Award No. 6688
Docket No. TE-6303

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

William M. Leiserson, Referee

PARTIES TO DISPUTE:

THE ORDER OF RAILROAD TELEGRAPHERS

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY (Eastern Lines)

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

(a) The Carrier violates the terms of the prevailing agreement between the parties when, commencing with September 1, 1949, it required the occupants of a monthly rated position of agent at Shawnee, Oklahoma to assume and perform, in addition to his own duties, the duties of operator at Shawnee, Oklahoma on Saturday, an assigned rest day of the operator, beginning with the first Saturday in September 1949, which duties are those normally performed by the operator at Shawnee, assigned hours 8:00 A. M. to 5:00 P. M., Monday through Friday, inclusive.

(b) That beginning with the first Saturday on which the violation occurred and continuing thereafter until the violation is corrected, the Carrier shall compensate the senior available extra employe at the straight time rate of the operator's position with a minimum of eight (8) hours each day, or if no extra employe available, then the Carrier shall compensate the employe who occupied the position of operator at Shawnee, Monday through Friday, for eight (8) hours each day at time and one half.

EMPLOYES' STATEMENT OF FACTS: A supplemental Agreement, bearing effective date of September 1, 1949, an agreement bearing effective date of December 1, 1938, and agreement bearing effective date of June 1, 1951, between the parties to this dispute are in evidence.

On September 1, 1949, there were employed in "SN" Shawnee, Oklahoma freight and passenger station, an Agent working on a monthly salary on a so-called "all services rendered" basis with no assigned hours and a telegrapher assigned 8:00 A. M. to 5:00 P. M. with one hour off for lunch.

Beginning with September 1, 1949, when the Supplemental Agreement covering provisions of the so-called National Forty-Hour Week Agreement was made effective on this property the Carrier changed the six day per week assignment of the operator at "SN" Shawnee to work Monday through Friday inclusive, with rest days of Saturday and Sunday, blanked his position on Saturday and required the monthly rated agent to perform the duties attaching to the telegrapher's position.

have occurred, are barred from consideration. Time claims must be presented in writing to the Railway Company to be entitled to consideration, and any payment claimed will, if allowed, be restricted to a period commencing not earlier than thirty (30) days prior to date so presented."

The Board will also readily recognize that that portion of the Employes' claim in the instant dispute for eight hours at time and one-half in behalf of the occupant of the Telegrapher-Clerk (operator) position at Shawnee for work not performed on Saturdays 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. (Exhibits not reproduced.)

OPINION OF BOARD: When the 40-Hour Week provisions of the Agreement between the parties became effective on September 1, 1949, the Carrier assigned the Agent-Telegrapher in charge of the station at Shawnee, Oklahoma, to a six-day work-week, with a rest day on Sunday. At the same time it assigned the Telegrapher-Clerk in this station to a five-day work-week, Monday through Friday, with rest days on Saturday and Sunday. Prior to September 1949, the Agent-Telegrapher worked 56 hours a week, and the Agreement required this to be changed to 48 hours. The Telegrapher-Clerk's previous assignment was a work-week of 48 hours, which was reduced to five 8-hour days.

The Agent-Telegrapher is paid by the month for "all services rendered." He has no regular assigned hours, but normally works from 8 A. M. to 5 P. M. The Telegrapher-Clerk's assigned hours are from 8 A. M. to 5 P. M. with an hour out for lunch. The duties and responsibilities of the two assignments are not the same and the Agent-Telegrapher's rate of pay is higher, but some of the same duties are performed on both assignments. Service at the station is necessary and required six days a week.

Because the Telegrapher-Clerk works only five days, Monday through Friday, and the Agent-Telegrapher works every day except Sunday, the Carrier decided to transfer to the Agent-Telegrapher the necessary work on Saturday which prior to September 1949 was regularly performed on that day by the Telegrapher-Clerk as part of his six-day bulletined assignment. Whether this action of the Carrier is permissible or not under provisions of the Agreement is the sole issue in the present case although the lengthy record of more than 150 pages contains much discussion of other issues that have little or no relevance to the instant dispute.

The Employes charge that the Carrier violated the Agreement when beginning with September 1, 1949, it required the Agent-Telegrapher "to assume and perform, in addition to his own duties, the duties of operator . . . (Telegrapher-Clerk) on Saturday, an assigned rest day of the operator."

The Carrier denies the charge, and contends that there is nothing in the 40-Hour Week provisions of the Agreement which prohibits assigning the Saturday work to the Agent-Telegrapher in order to cover the six-day operation; and further, that a 1943 Memorandum of Agreement still in effect specifically provides that the Carrier shall be unrestricted in assigning duties to the Agent-Telegrapher.

