Award No. 8103
Docket No. TE-7723

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Paul N. Guthrie, Referee

PARTIES TO DISPUTE:

THE ORDER OF RAILROAD TELEGRAPHERS

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

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

1. The Carrier violated the Agreement between the parties when on Saturday, March 6, 1954, it notified the incumbent of a telegrapher-clerk position at Hurley, New Mexico, that effective with the close of work Monday, March 8, 1954, his assignment would be changed to work Mondays through Fridays with rest days of Saturday and Sunday instead of Tuesdays through Saturdays with rest days Sunday and Monday, thereby reducing his work week to four days in the work week beginning Tuesday, March 9, 1954 and thereafter refused and continues to refuse to compensate said incumbent for five days in said work week; and

2. The Carrier shall now be required to compensate the occupant of the telegrapher-clerk position named in 1 above the equivalent of eight hours' pay at the rate applicable to his position.

EMPLOYES' STATEMENT OF FACTS: An Agreement between the parties bearing effective date of June 1, 1951 is in evidence.

At Hurley, New Mexico, the Carrier maintains a station at which it employes two telegrapher-clerks covered by the Agreement.

Prior to February 3, 1954, their assigned hours and rest days were as follows:

Telegrapher-Clerk	5 A. M. to 1 P. M.	Rest Days Thursday and Friday
Telegrapher-Clerk	3 P. M. to 11 P. M.	Rest Days Sunday and Monday

Service was required on these two positions seven days each week and rest day relief work was performed by the incumbent of a regular rest day relief position.

Beginning February 7, 1954, the Copper Company discontinued service on Sundays and the positions at Hurley were thereafter reduced to six days service each week and the office was thereafter closed on Sundays.

tion requiring a Sunday assignment had to be filled seven days each week, and which was nullified by the rules of the national Forty-Hour Week Agreement effective September 1, 1949. In other words, the Forty-Hour Week Agreement rules eliminated the former requirement that positions requiring a Sunday assignment had to be filled seven days each week. Moreover, a similar rule to the aforementioned "Rest Day Rule—Section 1(a)" of the Telegraphers' Agreement involved in Award No. 5129 does not appear in the Telegraphers' Agreement between the parties hereto; hence that Award lends no support to the Employes' claim.

While no mention was made thereof by the Employes' General Chairman in his handling of the instant dispute with the Carrier, the Employes will in their ex parte submission undoubtedly cite Award No. 6519, which is the only award to which they can possibly point as lending even a semblance of support to their claim.

It is needless for the respondent Carrier to again point out the fallacy of the majority's reasoning in Award No. 6519, since the Carrier Members' dissent thereto should be sufficient to show that the Award was rendered in complete disregard of the record and agreement rules and should not be accepted as a controlling precedent.

It is also interesting to note that the majority in Award No. 6519 did not attempt to construe the guarantee rule, and did not even make mention thereof in the Opinion of Board, but simply based their decision on (1) the Carrier's admitted failure to comply with the 72 hours' notice rule and (2) an alleged violation of the "beginning of work week" rule. Award No. 6519 also lends no support to the Employes' claim in the instant dispute for the reason that the respondent Carrier complied in all respects with the 72 hours' notice rule, i.e., Article III, Section 17 of the current Telegraphers' Agreement, by giving the claimant Telegrapher-Clerk more than the required 72 hours' advance notice of the change in his assigned rest days. Insofar as concerns Article III, Section 13 of the current Telegraphers' Agreement, which is similar to the rule referred to in Award No. 6519 as the "beginning of work week" rule, a careful examination and analysis of the language of Article III, Section 13 will plainly reveal that there is nothing contained therein which could possibly lend support to the Employes' claim in the instant dispute. Article III, Section 13 simply defines the term "work week" and contains nothing whatever which could possibly be construed as requiring the Carrier to guarantee employes against loss of time or earnings in instances where the needs of the Carrier's service necessitate changing their assigned rest days.

