

Award No. 6072

Docket No. TE-6126

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

Thomas C. Begley, Referee

PARTIES TO DISPUTE:

THE ORDER OF RAILROAD TELEGRAPHERS

MISSOURI PACIFIC LINES (in Texas and Louisiana)

STATEMENT OF CLAIM: Claim of the General Committee of The Order of Railroad Telegraphers on the Missouri Pacific Lines in Texas and Louisiana that the carrier violates the provisions of existing agreements:

(1) When it requires an employe not covered by the agreement to assume and perform the duties and work of the agent-telegrapher at Overton, Texas, on Sundays, an assigned rest day of the agent-telegrapher, beginning with the first Sunday in September, 1949, which work and duties are covered by the scope of the Telegraphers' Agreement and normally performed by the agent-telegrapher at Overton, Monday through Saturday, inclusive.

(2) That beginning with the first Sunday subsequent to September 1, 1949, and continuing until the violation is corrected the carrier shall compensate the agent, Mr. Roy A. Brown for the difference in compensation paid to him for any service performed on Sundays and the amount he would have earned, based on eight hours per day at the time and one-half rate, had the rules of the Telegraphers' Agreement been properly applied.

EMPLOYEES' STATEMENT OF FACTS: There is an agreement in effect between the parties bearing effective date of October 15, 1940, amended as to various rates of pay on subsequent dates, also amended as to rules on various dates; the next previous amended agreement covering rules being those contained in a Memorandum signed July 26, 1949.

The Agreement dated October 15, 1940, includes the following positions:

Overton	Agent-Telegrapher	Monthly Rated
Overton	Telegrapher-clerk	Hourly Rated
Overton	Telegrapher-clerk	Hourly Rated

In addition to the above named force there is a position of cashier in effect at Overton. This position is covered by the agreement of another organization.

supra) the Cashier is performing no work on Sundays that belongs to or should be performed exclusively by the Agent.

In the light of these facts, it must be evident that the contention and claim of the Organization in this case is not in harmony with the Organizations' argument before the Emergency Board that their purpose in demanding the 40 Hour Work Week was "Not to add to rates of pay or to increase earnings, but simply to enable railroad men to live as other men." Under the circumstances existing in this case the contention and claim of the Employees can be interpreted only as an attempt to force the Carrier to have the Agent on duty Sundays, at the time and one-half rate, to do nothing more than be present while the Cashier is on duty performing work properly assigned to the Cashier position.

Therefore, in the absence of any showing that the services of the Agent are required on Sundays it is the position of the Carrier that the Employees' contention and claim be denied.

Without any thought or intention of detracting from the position of Carrier and the merits supporting said position as argued in the foregoing submission, the Carrier, realizing, but not necessarily anticipating, the possibility of an adverse decision, and, further, appreciating the fact that your Board has rendered conflicting decisions where claims for payment at the punitive (time and one-half) rate have been made, as here, when no service whatever was performed by the claimant, desires to call attention to the fact that the preponderance of such decisions recognize the pro rata (straight-time) rate only as applicable where the merits of the case have, in the opinion of the Board justified payment at all. Awards 3587, 3467, 3955, 4244, 4245, 4963, 5419, 5620, 5638. In this particular case, however, the contention of the Employees is entirely lacking in merit and accordingly should be unqualifiedly denied.

The substance of matters contained in this submission have been the subject of discussion in conference and/or correspondence between the parties.

OPINION OF BOARD: The Carrier advances the contention that this Board has not the right to hear and determine this claim for the reason the record shows that the Clerks have rights under their contract which may be affected by our decision. The Clerks are interested parties, and they have not been given notice of this claim filed with this Division of the Board and have no opportunity to appear and be heard; therefore, we cannot render a valid sustaining award.

Section 3. First. (j) of the Railway Labor Act reads as follows:

"(j) Parties may be heard either in person, by counsel, or by other representatives, as they may respectively elect, and the several divisions of the Adjustment Board shall give due notice of all hearings to the employe or employes and the carrier or carriers involved in any disputes submitted to them."

The Referee in Award 5432 made an exhaustive study of this question and the previous awards of this Division as well as the decisions of the courts. We find ourselves in agreement with the reasoning set forth at length in Award 5432.

This claim, therefore, should be dismissed without prejudice on authority of the above award.

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 this claim should be dismissed without prejudice for the reasons above stated.

AWARD

Claim dismissed without prejudice.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: (Sgd.) A. Ivan Tummon
Secretary

Dated at Chicago, Illinois, this 30th day of January, 1953.

DISSENT TO AWARD NO 6072, DOCKET TE-6126

We dissent.

/s/ _____
J. W. Whitehouse

/s/ _____
C. R. Barnes

/s/ _____
G. Orndorff

/s/ _____
J. H. Sylvester

/s/ _____
Roger Sarchet