Award No. 6098

Docket No. TE-5890

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Paul G. Jasper, Referee

PARTIES TO DISPUTE:

THE ORDER OF RAILROAD TELEGRAPHERS

THE PENNSYLVANIA RAILROAD COMPANY

STATEMENT OF CLAIM: Claim of the General Committee of The Order of Railroad Telegraphers on The Pennsylvania Railroad that:

(1) The positions of Telegrapher at "DOCK" Tower comprehend seven (7) days' continuous operation and that effective September 1, 1949, the Carrier in violation of the Agreement inaugurated a policy of blanking the positions of the Telegrapher on first and second trick on Saturdays and Sundays, requiring the Block Operators on those tricks to absorb the work of the Telegraphers, and

(2) these positions of Telegrapher on first and second trick shall be restored on Saturdays and Sundays, and

(3) All employes suffering any loss in earnings because of the violation of the Agreement as set forth in (1) in this claim shall be compensated because of such loss in earnings, and/or

(4) M. C. Fisher and W. J. Brehony, regular incumbents of first and second trick Telegraphers "DOCK" Tower who filed time claims, shall be compensated at the rate of time and one-half when not used on their rest days from February 4th and 25th respectively, when there were no available extra idle employes.

EMPLOYES' STATEMENT OF FACTS: The Wage Scale of the Telegraphers' Agreement, New York Division, contains the following positions and rates of pay in "DOCK" Tower, Newark, N. J.:

LOCATION	TRICK	POSITION	HOURLY RATE
Dock	1st, 2nd, 3rd	Block Operator	$1.905
Dock	1st & 2nd	Telegrapher	1.773
Dock	1st, 2nd & 3rd	Leverman	1.773

The Carrier contends that the claim for "All employes suffering any loss in earnings" is improper and must be denied for it does not comply with Regulation 4-T-1 (a), nor with the provisions of the Railway Labor Act.

Item (4) contemplates the payment to named Claimants of compensation based on the time and half-time rate. It is a well established principle of this Board that punitive rates are not compensible for time not worked. In no event, therefore, would the named Claimants be entitled to compensation in excess of that provided by the straight time rate. The attention of the Board is directed to Award No. 4244 and the Awards listed therein.

III. **Under the Railway Labor Act, the National Railroad Adjustment Board, Third Division, is Required to give Effect to the Said Agreement and to Decide the Present Dispute in Accordance Therewith.**

It is respectfully submitted that the National Railroad Adjustment Board, Third Division, is required by the Railway Labor Act to give effect to the said Agreement and to decide the present dispute in accordance therewith.

The Carrier demands strict proof by competent evidence of all facts relied upon by the Claimants, with the right to test the same by cross-examination, the right to produce competent evidence in its own behalf at a proper trial of this matter, and the establishment of a record of all of the same. Oral hearing is desired.

All data contained herein have been presented to the employes involved or their duly authorized representative.

(Exhibits not reproduced.)

OPINION OF BOARD: With the advent of the 40-hour week, which became effective on September 1, 1949, the Carrier abolished the position of telegrapher on the first and second tricks, on Saturday and Sunday, at Dock Interlocking Tower, Newark, New Jersey.

On each the first and second trick, Monday through Friday, a telegrapher, block operator, and leverman are on duty at the Dock Interlocking Tower. A block operator and leverman are the only assigned positions on the third trick, and were prior to September 1, 1949.

Both block operators and telegraphers involved in this case have common seniority and appear on the same roster and are subject to the same Agreement. The Agreement does not define the duties of block operator, telegrapher, and leverman. The record shows that the telegrapher on the first and second tricks, prior to September 1, 1949, assisted the block operator. Both performed the same duties at the Dock Tower.

