits of their contract seniority. It is significant that neither party to the present dispute cited 5333, indicating that neither of them thought it had any relevancy thereto.

The only other Award relied upon by the majority in the present case is 5475. In that case the question was which of two employes should have been used to fill an established full time rest day relief assignment. There was no question there, as here, of the right of the Carrier to perform the work by consolidating it with other work already assigned. The holding in that case that the regular incumbent was entitled to such work as against the rights of another employe, normally assigned to a different trick, bears no helpful similarity to the position taken by the majority in this docket.

It is evident, therefore, that the Awards relied upon by the majority as the sole basis for its decision in this case fail, utterly and completely, to provide any authoritative support for the position they have taken. Likewise, the reasons advanced by the majority to explain why it chose to rely on the Awards cited by the Employes and to reject those cited by the Carrier are not persuasive. Award 5364, referred to by the Carrier, is unique in that it alone, among all the previous decisions of this Board, was concerned with a factual situation identical with that here pertaining. There, as here, there was a true consolidation of work on rest days. Unlike the cases relied upon, 5364 involved the performance by one employe on certain days of work which required two employes on certain other days. No craft or seniority lines were crossed, and there, as here, there was a showing that it was impossible to include the work in a relief assignment.

The majority, apparently realizing the obvious inconsistency between that Award and its proposed finding in the present dispute, attempted to rationalize its action by the wholly inaccurate observation that Award 5364 "was premised on the fact that only a portion of the duties were assumed or combined". Nothing in the record of that case warrants any such conclusion. The exact contrary, by the Employes' own statement, is true. A reference to pages 4 and 5 of the printed Award will disclose that the Organization alleged, and the Carrier did not deny, that **all** of the duties of both jobs were involved.

If the decision in the present docket is to be based upon prior Awards, it should follow an Award in a similar case; not Awards which are clearly irrelevant. If the doctrine of **stare decisis** is to control these decisions, it should be fairly and properly applied; not perverted to compound a previous error.

When the merits of the dispute are considered, the error into which the majority has fallen becomes greatly magnified. Great pains were taken to incorporate into the record of this case an analysis and documented history of the 40-Hour Week Agreement in order that the Board might be able to determine its true purpose from the intention of the members of the Emer-

gency and Arbitration Boards who drafted it and of the parties who signed it. No essential part of this data was challenged or controverted; yet the Board either completely ignored or rejected it.

This evidence clearly demonstrated that this Carrier and this Organization, among others, in writing this governing Agreement, intended to permit the performance of work in exactly the manner which this Organization now protests. The Organization did not claim, and the majority did not find, that any rule in the Contract requires the assignment of separate, full time, relief on each job. The only rule in the Agreement having any possible bearing on the subject is that which provides that "all **possible** regular relief assignments * * * will be established to do the work **necessary** on rest days". Even the Organization did not contend that this rule should be applied. They did not deny that it was impossible to assign relief, and they did not allege that relief work was necessary. Their claim was that an extra man be assigned, or if no extra man was available, that the regular man be required to work the sixth day at overtime rates.

By requiring the Carrier to do this, the majority have, in large effect, nullified and destroyed the five-day week. Instead, they have substituted a six-day week for all employes of the Carrier who perform work necessary to be done on more than five days where regularly assigned relief is not feasible or desirable.

Moreover, they have rendered a decision which, by requiring all jobs to be independently filled on every day would, if applied generally to railroad operations, prevent the Carriers from regulating forces in accordance with work load, and would require the employment of level, or constant forces, on every day, regardless of the work to be done. This is not only plainly contrary to the clear intent of the Contract, it is unworkable. It ignores the obvious requirements of railroad operations. It is contrary to good common sense.

There are innumerable situations on the railroads of this country where in freight stations, passenger stations and countless other facilities a particular type of work is performed on certain days of the week by a given force of employes but, because of the nature of the operation, the volume of service and other pertinent factors of this kind, can be performed on other days of the week by a lesser number of employes. The Award of the majority in this present case would apparently hold that if it takes one hundred employes to perform a certain type of work on five days of the week and any of that work remains to be performed on one or the other two days in the week, the Carrier cannot use less than one hundred employes to do it. This is patently ridiculous and entirely contrary to the whole theory of the 40-Hour Week Agreement. That Agreement contemplates that the Carriers would be able to use a lesser number of employes on two days of the week than might be necessary on the other five. As pointed out in this docket, the representatives of the Organizations themselves in the hearings before the Emergency Board clearly and unequivocally stated that they expected the Carriers to do this very thing and that this would provide one of the devices whereby the Carriers could reduce the cost of the imposition of a 40-Hour Week. To hold that the Carrier must, in effect, use the same number of employes on each day where it has established 6 or 7 day service requires the Carrier to use a greater number of employes than are necessary to perform the work and promotes featherbedding in its worst form.

In reaching such a conclusion the majority either ignored or rejected extensive and undisputed evidence of the entirely contrary purpose of the 40-Hour Week Agreement. The Emergency Board, in recommending the five-day week to the parties, said,

> "Recommendation No. 1 deals with the establishment of a shorter workweek which was the primary aim of the Board. It is well to

bear this in mind. The Board intended to have the employes achieve a workweek of five 8-hour days, without loss in earnings. Its purposes were two: (1) **to give employes 2 days rest each week** and (2) to spread and maintain employment. **Its purpose was not to obtain more pay for employes through overtime on the 6th and 7th day of the week,** and it sought through the penalty provisions to **discourage such work schedules."** (Emphasis added.)

The majority ignored or rejected this.

The Emergency Board also said,

"It is the Board's attention to apply the 40-hour principle in the manner which will be the least disturbing and costly to the industry."

The majority also ignored or rejected this.

The Contract itself provides that in making the work assignments "the work weeks may be staggered **in accordance with the carriers' operational requirements".** The majority also ignored or rejected this.

In making this Award the majority of this Board has thus not only thwarted the intention of the parties themselves, but has substituted its judgment for that of the members of the Emergency and Arbitration Boards rendered after long and careful consideration of these problems.

For the reasons set forth above, we dissent.

/s/ W. H. Castle

/s/ R. M. Butler

/s/ C. P. Dugan

/s/ J. E. Kemp

/s/ A. H. Jones