Before considering the merits of the dispute, it is necessary to dispose of some side issues which took up many pages of the record, but which we think are of no importance in deciding the issue here. First, there is disagreement between the Parties as to whether the title of the monthly-rated position is Agent or Agent-Telegrapher. Although the Wage Appendix to the Agreement lists the position as "Agent-Telegrapher," the Employes contend it should be "Agent." Since the position is covered by the Agreement, though

with exceptions such as its 6-day work-week with unassigned working hours and payment for all services rendered, this case does not involve transferring work to employes outside the Agreement. It is the nature of the assignment that is important, regardless of the name given to the position or classification. We use the name Agent-Telegrapher because it is so listed in the printed Wage Schedule.

Secondly, there is contention whether the Agent-Telegrapher does or does not copy train orders during the first five days of his work-week. The question here is whether any of the regularly assigned duties of the Telegrapher-Clerk were transferred to the monthly rated position, not that the Agent was required to do train order work only on Saturdays.

Thirdly, there is the Carrier's argument that the word "positions" as used in the 40-Hour Week Agreement changed "the former concept of what constitutes a position", and it cites awards of this Division so holding. But a careful reading of the Parties' printed Agreement shows that in the seniority and bulletin rules of the Agreement the word "position" means what it always has meant in such rules of labor agreements on the railroads; namely, the job or assignment that is new or vacant and has to be bulletined. Prior to September 1, 1949, these positions usually worked six days a week, sometimes seven days a week. When the 40-Hour Agreement became effective, most of these same positions were reduced to 5 days a week, some to 6 days.

All that the "Note" in Article III of the 40-Hour Agreement here does is to distinguish "positions" from services, duties or operations which may be necessary on different positions for 7, 6 or 5 days. This is made particularly plain in Section 20, A-1 of Article III, which provides that "Employes occupying positions requiring a Sunday assignment of the regular week-day hours shall be paid at the (overtime) rate . . . whether the required service is on their **regular position** or on **other work.**" (Emphasis added) Plainly regular positions means in this sentence just what it meant in the previous Agreement and still means in the bulletin and seniority rules that were carried over to the present Agreement; namely, the job to which an employe is assigned with the number of days specified in the bulletin. The words "other work" clearly refers to the same duties or services on other positions or unassigned days that the Carrier may require in order to cover its operational requirements for six or seven-day service. Prior to the 40-Hour Week it was well known that one position could cover seven days' service by working 56 hours, or by staggering positions which worked six days and allowing one rest day in seven. We think there is no reason for misunderstanding that the word "position" in the present agreement has the same meaning that it had in the preceding agreements.

Turning now to the merits of the dispute it is important to bear in mind that Section 16 of Article III stipulates that "Existing assignments reduced to a five day basis under this agreement shall not be considered new jobs under bulletin rules . . ." The duties of the assignments could not be diverted to other employes in converting to the 40-hour work-week, except as specifically provided in Section 10 (a), by a regular relief assignment; or by a qualified extra employe as provided in 10 (b), and also in Section 14 if one of the days of the regular assignment is left unassigned. In all other cases, Section 14 prescribes, the day's work belongs to the regular employe.

Claimant's assignment prior to September 1, 1949, was to work six days a week including Saturday. In converting this to a five-day assignment or position, the Carrier was not obligated to establish a regular relief position if this was not possible or practical; it was given two other alternatives by Sections 10 and 14, either to use a qualified extra employe or to use the regular assigned employe. The Carrier did not use any of the alternatives the Agreement specifies for preserving to the occupant or an extra employe the sixth day of work that was an integral part of the Telegrapher-Clerk's assignment prior to September 1949. Instead it detached the Saturday day's work and made it a part of the Agent-Telegrapher's assignment.

The Carrier repeatedly argues that "the Telegrapher-Clerk's position at Shawnee is a five-day position and not a six-day position." This is obvious for all previous six-day positions had to be reduced to five on September 1, 1949. But it goes on to contend that Saturday being Claimant's rest day, therefore rest day relief is not necessary for this day. But the reason it is not necessary is because the Carrier combined the Saturday work done by the Telegrapher-Clerk before September 1 with the duties of the Agent-Telegrapher who has Saturday as his sixth work-day. The issue here is whether it had the right to do this beginning with September 1. We cannot agree that it does have the right so to combine the two assignments of different classifications so that on Saturday one employe will perform the duties of both. The Carrier's contractual obligations under Sections 10 (a) and (b), 14, and 16, do not permit such a combination of assignments, and this Division has so ruled in many cases, (Awards 5736, 5579, 5271-5275, 5967).

