

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Frank Elkouri, Referee

PARTIES TO DISPUTE:

THE ORDER OF RAILROAD TELEGRAPHERS

MISSOURI-KANSAS-TEXAS RAILROAD COMPANY OF TEXAS

STATEMENT OF CLAIM: Claim of the General Committee of The Order of Railroad Telegraphers on the Missouri-Kansas-Texas Railroad; the Missouri-Kansas-Texas Railroad of Texas, that:

(1) Carrier violated the provisions of the Telegraphers' Agreement beginning September 1, 1949 and continuing violation of the Telegraphers' Agreement, Rule 26, Section 1, when on certain Saturdays and Sundays it requires or permits the regular assigned occupant of the agent-telegrapher's position at New Braunfels, Texas, to suspend work on these Saturdays and Sundays, which the Carrier designated as the assigned days of rest for the employe regularly occupying such position, and proceeded to relieve him with an employe not covered by the prevailing Telegraphers' Agreement, and who held no seniority thereunder, and,

(2) The Carrier shall be required to now compensate the occupant of the agent-telegrapher's position at New Braunfels, Texas, from September 1, 1949, up to and inclusive of the date the Carrier corrects the violation under the provisions of Rule 26, Section 1, paragraphs (e) and (m), B, (1) and (2), for each Saturday and Sunday he has been deprived of proper payment because of this violative act of the Carrier.

EMPLOYEES' STATEMENT OF FACTS: There is in effect an agreement between the parties to this dispute dated September 1, 1949 (rules in effect September 1, 1949; rates of pay effective February 1, 1951).

Originally, there was an agent and a first, second and third trick telegrapher clerk at the passenger-freight station at New Braunfels, Texas. About the year 1923 the first, second and third telegrapher's tricks were abolished at the passenger-freight station; the telegraph service in connection with the handling of train orders being moved down the tracks about two blocks to an interlocking tower and handled by employes of the old I. G. N. Railroad (now a part of the Missouri Pacific System), classified as telegrapher-levermen. This move is not particularly pertinent to a determination of the issue, but is merely mentioned to review the history leading up to the present controversy. The agent's position was reclassified to agent-telegrapher and continued to be maintained in the passenger-freight station. At present the

(Exhibits not reproduced).

OPINION OF BOARD: At the outset two procedural matters should be considered. One concerns the Carrier's contention that the Claim should be dismissed because of the Organization's delay in bringing it to this Board. However, the Organization was entitled to bring the case here by virtue of the Agreement of August 21, 1954. See Awards 7593, 7833, 7959 and 7961. Next, as to the issue of giving "third-party notice", the present Referee shares the view of the Referee in Award 7387 that "it is neither his function nor responsibility to pass upon the question of whether the Division is obligated to give such notice."

Turning to the merits, the facts of this dispute, and the Rules involved herein, bring it squarely within the extensively reasoned Opinion of this Board in Award 6689. There it was said in part:

"In addition, if it is not practicable to maintain a regular relief assignment at all, the Carrier may leave work on rest days go unassigned. But if it does this, work is still reserved to the regularly assigned employees, except that extra employees may have priority under a specified condition. Paragraph (n) of Section 1, Article 11, 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.' [The Agreement in the present case contains a provision identical to that just quoted.]

"Thus the Carrier had a contractual obligation in converting to the 5-day week to have its necessary rest day work in the Murphysboro seniority district performed either by a regular relief telegrapher, or by a qualified extra employee, or by a telegrapher holding a regular bulletined assignment. It chose to leave the admittedly necessary rest day work unassigned, so far as the Agreement was concerned. But instead of complying with the provisions of the rule governing work on unassigned days, it took this work out from under the Agreement, and made it parts of the assignments of other employees not covered by the Agreement.

"By so doing, we think the Carrier failed to meet its obligations under the plain provisions of its 40-Hour Agreement with the Telegraphers. * * *."

