

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Edward F. Carter, Referee

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**PARTIES TO DISPUTE:**

**THE TEXAS AND PACIFIC RAILWAY COMPANY**

**BROTHERHOOD OF RAILWAY AND STEAMSHIP CLERKS,  
FREIGHT HANDLERS, EXPRESS AND STATION EMPLOYES**

**STATEMENT OF CLAIM:** The claim of the Carrier is that the following claims, which were submitted by the Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employees, are without merit:

**Claim 2.**

. . . claim of B. N. Chapman, General Clerk, Bonham, Texas, that he be compensated at rate of time and one-half for each Saturday retroactive to date Carrier assigned an employee of another craft or class to perform the duties of Mr. Chapman's position on his rest day until this claim has been satisfactorily settled. (T-27904)

**Claim 6.**

. . . claim filed for and in behalf of W. J. Tunnell, General Clerk, Midland, Texas account Carrier assigning and requiring telegraph operators, employees of another craft or class, to sell tickets on Saturdays, Sundays and holidays effective May 2, 1953 and forward until this rules violation has been satisfactorily corrected. (T-28192)

**Claim 8.**

. . . claim filed for and in behalf of Mrs. A. J. Ford, Ticket Clerk, Midland, Texas at the rate of time and one-half for each Saturday, Sunday, and holiday retroactive to May 2, 1953 and each succeeding Saturday, Sunday and Holiday until this violation is satisfactorily disposed of account Carrier requiring and using telegraph operators, employees of another class or craft and holding no clerical seniority under the clerks' agreement, to sell tickets on Saturdays, and Sundays, which days are Mrs. Ford's assigned rest days. (T-28195)

**Claim 9.**

. . . claim of W. M. Shook, Ticket Clerk, Sweetwater, Texas account Carrier requiring and using telegraph operators, employees of another craft or class, to perform work on Saturday and Sunday, assigned rest days of

Ticket Clerk position W-925, effective Saturday, January 5 and Sunday, January 6, 1952 and each succeeding Saturday and Sunday until this violation is corrected. (T-28197)

**CARRIER'S STATEMENT OF CLAIM:** The claim of the Carrier is that the following claims, which were submitted by the Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employees, are without merit:

No. 1. "... claim of Yard Clerk L. F. Teague, Sherman, Texas, that he be paid a minimum of eight hours at overtime rate beginning April 15, 1951 to and including Sunday, December 9, 1951 and on Sunday, March 9, 1952; and also that on a call basis at a minimum of two hours at time and one-half for the two hours and if held on duty in excess of two hours, time and one-half on the minute basis beginning Monday, April 16, 1951 and forward to and including Monday, June 2, 1952, account of Agent performing work on days in question; which duties are assigned to yard clerk position and performed by Yard Clerk Teague." (T-26073)

No. 2. "... claim of B. N. Chapman, General Clerk, Bonham, Texas, that he be compensated at rate of time and one-half for each Saturday retroactive to date Carrier assigned an employe of another craft or class to perform the duties of Mr. Chapman's position on his rest day, until this claim has been satisfactorily settled." (T-27904)

No. 3. "... claim of Woodrow Reeves, General Clerk, Paris, Texas, that he be compensated at the rate of time and one-half retroactive to the date Carrier assigned an employe of another craft or class and not covered by the Scope Rule of the Clerks' Agreement to perform the duties on Mr. Reeves' position on Saturday, his rest day, and forward until this claim is satisfactorily settled." (T-27905)

No. 4. "... claim of L. F. Teague, Yard Clerk, Sherman, Texas for a minimum of eight hours at the rate of time and one-half on July 4, 1951 and September 3, 1951, Fourth of July and Labor Day, account Agent performing yard clerk work on those holidays." (T-28150)