But aside from these obligations, which it does not acknowledge, the Carrier relies on the 1943 Memorandum of Agreement above referred to, and it contends that paragraph 6 of this Agreement distinguishes the present case from the awards cited. The paragraph provides that "there shall be no restrictions on the duties which may be required of the agents listed in" (the Scope Rule). Agent-Telegraphers are included in the list, and it is clear that so far as these employes are concerned they are obligated to perform any duties that the Carrier may want to assign to them. But there is nothing in this paragraph which authorizes the Carrier to transfer to such agents duties from assignments belonging to other employes by reason of their seniority.

What the paragraph means is that the Carrier is unrestricted in its right to assign any work to the Telegrapher-Agent which it has not bound itself by the seniority or other rules of its working contract to have performed by other employes. If there was any doubt about this prior to September 1949, the rules of the 40-Hour Agreement no longer leaves room for doubt. In converting from the six to the five-day work-week, the contractual right of the Telegrapher-Clerk to the work of his six-day assignment was preserved by Section 16 of Article III. The extent to which the work of the sixth day might be done by another employe was strictly limited to a regular relief employe or an available extra employe as specified in Section 10(a) and (b) and Section 14. In the absence of a relief or extra employe, this last section states clearly that the sixth days' work belongs to the holder of the five-day assignment.

The Referee's attention was called to Award 6602 which was adopted by the Division the day before the present case was argued. This Award ruled contrary to the Awards cited above, and appears to be based on the assumption that Award 6184 was authority for combining the work of Agents and Telegraphers even though these positions are numbered as two different classes. But Award 6184 was careful to point out: "It should be understood that such employes (whose work is combined so that one performs the duties of both) must be of the same class and within the same seniority district."

Article XX, Section 15 (g) of the Agreement here states that "In the exercise of displacement rights employes covered by the scope of this Agreement are segregated as to classes . . ." Agent-Telegraphers are numbered Class 2 and Telegrapher-Clerks are in Class 4. It may be that Award 6184 did not use the word "class" in the same sense that it is used in this Agreement. But Awards 5736, 5579, 5271-5275, and 5967 have ruled that the duties of such different classes may not be combined so that one employe performs the duties of both. The Referee is of the opinion that these Awards are controlling.

Accordingly, the Carrier violated the Agreement, and the claim should be sustained. It appears, however, that the claim was not filed until December 25, 1949, and Section 10 of Article V governs time claims not presented within 30 days of date claimed. Compensation must therefore be in accordance with this provision.

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 Carrier violated the Agreement.

AWARD

Claim sustained in accordance with Opinion and Findings.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: (Sgd.) A. Ivan Tummon
Secretary

Dated at Chicago, Illinois, this 25th day of June, 1954.

DISSENT TO AWARD NO. 6688, DOCKET NO. TE-6303

The Opinion and Award in this docket misinterpret the 40-Hour Week Agreement and are contrary to the many consistent awards which have been rendered by this Division on the questions involved in this case. The improper and unnecessary confusion which would result if this decision were to be given faith and credit would be harmful and unfortunate.

An analysis of the Opinion indicates that the Referee has committed no less than five separate errors.

The first of these is the same error which this Referee committed in reaching his conclusions in Award No. 6689. In this case, as in that one, he has made the curious finding that it was improper for the Carrier to change the work assignments of employes at the time of the conversion to the five-day week in September of 1949. He says:

> "The duties of the assignments could not be diverted to other employes in converting to the 40-hour work-week * * *."

As in Award 6689, the Referee makes no finding that the employes to whom the work was "diverted" were not as equally qualified and entitled to perform it as the employes who previously performed it. We are concerned here with six-day service at a small agency station where, prior to September 1949, the two employes involved each worked six days a week. Both were, and still are, subject to the Agreement with The Order of Railroad Telegraphers; both were, and are, carried on the same seniority roster and both of them did, and still do, substantially the same work. When the five-day week became effective, because the volume of work necessary to be performed on Saturday did not require the presence of two employes, the Carrier assigned one of the employes (the Telegrapher-Clerk) to work Monday to Friday, inclusive, and continued the other employe (the Agent-Telegrapher) on a six-day week, Monday to Saturday, inclusive.

