Award No. 8136
Docket No. TE-7666

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Frank Elkouri, 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 Railroad Telegraphers on the Atchison, Topeka & Santa Fe Railway System, that:

1. The Carrier violated the terms of the prevailing agreements between the parties, when commencing with September 1, 1949, it required or permitted the occupants of a telegrapher-clerk position and persons not covered by the agreement between the parties to assume and perform, in addition to their own duties, the duties of the agent-telegrapher on Saturdays and Sundays, the assigned rest days of the agent-telegrapher, which duties are those regularly performed by the agent-telegrapher at Nemo, Illinois, Monday through Friday, and;

2. That beginning with the first Saturday in September, 1949, on which the violation first occurred and continuing thereafter until the violation is discontinued, the Carrier shall compensate the senior available extra employe on the seniority district at the straight time rate of the agent-telegrapher's position with a minimum of eight hours each Saturday and Sunday and/or, if no available extra employe, the Carrier shall compensate the employe who occupied the position of agent-telegrapher at Nemo, Illinois, Monday through Friday for eight (8) hours at the time and one-half rate for each Saturday and Sunday.

EMPLOYES' STATEMENT OF FACTS: The following agreements between the parties are in evidence:

Mediation Case A-2070, signed at Chicago, July 13, 1945.

Agreement bearing effective date of December 1, 1938.

Supplemental Agreement bearing effective date of September 1, 1949.

Agreement bearing effective date of June 1, 1951.

and not within the purview of the provisions of the Railway Labor Act, and said claim should be denied. We are in accord with Award 4941, Carter Referee."

* * * * *

In conclusion, and without any withdrawal from or prejudice to its position as set forth herein that the claim of the Employes in the instant dispute is entirely without support under the agreement rules and should be either dismissed or denied, the respondent Carrier respectfully asserts that if the Board should, for some unforeseeable reason, conclude in disregard of the record that the governing agreement rules had been violated, the penalties claimed in Item (2) of the Employes' claim should be denied on the basis of the conclusions expressed by the majority of the following excerpt which is quoted from Third Division Award No. 6656:

> "Moreover, decisions of this Board have gone so far as to deny claims for unreasonable delay in pressing them to a conclusion even though neither the Railway Labor Act nor the Agreement contains any cut-off of limitation provision (Awards 3778 (3 years), 4941 (3 years), 5190 (3 years) and 6229 (2 years)). The delay of 32 months here was unreasonable and the continuous running nature of the claim has made the delay prejudicial to the Carrier.
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> "No useful purpose will be served by denying the claim and leaving the essential dispute on the merits unresolved. The long continued acquiescence in the violation of the Rule coupled with the unreasonable delay in pressing this claim to a final conclusion should bar any monetary claims to the date of this award (Award 5013)."

The Board's attention is also respectfully directed to the fact that:

(1) The penalties claimed by the Employes in Item (2) of their claim are limited, by the provisions of Article V (i) (previously quoted herein) of the Telegraphers' Agreement effective December 1, 1938, under which the instant claim was initiated, to a period commencing not earlier than 30 days prior to the date the claim was initially submitted to the Carrier on December 5, 1949.

(2) The Employes' claim for the payment of time and one-half in behalf of the Agent-Telegrapher in the event an extra employe was not available, is contrary to the well-established principle consistently recognized and adhered to by the Third Division that the right to work is not the equivalent of work performed under the overtime and call rules. See Awards 5195, 5261, 5419, 5437, 5548, 5708, 5764, 5929, 5967 and many others.

The Carrier is uninformed as to the arguments the Organization will advance in its ex parte submission and accordingly reserves the right to submit additional facts, evidence and argument as it may conclude are required in replying to the Organization's ex parte submission or any subsequent oral arguments or briefs placed by the Organization in this dispute.

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

(Exhibits not reproduced.)