The Agreement here involved does not require the Carrier to employ a specified number of employes, or to employ persons to do work which the Carrier does not want performed. This, of course, is contingent on it not violating the Agreement. It is also true that the Carrier can determine the number of employes to be used in the performance of work, except as it is limited by Agreement. The Forty-Hour Week Agreement did not invade this prerogative. The Forty-Hour Week Agreement further did not permit the Carrier to abolish a position where it is necessary that work be performed seven days a week. If the same work was necessary to be performed seven days a week prior to the Forty-Hour Week Agreement, and the same work was necessary to be performed after September 1, 1949, then the position could not be blanked or abolished. The Forty-Hour Week Agreement does allow the Carrier to use relief, extra, or unassigned men, stagger work or combine duties where such combination does not violate the Agreement.

If the telegraphers in this case, assigned to assist the block operators in the performance of their duties, were not needed on the first and second tricks because of the reduction of work on Saturday and Sunday, then, under the Agreement, the Carrier could abolish the position on those days.

Regulation 5-G-1 (f) provides:

> "All possible regular relief assignments with five (5) days of work and two (2) consecutive rest days will be established to do the work necessary on rest days of assignments in six (6) or seven (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."

This regulation requires the relief assignments on the sixth and seventh days where work is necessary to be performed. Where it is necessary that work be performed on the sixth and seventh days of the week, the Carrier cannot arbitrarily blank the position.

The question, then, is, was there a change of conditions and a reduction in work on Saturday and Sunday at Dock Tower?

The record reveals in this case that there was no change of conditions on and after September 1, 1949. Practically the same conditions existed after September 1st as existed prior thereto. The work remained the same.

The Forty-Hour Week Agreement did not allow the Carrier to do away with positions where, as defined under Regulation 5-G-1 (a), the "service, duties, or operations necessary to be performed the specified number of days per week" were needed.

The Forty-Hour Week Agreement did not do away with the requirement that there must be a change of condition before a seven (7) day position can be abolished or blanked. Unless there was a change of condition which reduced the work, a telegrapher's position could not be blanked or abolished on the first and second tricks on Saturday and Sunday.

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

Claim sustained at pro rata rate.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: (Sgd.) A. Ivan Tummon
Secretary

Dated at Chicago, Illinois, this 24th day of February, 1953.

DISSENT TO AWARD 6098, DOCKET TE-5890

The opinion of the majority states:

"Both block operators and telegraphers involved in this case have common seniority and appear on the same roster and are subject to the same Agreement. The Agreement does not define the duties of block operator, telegrapher, and leverman. The record shows that the telegrapher on the first and second tricks, prior to September 1, 1949, assisted the block operator. Both performed the same duties at the Dock Tower."

In other words, the majority finds, and properly so, that both the block operator and the telegrapher have common seniority rights under the same Agreement; the Agreement does not define the duties of either; the telegrapher (7 days a week prior to Septembr 1, 1949 and from Monday to Friday after that date) assists the block operator in the performance of the latter's duties and, consequently, both perform the same type of duties—i.e., blocking trains at Dock Tower.

After making such findings the majority then concludes that the Agreement between the parties prohibits the Carrier from using one employe (the block operator) to block trains at Dock Tower on Saturdays and Sundays instead of two (the block operator plus the telegrapher), and that the Agreement requires the Carrier to continue to use two employes to do this work although it is obvious that only one is necessary (since the block operator has been doing it alone without difficulty for over two years). This conclusion is reached in spite of the fact that the majority admits that the work in question does not belong exclusively to the telegrapher as distinguished from a block operator; there is no violation of any seniority provision of the Agreement; and in the face of the findings of the majority that "the Agreement here involved does not require the Carrier to employ a specified number of employes - - -" and "it is also true that the Carrier can determine the number of employes to be used in the performance of work, except as it is limited by Agreement"—the majority has not referred to any provision of the Agreement which so limits the Carrier.

Despite the findings referred to above, the majority concludes that "unless there was a change of condition which reduced the work, a telegrapher's position could not be blanked or abolished on the first and second tricks on Saturday and Sunday." Why not? There is no provision of the Agreement which provides that once a Carrier has employed two persons to do the same task it must forever thereafter continue to employ two persons even though it finds that only one person is necessary to do it. The majority erroneously concludes that there is some general principle to the effect that "there must be a change of condition before a seven (7) day position can be abolished or blanked." What is the basis for such a conclusion? No provision of the Agreement is cited which supports it as applied to the facts of this case. We have here simply a situation where the work of a telegrapher and block operator is interchangeable and where the Carrier employed a telegrapher to assist a block operator in the performance of the latter's duties. The Carrier decided that it had an excessive force engaged in blocking trains at Dock Tower on these days and no assistance for the block operator was necessary on Saturday and Sunday. Consequently, the Carrier established, effective September 1, 1949, 5-day assignments for the telegraphers from Monday to Friday, inclusive.