No. 5. "... claim filed for and in behalf of Charles Stowers, Yard Clerk, Midland, Texas account Carrier violating Rule 26½ of the Clerks' Agreement and that Mr. Stowers be paid at rate of time and one-half effective May 1, 1953, due to Carrier requiring Agent Davis, an employe of another craft or class and holding no seniority rights under the Clerks' Agreement to perform work on Friday and Saturday, the regularly assigned rest days of Yard Clerk Stowers, which work is performed by Mr. Stowers five days per week Sunday through Thursday." (T-28191)

No. 6. "... claim filed for and in behalf of W. J. Tunnell, General Clerk, Midland, Texas account Carrier assigning and requiring telegraph operators, employes of another craft or class, to sell tickets on Saturdays, Sundays and holidays effective May 2, 1953 and forward until this rules violation has been satisfactorily corrected." (T-28192)

No. 7. "... claim filed for and in behalf of Jack Kittrell, General Clerk Monahans, Texas account Carrier requiring Agent, an employe of another craft or class and with no seniority under the clerks' agreement to relieve Mr. Kittrell on November 8, 15 and 22, 1952, his regular assigned rest days." (T-28194)

being used by Carriers to handle the work normally attached to clerical workers' jobs on the latter's rest days. The question is rather extensively dealt with by the Board, who with the assistance of Referee Wenke, stated in one of its recent Awards, namely No. 6216, in part:

"Prior to the 40 Hour Week Agreement, under circumstances such as here where clerical work has been regularly assigned to a clerical position during the work week thereof, that same work could not be assigned to employees not under the Clerks' Agreement on the assigned rest days of the clerical positions. See Awards 2052, 2706, 3360, 3425, 3491, 3858, 4059, 4477, 4815, 4832, 4866 and 5880 of this Division. Since the 40 Hour Week Agreement this Division has often held, and properly so, that it did not change the application of this principle. See its Awards 5117, 5195, 5254, 5879, 5580, 5622, 5623, 5925, 6019 and 6115.

"As stated in Award 5622 'That principle was not changed or abrogated by the 40 Hour Week Agreement.' The Agent or Telegrapher had no right to perform on rest days the work that the Bill Clerk regularly performed on the assigned days of his regular work week.

"Rule 34½ (e) of the parties' effective agreement provides:

'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 employee who will otherwise not have 40 hours of work that week; in all other cases by the regular employee.'

"Under this rule, no regular relief having been assigned thereto, this work on Saturdays first belonged to available extra or unassigned employees who did not otherwise have 40 hours of work that week, and, if none are available, then to the regular employee. The latter is the situation here but it should be on a pro rata and not on an overtime basis since the regular employee did not do the work. See Awards 5579, 5117, 5195, 5240 and 6019 of this Division."

That said above by the Board applies, in our opinion to the instant dispute.

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It is hereby affirmed that all data herein contained in support of claimant's position has been submitted in substance to the Carrier and is made a part of this claim.

(Exhibits not reproduced.)

**OPINION OF BOARD:** This dispute was filed by the Carrier and involves the contention of the Carrier that 13 claims, numbered 1 to 13, filed with it by the Organization are without merit. It appears that claims numbered 1, 3, 4, 5, 7, 10, 11, 12, and 13 have been adjusted on the property and have properly been withdrawn from the consideration of the Board. This leaves for the consideration of the Board claims numbered 2, 6, 8, and 9. We shall dispose of them in numerical order.

#### Claim 2.

In this dispute, it is difficult to determine the exact claim that is properly before this Board. The claim brought here by the Carrier is shown by the Statement of Claim. Carrier shows by its original submission that on January 6, 1953, Claimant, B. N. Chapman, was assigned to the position of General Clerk at Bonham, Texas, Monday through Friday, with Saturdays

and Sundays as rest days. He continued to occupy the position until January 8, 1954, when it was abolished. The claim filed on behalf of Chapman was that he be compensated at the time and one-half rate for June 6, 1953, and each Saturday thereafter because Telegrapher Jenkins performed the Saturday work of Claimant's position.