The Referee cites no rule of the Agreement which prohibits the assignment of the work to the Agent and, in fact, takes cognizance of a special agreement between these parties on this property which he finds "specifically provides that the Carrier shall be unrestricted in assigning duties to the Agent-Telegrapher." Thus the Referee, while admitting that the Agent was both qualified and entitled to perform the work, finds that the Carrier wrongfully "diverted" the work to him. If the work was not the exclusive property of the Telegrapher and could be properly assigned to the Agent, then there is no possible justification for the conclusion that it could not be assigned to him **at the particular time** the 40-Hour Week Agreement became effective. Nothing in that Agreement guarantees to employes forever the particular work that they happened to be doing when the Agreement became effective. The provisions of the basic contract respecting rights to perform work were not changed with the adoption of the 40-Hour Week Agreement and the Carrier continued to have the same rights to assign and re-assign work following that Agreement as it had prior thereto.

Obviously, a very considerable revision of working assignments was required by the conversion to the shorter work week. Work which had previously been done by employes working six days a week had to be rescheduled on a five-day basis. Work on the sixth day either had to be eliminated or re-assigned to other employes. As long as these other employes were those qualified by seniority to do the work, there were no restrictions on their identity or on the capacity in which they performed the work. They could be relief employes, extra employes, or other regular employes working staggered assignments. The point is that there had to be a diversion of work. The finding of the Referee to the effect that existing employes continued to have rights to perform all work previously assigned to them is not only contrary to the realities, it is completely antagonistic to the basic purpose of the Emergency Board in recommending the 40-Hour Week. In its letter of February 27, 1949, by which it explained the meaning and purpose of its report, the Board 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."

The second error committed by the Referee is his description of the so-called "alternatives" available to the Carrier for performance of assigned work on the sixth day of the work week. This is the same error that he committed in Award No. 6690. He has here held again that a carrier must either make a relief assignment for the individual job, give the work to an extra employe, or use the regular employe at the overtime rate. The only place in the 40-Hour Week Agreement where any such requirement appears is reproduced in the Agreement of these parties as Article III (a-11-E), which reads as follows:

> "Where work is required by the Carrier to be performed on a **day which is not a part of any assignment,** it may be performed by an available extra or unassigned employe who will otherwise not have 40 hours of work that week; in all other cases by the regular employe." (Emphasis added.)

This rule is concerned exclusively with the performance of work on days which are **not** a part of any assignment. All of the work in this case was assigned work, and there was **no** work performed in this case on any day which was **not** a part of the assignment. The rule referred to has no possible application here. There is no other rule in the 40-Hour Week Agree-

ment which deals with the identity of any person to be used to fill an assignment or to perform work on a day which is a part of an assignment. The so-called "alternatives" referred to by the Referee, insofar as they apply to work on assigned days, are inaccurate and incomplete in that they omit the first and most important alternative available to the carriers for performance of such work. The omitted alternative is that of performing the work through the device of staggered assignments. Provisions for this method of performing work are repeatedly spelled out in various rules of the Agreement and were later point out and explained by the Members of the Emergency Board who wrote the report. The very first rule in the National Agreement provides:

> "The carriers will establish, effective September 1, 1949, for all employes, subject to the exceptions contained in this Article II, 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 carriers' operational requirements;** so far as practicable the days off shall be Saturday and Sunday." (Emphasis added.)

In its February 27th letter, the Emergency Board said:

> "The tenor and substance of the Board's discussions and recommendation show definitely that the Board intended to permit the Carriers to stagger workweeks."

The right of the carriers to perform assigned work by means of staggered assignments has been explicitly recognized by this Board in at least 31 prior awards.* The contrary and unsupported finding in this docket is unworthy of credence.

The third error committed by the Referee appears in his attempt to explain the conclusions he has reached in this docket by finding that the Carrier has combined work of "two assignments of different classifications." In undertaking to distinguish this decision from the many awards (he mentions only 6184 and 6602) which have held that the carriers have the right to combine work on rest days, the Referee found that the Carrier could not do so in this case because the employes were not of the same "class." The error is demonstrated by two consecutive but totally incompatible statements which appear at the end of the fifth from last paragraph of the Opinion:

*Third Division Awards Nos. 5250, 5290, 5545, 5546, 5547, 5912, 6001, 6002, 6042, 6075, 6184, 6212, 6216, 6232, 6602; Second Division Awards Nos. 1528, 1565, 1566, 1644 to 1655, 1669.

> "Agent-Telegraphers are included in the list, and it is clear that so far as these employes are concerned they are obligated to perform any duties that the Carrier may want to assign to them. But there is nothing in this paragraph which authorizes the Carrier to transfer to such agents duties from assignments belonging to other employes by reason of their seniority."