This is not a case where work performed from Monday to Friday by telegraphers was assigned by the Carrier on Saturday and Sunday to some one who had no right to perform it under the Agreement (the majority finds that there was no distinction between the work performed by the block operator and the telegrapher, that the telegrapher merely assisted the block operator and that both had common seniority); the Carrier did not remove any work from telegraphers which they had the exclusive right to perform;

it simply had an excessive force assigned to block trains at Dock Tower and discontinued the use of an assistant to the block operator on Saturday and Sunday because no such assistance was necessary. Nothing in the Agreement between these parties prevents such an action and the majority has not been able to find any such provision. The majority, in effect, has determined (without any basis in the record for such a determination) that assistance for the block operator is necessary on Saturday and Sunday, and that the Carrier must continue to supply it—while at the same time admitting that the Carrier has the right to determine how many employes it will use to do a given task. In fact, the record shows that no such assistance is necessary—for some time prior to September 1, 1949 the number of trains passing Dock Tower on Saturday and Sunday had become progressively less; between September 1, 1949 and June 1950 there was a further reduction of 23%; the block operator has been performing the work satisfactorily and without complaint on his part for over three years.

The operation of Dock Tower is carried on seven days a week, but nothing in the 40-Hour Week Agreement requires the Carrier to employ the same number of persons in such an operation on every day of the week, and this Board has so held repeatedly. Nothing in the Agreement between these parties either before or after September 1, 1949 provides that the Carrier must use two employes to block trains when one employe can do it, and this is true whether or not the Carrier may have used two employes to do this work at some time in the past. This Award constitutes an invasion of the Carrier's prerogative of determining how many employes it will use to perform a given task. No support for such conclusion can be found in the Agreement and none is referred to by the majority.

The majority says, in one breath, that the 40-Hour Week Agreement did not change the situation, and, in the next, cites Regulation 5-G-1(f) and says:

> "This regulation requires the relief assignments on the sixth and seventh days where work is necessary to be performed. Where it is necessary that work be performed on the sixth and seventh days of the week, the Carrier cannot arbitrarily blank the position."

This is the only provision of the Agreement cited by the majority. It is not clear whether it is cited in support of the conclusion reached. It is clear that this rule does not require the Carrier to employ two men to block trains at Dock Tower where one man can do the work. The work of assisting the block operator was not "necessary to be performed" on the sixth and seventh days of the week.

Furthermore, this Board has held, in many well-reasoned awards, that this rule does not require the Carrier to establish relief assignments where work is to be performed six or seven days a week, but that a number of other devices are available under the 40-Hour Week Agreement. The majority itself states:

> "* * * The Forty-Hour Week Agreement does allow the Carrier to use relief, extra, or unassigned men, stagger work or combine duties where such combination does not violate the Agreement."

Having admitted that the 40-Hour Week Agreement permits the Carrier to combine the duties of two jobs on the rest days of one of them, the majority in this case presumably came to the conclusion that the Schedule Agreement was violated by combining the duties of the block operator and the telegrapher on Saturday and Sunday. No provision of the Schedule Agreement is cited to support this conclusion. What more perfect case for the combination of duties could be found than this one—where the duties of the block operator and telegrapher were substantially the same and the telegrapher was admittedly merely an assistant to the block operator?

The Award is not based upon the Agreement but upon a series of vague and improper assumptions which have no foundation in the Agreement nor in the facts of this case.

For the reasons stated we dissent.

/s/ R. M. Butler

/s/ W. H. Castle

/s/ E. T. Horsley

/s/ C. P. Dugan

/s/ J. E. Kemp