It appears that the station clerical forces at Bonham consisted of a cashier, general clerk, and a yard clerk. These positions were assigned as five-day positions in 1950, all having Saturday and Sunday assigned as rest days. There was also an agent-yardmaster and an operator assigned who were covered by the Telegraphers' agreement. The operator was assigned to a five-day position with a call for each Saturday. The operator's assigned hours were 3:00 P. M. to 11:00 P. M. The call was given the operator to handle Train No. 57 which left about 8:00 P. M., for the purpose of calling the crew, make the switch list, wheel the train, and deliver its orders. The Carrier asserts that there was telegrapher's work to be performed and that it was for this reason the call was given to a telegrapher instead of a clerk. It is further contended by the Carrier that the operator while working the call performed necessary clerical duties which he performed on his regular assignment Monday through Friday. Claimant's hourly assignment was 5:30 A. M. to 2:30 P. M. It is the contention of the general clerk that he should have been used on the Saturday work rather than the operator to perform the necessary clerical work on Saturdays.

It will be noted that the Saturday call given to the operator was during the same hours to which the operator was assigned Monday through Friday. It involved the same work he regularly performed Monday through Friday. The call given was outside the regularly assigned hours of the General Clerk. It is not questioned that the General Clerk performed similar clerical duties during his regularly assigned tour of duty.

The Carrier asserts that it has always been the practice of this Carrier for agents and operators to perform, in addition to their telegrapher's work, all of the clerical work that was within their capacity to perform within their assigned hours. This is the rule generally with reference to the performance of clerical work by telegraphers during their assigned tour of duty. We do not here depart from this long established rule.

The controlling rule is 30 (f) which provides:

"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 assigned that class of work."

In Decision No. 2 of the Forty-Hour Week Committee, the corresponding section of the National Forty-Hour Week Agreement is explained as follows:

"Section 3 (i) did not create the right to utilize extra or unassigned employes unless a carrier has that right under existing agreements or practices. However, where that right exists, the intent of Section 3 (i) is that where work is required by the carrier to be performed on a day which is not a part of any assignment, either an available extra or unassigned employe who would otherwise not have 40 hours of work that week or the regular employe may be used; unless such work is performed by an available extra or unassigned employe who would otherwise not have 40 hours of work that week, the regular employe shall be used. \* \* \* Wherever the words 'the regular employe' are used in this paragraph, they shall mean the regular employe entitled to the work under the existing agreement."

The record in this claim shows that the operator's assigned hours were 3:00 P. M. to 11:00 P. M. The call was given to handle a train which departed about 8:00 P. M. The operator handled this train Monday through Friday as a part of his regular duties and performed all the work on his regular assignment that he performed on the Saturdays here complained of. The claimant, who occupied the General Clerk's position, was assigned to work 5:30 A. M. to 2:30 P. M. It is clear that he was not even working when Train No. 57 was handled on Monday through Friday. It seems clear to us that the Saturday work here involved belonged to the regular employe and that the regular employe is the operator since he performed the same work on his regular assignment, Monday through Friday.

It is not questioned that an operator is required to copy the train orders and clear the local (Train No. 57). Nor is it disputed that in connection therewith the operator performs clerical duties, the same clerical duties he performs on his regular assignment on Monday through Friday. It is not questioned that he can properly perform them on his regular five day work week assignment. Consequently, he can properly perform them on Saturday, in the absence of an available qualified extra or unassigned employe, as the regular employe assigned that class of work.