The first sentence recognizes that the Carrier has the right to assign Agent-Telegraphers any duties that it may want to assign to them. The second sentence then says that there is nothing in the Agreement which authorizes the Carrier to assign to them work which "belongs to other employes by reason of their seniority." What seniority? These employes are both members of the Telegraphers' craft, both are carried on the same seniority roster, and both have equal rights to the work in question. The only differences between them are that they have different job titles and one (the Agent-Telegrapher) is paid on a monthly rate whereas the other (the Telegrapher-Clerk) is paid an hourly rate. Nowhere in the Agreement or in

the awards of this Board can there be found any authority for the distinction which the Referee attempts.

The Referee himself admits some doubt as to the validity of his conclusion when he says, "It may be that Award 6184 did not use the word 'class' in the same sense that it is used in this Agreement." That award held that the employes concerned must be "of the same class and within the same seniority district." A plain reading of that award and many other awards on this subject indicates that the restriction extends only to the use of employes not entitled by scope or seniority to perform the work in question.

This principle was established early after the 40-Hour Week Agreement became effective and the question has been put to rest by repeated rulings since that time. In **Award 5250** this Division decided a case where certain work performed by a Clerk during his five-day week was assigned to a member of an altogether different craft (a Telegrapher) on the Clerk's rest days. Because the work involved was found to be not such as fell exclusively within the Clerks' Agreement, the Board held that it was proper to assign it to other employes equally entitled to perform it. In its Opinion, the Board, citing previous decisions, said that:

> " * * * where the Board has found that the work of ticket clerk had not passed under the exclusive protection of the Scope Rule of the Clerks' Agreement, it has permitted the assignment of such work to telegraphers on Sundays and holidays."

A similar ruling was made in **Award 5290,** again involving two separate crafts. In other awards, such as **5545, 5912, 6001, 6075** and **6184,** the Board has approved the performance of rest day work by other members of the same craft. The principle involved in all of these decisions is the same, namely, that work may be assigned on rest days to any employe qualified and entitled to perform it. As we said in **Award 6001:**

> "We do not think any rule of the agreement states directly and explicitly that a man working on one position having certain normal duties may not, if qualified and under the same Scope Rule and in the same seniority district, perform on his own regularly assigned work days some of the normal duties of another position when the incumbent of the latter is absent during the latter's rest days."

The effort of this Referee to justify his different conclusion in this case by arbitrarily categorizing these two employes as members of a different "class" is justified neither by the facts nor the authorities.

The fourth error committed by the Referee repeats an error in Award No. 6690 and consists of his refusal to recognize the long line of recent decisions on this subject and his arbitrary reliance upon a few old, superseded awards. As in Award No. 6690, he has cited five awards which support his position (5736, 5579, 5271, 5275 and 5967) and has refused to be governed by 31 awards to the contrary, 22 of which have been rendered since the most recent of the awards cited. This violent misuse of precedent impeaches the validity of the Award.

The fifth and last error committed by the Referee consists of his finding that the 40-Hour Week Agreement guarantees to employes on five-day assignments the right to perform the work of their position on the sixth day. He says, "the contractual right of the Telegrapher-Clerk to the work of his six-day assignment was preserved by Section 16 of Article III." Section 16 of Article III reads as follows:

> "Existing assignments reduced to a five day basis under this agreement shall not be considered new jobs under bulletin rules and employes will not be permitted to exercise displacement privileges as a result of such reductions."

Neither party to this dispute cited this rule or made any mention of it in its submissions. Both parties are agreed that this rule is not involved. Instead of deciding the dispute before him the Referee has manufactured an entirely new dispute. This action was not only improper **per se**, but has resulted in an entirely unsound conclusion. The Referee is or should be aware that the rule he has referred to was placed in the National Agreement for the sole purpose of avoiding confusion which would have arisen had the carriers been required to re-bulletin all jobs at the time the five-day week became effective. It merely provided that the carriers be relieved of the obligation to bulletin these jobs and that the employes would continue on their same jobs on the reduced work week basis. Nothing in this rule provides, or was ever intended to provide, any guarantees or contractual rights to employes to continue to perform the work of their assignments beyond the five days of their new work week. In fact, the entire text and underlying concept of the 40-Hour Week Agreement is exactly to the contrary. Employes have no rights, with certain specific exceptions not applicable here, to perform any work beyond five days in a work week. The Emergency Board specifically said in its letter of February 27, 1949, that the purposes of the five-day week recommendation 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 * * *.**" (Emphasis added.)

The Opinion which the Referee has filed in attempted support of this Award is lacking in reason, is inconsistent and manifestly unsound, and we vigorously dissent to its adoption.

/s/ C. P. Dugan

/s/ R. M. Butler

/s/ W. H. Castle

/s/ E. T. Horsley

/s/ J. E. Kemp