Award No. 8043
Docket No. TE-7619

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Frank Elkouri, Referee

PARTIES TO DISPUTE:

THE ORDER OF RAILROAD TELEGRAPHERS

CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY

STATEMENT OF CLAIM: Claim of the General Committee of The Order of Railroad Telegraphers on the Chicago, Burlington & Quincy Railroad, that:

Operator-Leverman P. C. McKibbin, Seward Tower, Lincoln Division, be paid a call April 24, 25, 26, 27, May 1, 2, 3, 4, 5, 8, 9, 10, 12, 15, 17, 18, 19, 22, 23, 24, 25, 26, 1951 and on each date thereafter that the claimant is not permitted to perform service accruing to the position occupied by him.

EMPLOYES' STATEMENT OF FACTS: Seward Tower at the time covered by this claim was a one-man operation. Assigned hours of the claimant were 8 A. M. to 5 P. M. Work week Monday through Sunday. Work days Monday through Friday. Rest days Saturday and Sunday. Duties of the position were to handle levers controlling interlocking crossing of the CB&Q and CNW Railroads, with the usual telegraphing in connection with the handling of trains using the crossing.

Prior to April 24, 1951, claimant was used to perform all service necessary at Seward Tower, both within and without his assigned tour of duty. For service outside his assigned hours constituting his regular tour of duty, he was paid on the call or overtime basis. If held on duty continuous with his assigned hours no dispute ever arose as to the overtime due.

Beginning on April 23, 1951 the Carrier ordered an employe at the Seward Passenger Station to take over and perform the work at Seward Tower outside the assigned hours of the claimant. This act of the Carrier was an attempt to deny to the claimant the work due him by virtue of exercising his seniority in acquiring the position at Seward Tower. The action of the Carrier constituted an invasion of the seniority rights of the claimant. Prior to the first date of this claim the Carrier recognized the seniority right of the claimant to perform all service at this one-man station by permitting him to perform all the service. The invasion of that right occurred when the Carrier ordered the employe at another station to perform the call service at Seward Tower.

POSITION OF EMPLOYES: This claim is filed and handled under the Agreement effective September 1, 1927, amended.

it may be said the protection of one (1) job is not endangered during the time the employe is performing the duties of the other position. * * * The contention one protecting operator-clerk duties may not be assigned the duties pertaining to leverman in addition thereto is overruled."

The contention of the employes in the instant dispute revolves around the theory that the claimant has a monopolistic right to all service performed within each 24-hour period at Seward tower, to the exclusion of any other employe subject to the Telegraphers' Agreement who may be assigned and on duty at Seward. However, the employes' contention and theory was rejected by the United States Railroad Labor Board in Decisions 3183 and 3184, involving the parties to this dispute; and by the Third Division in Awards 911 and 5364, and it must be rejected in this case. The question here in dispute has been settled for more than 30 years, and it should not now be unsettled.

It is possible that Petitioner might contend in Employes' submission that prior to the first claim date claimant had been given a call on occasions to perform the service in dispute, and for that reason he is forevermore entitled to be called to perform the service on an overtime basis. However, there is no rule in the agreement which requires that work once assigned on an overtime basis may not be assigned at straight time rates. This principle has long been adhered to by the Third Division, and affirmed in Award 5331 in the following language:

"For some reason, not relevant here, Carrier determined that that operational problem could be met by assigning that work to the Rate and Bill Clerk position, thus eliminating the overtime on the Ticket Clerk's position. Both positions were in the same group and senioriy district. Claim denied."

In the instant case, Carrier decided that its operational problem could be met by assigning the disputed work to the second operator who was on duty when the C&NW trains arrived at Seward, thus eliminating the overtime on the first operator position. Both positions are in the same group and seniority district and at the same station.

In conclusion, Carrier respectfully submits that:

(1) Petitioner's long delay in submitting this four year old claim to the Board acts as an effective estoppel against any award sustaining the claim.

(2) There is nothing for the Board to decide because Petitioner has never presented a particular question upon which an award is desired.

(3) Carrier's action in requiring the operator on duty to line the plant for trains arriving during his shift is supported by the agreement and by decisions of the United States Railroad Labor Board and by awards of the Third Division, NRAB, cited herein.

In view of the above, there can be no decision except denial of the claim in all respects.

* * * * *

The Carrier affirmatively states that all of the data herein and herewith submitted has previously been submitted to the Employes.