The Organization asserts that the foregoing was not the claim made by the Organization. In this respect the record shows that Carrier filed its notice of intention to file its ex parte submission with the Board on August 18, 1954, and thereafter on September 15, 1954, filed its original submission which included the claim we have hereinbefore discussed. It is shown in the record by a letter dated September 22, 1953 signed by the General Chairman that the claim was for work performed by Telegraph Operator Jenkins on Saturdays, this being the claim we have heretofore dealt with. On November 29, 1954, the General Chairman sought to change the claim by claiming work performed by the Carrier's local agent on Saturday mornings instead of that performed by the telegraph operator on Saturday evenings. In his letter the General Chairman said:

"According to the records there is no particular dispute as to the facts in the case as you acknowledged in your letter of July 30, 1954, that the Agent does call the crew, make wheel report and list the local each Saturday morning when the Clerk is not on duty and that the Clerk does do this work Monday through Fridays. This is the essence of our claim and with the understanding that the Adjustment Board will give consideration to the monetary phase of the claim as stated in our letter to Mr. Tummon, copy to you, we are filing 15 copies of our submission with the Adjustment Board."

While we have no doubt that the parties may amend a claim to conform to the facts so long as it is the same claim, no right exists to change the whole claim so that it reflects one not handled on the property. The claim submitted to the Board by the Carrier is the same claim submitted by the Organization to Carrier's highest officer designated to handle such claims. The Organization cannot change the whole claim after an appeal is taken to this Board. Neither do we know of a permissible practice for an answering party to make a new claim in the form of a counterclaim after a case has been appealed to this Board. We are required to hold that a claim for work performed on Saturdays by the local agent is not before this Board.

The position of the Carrier is the correct one as to this claim.

#### Claim 6.

In this dispute it appears that W. J. Tunnell was assigned as General Clerk at Midland, Texas, 3:00 P. M. to 12:00 Midnight, Monday through Friday, with Saturday, Sunday and specified holidays as rest days. On May 2, 1953, there were telegraphers assigned seven days per week at this station. All positions under the Clerks' Agreement were assigned five days per

week Monday through Friday. On that day and subsequent Saturdays, Sundays, and holidays, the telegraphers on duty performed the clerical work of which complaint is here made. No contention is advanced that the telegraphers were improperly assigned.

As we stated in discussing Claim 2 herein, it has been the practice on this Carrier for agents and operators to perform, in addition to their telegrapher's work, all of the clerical work that was within their capacity to perform within their assigned hours. This is the general rule with reference to the performance of clerical work by telegraphers within their assigned tour of duty. It is not disputed that they performed such work during their regular assigned hours when clerks were on duty. We do not depart from the rule that clerical work may be assigned to telegraphers to fill out their assignments.

On the days here involved one or more telegraphers were regularly assigned. The work here in question was the selling of tickets. The record shows that during claimant's assignment, the telegraphers and the clerks worked together in handling the sale of tickets. On shifts when there was no clerk working, the telegraphers sold the tickets. This appears to have been the practice on this railroad for many years. We think that under these circumstances a telegrapher who is regularly assigned to work on the clerk's rest days may properly sell tickets without infringing upon the rights of the clerks. If there had been clerical work necessary to be performed on the clerk's rest days which the telegrapher did not perform on his regular assignment, we think such rest day work would belong to clerks. When ticket-selling work is performed by clerks and telegraphers during their regular five day week work assignments, whether by rule or practice, a clerk has no valid claim to it on his rest days if a regularly assigned telegrapher can perform it during his assigned hours. Award 7137. If the work had been performed exclusively by clerks during the regular five day work week assignment, it would clearly have been that of clerks on the clerk's rest days. Awards 2052, 3900, 4059, 4477. But where the work is performed as a part of the telegrapher's regular assignment during the period of claimant's regular assigned hours, the work is not exclusively that of the clerk and a regularly assigned telegrapher can properly perform it on the clerk's rest days.

We sustain the Carrier's contention in this claim.

#### Claim 8.

In this case the record shows that Mrs. J. A. Ford was assigned as Ticket Clerk at Midland, Texas, on a five day position, Monday through Friday, with Saturday and Sunday as rest days. Prior to September 1, 1949, claimant was assigned to a six day position with Sundays off. With the effective date of the 40 hour week, the ticket work on Saturdays, Sundays and holidays was performed by telegraphers who were working regular assignments on those days. The work of making certain reports was held over until Monday.