OPINION OF BOARD: The ultimate question involved herein has been previously ruled upon by this Division in two reasoned Awards, 6688 and 6946, both involving the same Carrier and Organization that are now before us. That question, as stated in Award 6946, is "whether or not the occupant of a position may be used on one of his regularly assigned days to do work on a rest day of a different position having different duties by combining such

necessary duties with those of his own position." Award 6688 answered this question in the negative. Award 6946 answered the question as follows:

> "It is plain that the right to stagger work weeks to meet carriers' operational requirements was of equal importance with the establishment of the 40 hour work week itself. We must conclude that the establishment of the 40 hour week without a reduction in weekly pay carried with it the idea that the carriers could eliminate certain unnecessary employes through the process of staggering work weeks. It was one of the compensating factors that was of advantage to the carriers when they agreed to the 40 hour work week with the same pay as the previous six day week. Award 5545.
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> "The next question that naturally follows is what positions might be staggered to accomplish the purposes of the agreement. It is clear, we think, that a position within the scope of one craft could not be staggered with a position under another craft when the work is the exclusive work of one. Two positions occupied by a signalman and a telegrapher, for instance, could not be staggered as craft lines are not wiped out by the 40 Hour Week Agreement. Neither could two employes in the same craft holding positions in different seniority districts be staggered under this agreement; nor may two positions in different classes be staggered where common seniority between the classes does not exist. But where classes are established within a craft for purposes other than the establishment of seniority rights, positions in the two classes may properly be staggered if each is qualified to perform the work of the other."

In Award 6946 a Telegrapher-Clerk was assigned Tuesday through Saturday and an Agent-Telegrapher was assigned Monday through Friday; on Mondays and Saturdays "each was required to do whatever work was necessary to be done, including some of the duties of the other." There, as in the present case, "Both employes belonged to the Telegraphers craft, were in the same seniority district, were carried on the same seniority roster, and each was qualified to perform the work of the other." Award 6946 correctly concluded that the combining of duties under these circumstances did not violate the Agreement. Award 6688, in contrast, is seriously defective in its failure to give adequate effect to the right of the Carrier to stagger work weeks. This failure is discussed thoroughly in Award 6946 and no good purpose would be served in dealing further with it here.

In the present case the Carrier has asserted that the Agent-Telegrapher position at Nemo is a 5-day position; the Organization has asserted that it is a 7-day position. Suffice it to say that it clearly was necessary to perform some of the work of the Agent-Telegrapher on his rest days. The Carrier so staggered the work weeks of the employes at Nemo that Saturday and Sunday, the Agent-Telegrapher's rest days, were regularly assigned days of other employes. Insofar as said other employes were Telegrapher-Clerks, and insofar as said Telegrapher-Clerks performed any necessary work of the Agent-Telegrapher on Saturday and Sunday, it is clear that under Award 6946 the Agreement was not violated; as stated above, Award 6946 is deemed correct in that respect.

Let us turn next to the alleged use of Clerks (not covered by the Telegrapher Agreement) to perform some of the work of the Agent-Telegrapher on the rest days of the latter employe until the Clerk positions were abolished in 1954. As noted hereinabove, Award 6946 stated that "It is clear, we think, that a position within the scope of one craft could not be staggered with a position under another craft when the work is the **exclusive** work of one." (Emphasis added.) In this respect, the Carrier has asserted that some duties at Nemo were customarily assigned to and performed in common by Agent-Telegrapher, Telegrapher-Clerks, and Clerks, and the Carrier has strongly asserted that the Clerks performed no work on Saturdays and Sundays that they did not perform on the other days of their work week. The Organiza-

tion, on the other hand, has made strong assertions to the contrary. Indeed, insofar as the many assertions of the Parties are concerned the Record is in hopeless conflict as to whether or not Clerks performed any work on Saturday and Sunday that they did not perform on the other days of their work week. However, the Carrier has submitted one item of concrete evidence in this regard—that is, the May 18, 1950, letter from Mr. G. R. Sheldon, who has held the Agent-Telegrapher position at Nemo from 1912 to the present. That letter shows that most of the Agent-Telegrapher's "exclusive" duties at Nemo were not performed at all on Saturdays and Sundays, and that none of said "exclusive" duties were performed by Clerks at any time. The Sheldon letter gives very strong support to the Carrier's assertions and in view of the absence of any concrete evidence to contradict the statements and implications of that letter it must be concluded that the Organization has failed to support its allegations that the Carrier made improper use of Clerks in this case.

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 did not violate the Agreement.

AWARD

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: A. Ivan Tummon
Executive Secretary

Dated at Chicago, Illinois, this 19th day of November, 1957.