The Carrier further asserts that Award No. 6519 was improper and should not be controlling in the instant dispute for the reason that it had the effect of amending the agreement rules then under consideration by writing language into those rules which did not appear therein, and would also do the same to the Agreement rules in effect between the parties hereto, in total disregard of the fact that (1) the authority of the Board is limited to the interpretation of agreement rules as written, and (2) the Board is without statutory authority to either add to, take from or otherwise amend existing agreement rules.

In conclusion, the Carrier respectfully asserts that the Employes' claim in the instant dispute is entirely without merit or support under the agreement rules in effect between the parties hereto and should be declined in its entirety.

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

(Exhibits not reproduced.)

OPINION OF BOARD: There is substantial agreement in this docket with respect to the relevant facts. Claimant Telegrapher-Clerk Sheldon occupied the 6:00 A. M. to 2:00 P. M. shift at Hurley, N. Mex., with work days

Tuesday, Wednesday, Thursday, Friday and Saturday, and with Sunday and Monday as rest days.

Because of a reduction in business, Claimant was notified on March 6, 1954, that effective with the close of business Monday, March 8, his shift would work Monday, Tuesday, Wednesday, Thursday and Friday with Saturday and Sunday as rest days. Following receipt of the notice of change Claimant rested Sunday, March 7 and Monday, March 8. He resumed work on Tuesday, March 9 and worked Wednesday, Thursday and Friday and was required to take the newly designated rest days, Saturday and Sunday (March 13 and 14). As a result of this change he thus worked only four days that week.

There is no challenge to the Carrier's right to make the change which gave rise to the instant complaint. Neither is issue taken with respect the requirement of the rule (Article III, Section 17) that 72 hours notice of such change be given. The sole issue here is whether Claimant is entitled to pay at pro rata rate for the day which he lost as a result of this change.

Petitioner relies mainly upon Article III and Article XVII of the schedule. Article XVII is headed "Guarantee" and reads in Section 1:

> "Regularly assigned employes will receive one (1) day's pay within each twenty-four (24) hours, according to location occupied or to which entitled, if ready for service and not used, or if required on duty less than the required minimum number of hours as per location, except on their rest days and the designated holidays."

There is some confusion in the record with respect to the particular day Claimant was allegedly entitled to work, and was not permitted to work, resulting in the day's loss of pay which constitutes the claim here. The most logical conclusion in the view of the requirements of Section 13 of Article III would be that Claimant's new work week began on Monday, March 15, 1954. Hence Saturday, March 13, on which Claimant was not permitted to work was a work day of his old work week. While this appears to be the logical construction of the situation, the validity of the claim does not hinge entirely on this. Award 5129.

The issue involved in this case has, in various forms been before the Division a number of times, as well as before several Special Boards of Adjustment. There is no way to reconcile the conflicts in the holdings of these various awards. Neither is anything to be gained here by writing a detailed analysis of all the Awards brought to the attention of the Referee.

In view of Articles III and XVII of the Agreement and in view of the holdings of the Division in Awards 5129, 6519, 7324, and the holdings of Awards 7 and 8 of Special Board of Adjustment No. 186, the claim herein should be sustained. While the facts in cited Awards vary somewhat, the principle involved is essentially the same.

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 23rd Day of October, 1957.

DISSENT TO AWARD 8103, DOCKET TE-7723

The majority recognizes that Carrier was within its right under the Agreement in changing the rest days assigned to Claimant's position. From thereon out, however, the majority runs into error.

A change in rest days automatically brings about a change in the work week assigned a position **(Awards 6281, 6282,** Wenke, and **7918,** Shugrue); hence, the claim date, which the majority found to be Saturday, March 13, became nothing more than a rest day of the new work week. Article XVII, Section 1, which is cited in the award, specifically excludes "rest days" and since Saturday, March 13, was a rest day, no basis for claim existed thereunder.

