Award No. 6453
Docket No. TE-6331

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Dudley E. Whiting, Referee

PARTIES TO DISPUTE:

THE ORDER OF RAILROAD TELEGRAPHERS

THE ATCHISON, TOPEKA & SANTA FE RAILWAY COMPANY
— Eastern Lines —

STATEMENT OF CLAIM: Claim of the General Committee of The Order of Railroad Telegraphers on the Atchison, Topeka & Santa Fe Railway System, that:

(a) The Carrier violated the terms of the Agreement between the parties when the first trick telegrapher position at "AU" Chanute was blanked on October 1, 2, 3, 4 and 5, 1948, instead of filling the position by working the second and third shift telegraphers overtime on each of these days.

(b) That said second and third shift telegraphers regularly assigned at "AU" Chanute be paid 4 hours overtime each day on October 1, 2, and 3, and one hour overtime each day on October 4 and 5, 1948, because not so used.

EMPLOYES' STATEMENT OF FACTS: An Agreement, bearing effective dates of December 1, 1938, between the parties to this dispute is in evidence.

On page 31 of said Agreement we find:

"Chanute 'AU' Telegrapher-clerk (2) (L) $ .76"

At the time the agreement was made effective, there were employed two telegrapher-clerks at "AU" Chanute, the force was subsequently augmented to permit round the clock service at that point. On October 1, 1948, there were employed at "AU" Chanute three telegrapher clerks seven days per week with the following assigned hours:

First Shift	8:00 a.m. to 4:00 p.m.
Second Shift	4:00 p.m. to 12 mid.
Third Shift	12 mid. to 8:00 a.m.

On September 30, 1948, about 7:00 p.m., First shift telegrapher-clerk, Gill, reported that he was ill and unable to work. Carrier transferred the work of his position to employes in the "DI" Chanute relay telegraph office; said employes being in another seniority district, and blanked his position on October 1, 2, 3, 4, and 5.

4. The Third Division has held, in its Award No. 2827, that the rules of a current agreement can neither be interpreted nor applied in a manner that would countenance a violation of any law enacted pursuant to the police powers of the Government.

5. The Third Division has approved of the principle, in its Award No. 2827, that the Carrier is entitled to exercise reasonable discretion in deciding whether the Hours-of-Service Law would be violated by the course of conduct it is to follow under facts confronting it in a particular case.

6. Article III, paragraphs (e-1) and (e-2) and Article XVII of the Telegraphers' Schedule, effective December 1, 1938 and the "Rest Day" Rule of Mediation Agreement—Case A-2070, cited by the Employes in support of their claim, do not, as a matter of fact, have any bearing on or relation to such claim. These rules, therefore, lend no support whatsoever to the Employes' claim.

7. Third Division Awards Nos. 2467 and 4102, cited by the Employes in support of this claim, do not in fact support the claim. Award No. 2467 being a Clerks' case and Clerks not being subject to the Hours-of-Service Law, and Award No. 4102 having been decided on failure of Carrier to exercise proper diligence in presenting argument in support of its position.

8. The claim of the claimants for one hours' pay on October 4 and 5, 1948 is impractical, groundless and outside of the rules of the then current agreement.

In conclusion, the Carrier respectfully asserts that it should not be penalized for declining to violate the Hours-of-Service Law, and in the absence of a mutually agreed upon rule for the filling of short temporary vacancies when extra lists are depleted, respectfully suggests that this case be dismissed and remanded to the parties for the adoption of a mutually agreeable and lawful understanding to govern the filling of such vacancies henceforth.

The Board will also readily recognize that the Employes' claim in the instant dispute for four hours at time and one-half on October 1, 2 and 3, 1948 and one hour at time and one-half on October 4 and 5, 1948 in behalf of each of the two claimants, at Chanute, **for work not performed** is contrary to the Board's well established principle that the right to work is not the equivalent of work performed under the overtime and call rules of an agreement.

All that is contained herein is either known or available to the Employes or their representatives.

OPINION OF BOARD: We have consistently held that the unilateral transfer of work from one seniority district to another violates the seniority rights of the employes in the district from which it was taken and thus constitutes a violation of the Agreement. See Award No. 5437. Thus we hold that the Carrier violated the Agreement when it blanked first trick position at "AU" Chanute and assigned the work normally performed there to telegraphers in another seniority district.

The Carrier resists the claim of these particular employes on the basis that to have used them to fill the position would have constituted a violation of the hours of service law. That proposition was answered in our Award No. 5172 and the awards there cited.

The claim will be allowed only at the pro-rata rate in conformity with many awards of this Division.

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

The Agreement was violated.

AWARD

Claim sustained to the extent stated in the Opinion.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: (Sgd.) A. Ivan Tummon
Secretary

Dated at Chicago, Illinois, this 19th day of January, 1954.

DISSENT TO AWARD 6413, DOCKET TE-6331

This dispute involves the Hours of Service Law.

The Opinion correctly states:

"The Carrier resists the claim of these particular employes on the basis that to have used them to fill the position would have constituted a violation of the hours of service law."

Answering this defense, the majority then erroneously conclude that this defense was answered by Award 5172 and the awards there cited (2827, 3609 and 4645), entirely ignoring a subsequent court decision, cited by Carrier in the record, interpreting the Hours of Service Law, not evident in the four named awards. Under the ruling in that court decision (No. 3677-Civil, Oklahoma No. 5262), covering a case identical in all respects with the instant case, to have worked employes, as here contended, would have been in violation of the Hours of Service Law. This conclusion is supported in the Report (p.6) of the Director of the Bureau of Safety to the Interstate Commerce Commission for the fiscal year ending June 30, 1948.

The majority have cited Award 2827. But, the Board there held:

". . . That the rules of a current agreement can neither be interpreted or applied in a manner that would countenance a violation of any law enacted pursuant to the police powers of the Government, and we approve of the principle the Carrier is entitled to exercise reasonable discretion in deciding whether the Hours of Service Law would be violated by the course of conduct it is to follow under facts confronting it in a particular case."

Here, the Carrier did exercise reasonable discretion, and worked its employes in such manner as to avoid violation of the Hours of Service Law.

Carrier has complied with the Law, as interpreted by the Courts, and has done that which our awards clearly permit.

For the above reasons, the award herein is in error, and we dissent.

/s/ J. E. Kemp

/s/ C. P. Dugan

/s/ R. M. Butler

/s/ E. T. Horsley

/s/ W. H. Castle