The record shows that the telegraphers have been assigned seven days a week for many years prior to the advent of the 40 hour week. The clerk's position was a six day position before September 1, 1949, at which time telegraphers handled ticket work on Sundays, holidays, and shifts in which clerks were not on duty. It is shown that telegraphers and clerks worked together in performing ticket work when both were on duty. We necessarily conclude, under these circumstances, that the ticket work was not the exclusive work of the clerks. We are in accord with the rule that where clerical work had been regularly assigned to a clerical position during the work week thereof prior to the effective date of the 40 Hour Week Agreement, that same work could not be assigned to employees not under the Clerks' Agreement on the assigned rest days of the clerical positions. Award 6216. But we point out here that this same practice was in vogue prior to the 40 hour work week, i.e., the telegraphers performed ticket work on rest days, holidays, and when clerks were not working. It has been the practice on this Carrier for tele-

graphers to work with clerks in handling ticket work. The negotiation of the 40 Hour Week Agreement did not have the effect of changing this practice, except to make it apply to two rest days instead of one. We must necessarily come to the conclusion that under the rules and practices of this Carrier, that it was not a violation of the agreement for telegraphers to handle ticket work on their regular assigned hours on claimant's rest days.

This position of the Carrier is sustained as to this claim.

#### Claim 9.

In this portion of the dispute it appears that W. M. Shook was assigned as a Ticket Clerk at Sweetwater, Texas, on a five-day position, Monday through Friday, with Saturdays and Sundays as rest days. On the Saturdays and Sundays here involved, telegraph operators were regularly assigned to work and they performed the clerical work necessary to be performed on those days within their regularly assigned hours. The same reasoning applies in this case as is set forth in our discussions of Claims 2, 6, and 8.

The Carrier's contentions are sustained as to this claim.

The Organization argue strenuously that the rules, particularly Rule 30 (f), current agreement, have been improperly interpreted in the past. It would be a work of supererogation to attempt a review of all past decisions of the Board on this subject. However, a restatement of the basic principle involved might be of assistance in pointing up the proper application of the rules governing factual situations such as we have presented in this docket. Rule 30 (f) provides:

"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 assigned that class of work."

In this respect, we hold that Saturdays and Sundays of five-day positions, where regular assigned relief is not provided, are unassigned rest days within the meaning of this rule. It is the general rule that any work of the five-day position required to be performed on a rest day may be performed by an available extra or unassigned employe who will otherwise not have worked 40 hours that week. In all other cases, the regular employe is entitled to the work. When the rest day work involved is the exclusive work of the craft entitled to work the regularly assigned position, there is no other alternative to be applied. In cases where the work of the regularly assigned position is not the exclusive work of one craft, another alternative sometimes exists. For instance, when a telegrapher is regularly assigned and he is entitled by rule or practice to fill out his telegrapher's assignment by performing work ordinarily performed by clerks, and he does perform such work, such clerical work cannot be said to be that exclusively belonging to clerks in the application of the rule governing work on unassigned days. A telegrapher, under such circumstances, who is regularly assigned to work on the clerk's rest day, may properly perform clerk's work within his regularly assigned hours, if such clerical work has not been exclusively assigned to clerks. If there is clerical work necessary to be performed which is beyond the capacity of the telegrapher to perform within his assigned hours, the clerk is entitled to perform it in the absence of an extra or unassigned clerk who has not otherwise worked 40 hours in his work week. We think the past awards of the Board sustain this conclusion and we believe it to be correct. Any change in its application necessarily becomes a subject for negotiation.

**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 Employees involved in this dispute are respectively carrier and employees 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 not violated.

#### AWARD

The position of the Carrier is sustained as to Claims 2, 6, 8 and 9 .

NATIONAL RAILROAD ADJUSTMENT BOARD  
By Order of THIRD DIVISION

ATTEST: A. Ivan Tummon  
Executive Secretary

Dated at Chicago, Illinois, this 28th day of June, 1956.