The majority, however, uses Article III, Section 13, together with Article XVII, Section 1, and certain awards as a basis for entering a sustaining decision. Article XVII, Section 1, was in the parties' Agreement for some time prior to September 1, 1949, while Article III, Section 13, arose out of the March 19, 1949 National Forty-Hour Week Agreement. Using those rules together, the majority obviously assumes that in some manner or form Claimant was guaranteed pay for Saturday, March 13. Such an assumption is erroneous. Article XVII, Section 1, is but a daily guarantee (Award 28 of Special Board of Adjustment No. 117) which excludes rest days and nothing in the Forty-Hour Week Agreement extended same beyond that. Article II, Section 3 (f) of the March 19, 1949 National Forty-Hour Week Agreement specifically provided:

> "(f) **Guarantees—**
>
> "All existing weekly and monthly guarantees shall be reduced to five days per week. **Nothing in this agreement shall be construed to create a guarantee of any number of hours or days of work where none now exists.**" (Emphasis added.)

Cited in the Opinion are **Awards 5129, 6519 and 7324** of this Division and Awards 7 and 8 of Special Board of Adjustment No. 186. **Award 5129** involved the application of rules in existence prior to the Forty-Hour Week. It is, therefore, no authority for this case. As a matter of fact, in that Award the Referee expressly stated "(we pass no opinion on present rules)"—meaning the Forty-Hour Week rules. With respect to **Award 6519,** as the Dissent thereto clearly shows, the Referee therein so confused and misconstrued the facts that it is difficult to see how that Award can be cited as authority for anything.

Award 7324 and Awards 7 and 8 of Special Board of Adjustment No. 186 present quite another picture. In relying on these decisions the majority obviously concluded that a change in rest days, regardless of when Carrier's notification provided the change to be effective, could not be effected until the first work day of the new work week. Such a theory is not founded on sound contract construction.

It is the rule of contract construction that except insofar as it has limited itself by agreement, all rights remain with the Carrier **(Award 7296,** Carter).

Carrier here has limited itself under Article III, Section 17, **only** to the extent that it will give the employes affected the advance notice specified therein. This, the majority agrees, was done. There is however, no limitation or restriction in the rule or the Agreement as to when the change in rest days can be made effective, after expiration of the advance notice, and such determination was and is a prerogative of the Carrier. By relying on **Award 7324,** the majority not only disregards the statutory authority vested with this Board to construe the rule as written, but invades a field reserved only to Management. If the parties had intended such a strained and unwarranted "interpretation" placed on their Agreement as advanced in **Award 7324** and adopted by the majority here, it would have been a simple matter for them to have provided the appropriate language to cover **(Award 6044,** Whiting), but as expressed by Refree Carter in **Award 7166:**

> "* * * No such result was intended by the rules and this Board is not authorized to write such an intent into them in the form of an interpretation of the agreement. If any change is to be made it must be by negotiation. * * *."

Further, as to a rule relating to the work week of a regularly assigned employe, the unanimous opinion of the Members of Special Board of Adjustment No. 136, in Case No. 14, was:

> "* * * **There is no prohibition in the rules against assigning an employe to commence work on some day other than the first day of the work week.** * * *" (Emphasis added.)

Also see Dissent to **Award 7324.**

The framers of the Forty-Hour Week Agreement recognized the impracticability of freezing rest days as established September 1, 1949, and granted Carriers in order to meet operational requirements, the privilege to change rest days. It was never intended that Carrier would have to pay for that privilege. The weight of authority for a denial award in this dispute was with Carrier, viz., Third Division **Awards 5854, 5998, 6211, 6281, 6282;** Cases Nos. 14 and 15 of Special Board of Adjustment No. 136, and Awards Nos 28, 29, 30, 31, 32, 33, 34, 35 and 37 of Special Board of Adjustment No. 117. The Awards of these Special Boards are a matter of record.

For the reasons explained above and as outlined in Dissents to **Awards 7319, 7324, 8077 and 8078,** and Special Concurrences to **Awards 7320 and 7719,** we dissent.

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