While the Claim in the present case as stated in the Employees' Ex Parte Submission is a "continuous" one, the Record shows that as handled on the property it covered only January 21, 22, 28 and 29, 1950. (See Employee Exhibits No. 2 and No. 8.) Under the reasoning of Award 6689 the Claim should be sustained; the occupant of the Agent-Telegrapher position at New Braunfels, Texas, was entitled to work on the four days in question but was not used (only in this sense was "suspended" from work). Also see Awards 6019 and 6693.

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 Carrier violated the Agreement.

AWARD

Claim for a "Call" on each of the following dates is sustained: January 21, 22, 28 and 29, 1950. The Claim for other dates is denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: A. Ivan Tummon
Executive Secretary

Dated at Chicago, Illinois, this 30th day of July, 1957.

DISSENT TO AWARD NO. 8040, DOCKET NO. TE-7568

Contrary to whatever the Referee's personal feelings may be on the matter of "third-party notice," it is his function and responsibility to pass upon the question of "third-party notice" when the permanent Members of the Division are in disagreement thereon. It is a question which has to be determined before any decision can be reached on the merits of the case. See Awards 7975, 8022 and 8023; Dissents made by the Carrier Members to Awards 7311 and 7372, and Special Concurrence of the Carrier Members to Award 7387. That part of the Special Concurrence to Award 7387 which deals with the Carrier Members' dissent to that part of the Opinion dealing with "third-party notice," is made a part of the Dissent in this case. The failure of the Referee to rule upon the question of "third-party notice" makes the Award wholly invalid.

Not only is this Award invalid in its entirety, but the conclusions reached by the Referee on the matter of delay and on disposition of the case on its merits are erroneous and unwarranted by the facts.

The Record clearly established that this continuing claim had been finally declined by Carrier's highest officer designated to handle such matters, more than five years prior to the date the Organization brought the case to the Division. No plausible excuse or reason was given by the Organization for such unconscionable delay, and Carrier was prejudiced thereby. See Awards 6526, 6650, 7074. The claim was clearly abandoned and barred, and a denial or dismissal Award was warranted in that respect. Notwithstanding these undeniable facts, the Referee reached a conclusion that "the Organization was entitled to bring the case here by virtue of the Agreement of August 21, 1954." No doubt the Referee had in mind Article V of the August 21, 1954, National Agreement; however, that Article was not a vehicle by which the Organization could resurrect previously abandoned and barred claims as was the instant one. More particularly, by reason of the Organization's failure to progress this claim with reasonable dispatch, the claim was abandoned and barred before said Article V ever became effective. Second Division Award 2287.

On the matter of merits, without recitation of one fact, and in total disregard of the actual facts, the Referee arrived at the conclusion that Award 6689 was controlling. This claim was premised on the assumption the Claimant was "suspended" from his position on the rest days assigned his position. Since the claim dates were rest days assigned the Claimant's position, he was not "suspended" from anything. As these rest days had not been made a part of a regular relief assignment, whatever right Claimant had to work on those days necessarily stemmed from the "unassigned day" rule. The "unassigned day" rule, however, presupposes that the work required on such days is work reserved exclusively to telegrapher service employees. Herein lies the crux of this dispute which the Referee failed to grasp or distinguish. In its Station at New Braunfels, Texas, in addition to the Agent-Telegrapher, Carrier employs three clerks. Two of these clerks were given calls on Saturdays and some Sundays to handle the sale of tickets and securing of reservations, via telephone, from Carrier's Ticket Office in

San Antonio. This was work performed by these same clerks Monday through Friday. When clerks are given calls to perform such work on Saturday and Sunday (the same work they perform Monday through Friday), it is inconceivable how any violation of the Telegraphers' Agreement can result. It was work to which the Agent-Telegrapher had no exclusive or preferred right, and was properly performed by the clerks. Awards 6363, 5663, 5662.

This Award is wholly invalid and otherwise erroneous. For these reasons we dissent.

/s/ C. P. Dugan

/s/ J. F. Mullen

/s/ R. M. Butler

/s/ W. H. Castle

/s/ J. E. Kemp