(Exhibits not reproduced)

* * * * *

OPINION OF BOARD: At the time this dispute arose the Carrier maintained a position of Operator at Seward Depot and a position of Operator-

Leverman at Seward Tower. Claimant P. C. McKibbin held the Operator-Leverman position at Seward Tower. The Organization states that prior to April 24, 1951, Claimant was used to perform all service necessary at Seward Tower, both within and without his assigned tour of duty, and the Organization contends that it was improper for the Carrier to assign work of Claimant's position to the Seward Depot Operator commencing that date. The Carrier has not advanced any clear denial that exclusive use of Claimant was the established practice prior to the period involved herein. By instruction of April 2, 1951, the Carrier directed that the Seward Depot Operator "break in" on the proper handling of work at Seward Tower. That instruction is as follows:

> "Mr. Eastlick and also the relief man will **break in** on the proper handling of the Tower at Seward and the operator at the depot will walk to the Tower to line-up for any C&NW trains during the time that the Tower at Seward has no operator on duty.
>
> "Messrs. Eastlick and McKibbin **advise me when Eastlick has properly qualified himself** for handling this Tower so I can put this arrangement into effect.
>
> "Mr. Eastlick **please commence breaking in immediately** and not allow this to drag along." (emphasis added)

This instruction makes it obvious that it was not established practice for the Seward Depot Operator to share work at Seward Tower; otherwise, why the need to "break-in"? In this connection it is also significant that Claimant held an Operator-**Leverman** position at Seward Tower whereas there was no Operator-**Leverman** position at Seward Depot.

By instruction of October 12, 1951, the Carrier cancelled the April 2, 1951, instruction and returned to the earlier practice:

> "Effective Sunday, October 14, 1951, the operator from the depot will not handle the Tower at Seward. The Dispatcher will now call the operator assigned to the Tower to line up for any C&NW Trains."

The Carrier's primary defense appears to be in its assertion that Seward Depot and Seward Tower are one and the same station, and that since both employes worked at one station the work could be performed as it was. It need not be decided here whether or not the latter conclusion would be correct were only one station in fact involved, for the facts clearly indicate that Seward Depot and Seward Tower constitute two separate stations. The applicable Agreement (September 1, 1949) lists them as separate and distinct stations. During the period in question each was designated by name on the Carrier's time table; the Carrier's Operating Rules define the word "Station" to mean "A place designated on the time table by name." Also, they are located at least .40 of a mile apart.

The conclusion that two separate stations are involved herein also renders ineffective the Carrier's assertion that "The question of the propriety of requiring an operator at the depot to handle levers at the tower **within the same station limits** * * * was settled on this property by the United States Railroad Labor Board in Decisions No. 3183 and No. 3184 * * *" (emphasis added). Moreover, those Decisions contain no reasoning or explanation of their holdings and accordingly are of limited precedential assistance.

The Carrier charges the Organization with delay in processing this case to the Board, but the Organization was entitled to bring it here by reason of the Agreement of August 21, 1954. See Awards 7593 and 7833.

In view of the above considerations the Claim must be sustained.

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 Carrier violated the Agreement.

AWARD

Claim sustained.

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. 8043, DOCKET NO. TE-7619

The Carrier's primary defense in denying this claim from the time of its initial handling on the property was twofold—that there is no rule in the parties' Agreement which supports the claim and that the work which the Operator at Seward Depot was called upon to perform was one of the regular duties of a Telegrapher. (R., pp. 21, 22.) Its denial of the claim was not based upon an assertion that Seward Depot and Seward Tower are one and the same station, although it is a fact that they are separate offices or facilities within the same station limits. (R., p. 9.)

When the majority concluded that "the facts clearly indicate that Seward Depot and Seward Tower constitute two separate stations", it necessarily restricts the definition of a station to the confines of one office. In so doing, it has placed an interpretation on the parties' Agreement which was contrary to their expressed intent. For example, see Rule 9 which reads in part:

> ". . . If used at **another office at the same station** will be allowed additional transportation expenses incurred. . . ." (Emphasis added.)

The gravity of the majority's error in failing to grasp the actual defense asserted by the Carrier lies in this. It has used an erroneous conclusion as a means to distinguish away Decisions Nos. 3183 and 3184 of the United States Railroad Labor Board which were accepted and which settled this very question for the same two parties over thirty years ago. The Opinion completely ignores the fact that Bristol Tower and Bristol Depot (Decision No. 3183) and Somonauk Tower and Somonauk Depot (Decision No. 3184) were likewise respectively separated from each other by a fraction of a mile, in the same manner in which Seward Tower and Seward Depot were situated in this case. They, also, were separately listed in the applicable Agreement. These facts were stressed to the Referee.

Even if these decisions needed confirming authority, as the majority seems to indicate that they do, **Award 5364** provides a direct finding by the Third Division on the same issue. Our findings there are replete with supporting reasons. The majority does not refer to it in its Opinion.

There can be no doubt that decisions rendered by this and other lawfully constituted Boards of Adjustment, including the United States Railroad

Labor Board, are binding upon this Division. Awards 6022, 7155, 6786, 6732, 3628 and many others. In fact, the most logical reason for reporting decisions is to make them available for some type of precedential use in other cases, especially where the same parties are involved in a similar factual situation.

Unless, palpably wrong, this Board is never warranted in overruling, in a subsequent dispute between the same parties, a previous decision construing the same terms of their contract.

The majority does not even point out any rule of the parties' Agreement which supports its decision. Its reckless abandonment of these principles has contributed nothing to the stability and acceptability of the Awards of this Division.

For the foregoing reasons, we dissent.

/s/ J. F. Mullen
/s/ R. M. Butler
/s/ W. H. Castle
/s/ C. P. Dugan
/s/ J. E. Kemp