

Award No. 8659
Docket No. TE-7747

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Paul N. Guthrie, Referee

PARTIES TO DISPUTE:

THE ORDER OF RAILROAD TELEGRAPHERS

MISSOURI PACIFIC LINES (In Texas and Louisiana)

STATEMENT OF CLAIM: Claim of the General Committee of The Order of Railroad Telegraphers on the Missouri Pacific Lines in Texas and Louisiana, that:

(1) The Carrier violates the provisions of existing agreements when it requires an employe not covered by the agreement to assume and perform the duties and work of the agent-telegrapher at Overton, Texas, on Sundays, an assigned rest day of the agent-telegrapher, beginning with the first Sunday in September, 1949, which work and duties are covered by the scope of the Telegraphers' Agreement and normally performed by the agent-telegrapher at Overton, Monday through Saturday, inclusive.

(2) That beginning with the first Sunday subsequent to September 1, 1949, and continuing until the violation is corrected the Carrier shall compensate the agent, Mr. Roy A. Brown for the difference in compensation paid to him for any service performed on Sundays and the amount he would have earned, based on eight hours per day at the time and one-half rate, had the rules of the Telegraphers' Agreement been properly applied.

EMPLOYES' STATEMENT OF FACT: This is a resubmission of the dispute which reached your Board on March 27, 1952, covered by Docket TE-6126. On the 30th day of January, 1953, in Award 6072, the following Opinion and Findings were issued:

"OPINION OF BOARD: The Carrier advances the contention that this Board has not the right to hear and determine this claim for the reason the record shows that the Clerks have rights under their contract which may be affected by our decision. The Clerks are interested parties, and they have not been given notice of this claim filed with this Division of the Board and have no opportunity to appear and be heard; therefore, we cannot render a valid sustaining award.

OPINION OF BOARD: The claim involved in this docket has been before the Division on two prior occasions. It was first here as Docket TE-6126 on which Award No. 6072 was made on January 30, 1953. In that Award the claim was dismissed without prejudice because notice had not been given the Clerks' Organization pursuant to the provisions of Section 3, First (j) of the Railway Labor Act as interpreted by the courts.

On or about September 7, 1955 the case was resubmitted to the Division and assigned the present docket number, TE-7747. The record shows that following the issuance of Award No. 6072 the procedural defect regarding notice was never corrected. Notice was not given.

The case docketed as TE-7747 was handled by the Division, and eventually came before the Division for disposition with the present Referee sitting as a member thereof. On October 23, 1957 the Division made Award No. 8106 in which it was held that Award No. 6072 was *res adjudicata* insofar as the third party notice question was concerned. Therefore Award No. 8106 deferred action on the merits in the following language:

"Consideration of and decision on the merits is deferred pending notice by the Division to the parties, Carrier, Order of Railroad Telegraphers, and Brotherhood of Railway Clerks, as contemplated by Section 3, First (j) of the Railway Labor Act as interpreted by the Courts."

The record shows that following the issuance of this Award notice was duly given and an opportunity to be heard was afforded. Therefore, the procedural defects having been corrected, the claim is now before the Division for decision on the merits.

The claim asserts that since September 1949 the Carrier has permitted or required an employe not covered by the Telegraphers' Agreement to perform Agent-Telegrapher work on Sundays, the assigned rest day of the regular Agent-Telegrapher. It is contended by Petitioner that the Cashier, who is on duty on Sunday, performs essentially all of the duties normally performed by the Agent-Telegrapher Monday through Friday.

Carrier denies any violation of the Telegraphers' Agreement. It contends that the Cashier does not perform any of the exclusive duties of the Agent-Telegrapher; that on Sunday the Cashier performs only the duties which are performed on other days of the week by the Cashier when the Agent-Telegrapher is on duty. Furthermore, it is contended, the Cashier performed these duties in the same fashion prior to September 1, 1949, when the 40-hour week became effective. Our main difficulty with this claim is a factual one. The record presents such conflict in assertions with respect to the work of the Cashier on Sundays, particularly as to whether he does in fact perform the duties performed by the Agent-Telegraphers during his regular work week.

Assertions by Carrier and by Petitioner are in conflict on this matter, and neither presents adequate proof to enable us to fully evaluate the situation. If there was affirmative proof that the Cashier was performing on Sundays the regular duties of the Agent-Telegrapher we might well have to sustain the claim in view of the Supplemental Agreement rule (Record Page 6) which puts this situation in a different light than if the claim was based only on the Scope Rule. (Disregarding the possible application of the doctrine of laches). However, the lack of adequate proof makes it difficult to get a clear picture of the real facts.

The second problem here is the long delay in the progressing of this claim. It is a continuing claim where compensation is claimed for the Agent-Telegrapher at premium rates for each Sunday since September 1, 1949. While there were some understandable delays, there is no explanation or justification of the delay of some two and one-half years after the issuance of Award No. 6072 before the claim was filed with the Division again. The Railway Labor Act does not contemplate such dilatory handling of a claim like this. In many instances the Division has held that the doctrine of laches bars a claim under such circumstances, at least to the extent of any compensation claimed.

In view of the unsatisfactory factual record, and in view of the long delay in progressing this claim, we have no alternative but to deny it. Awards 4941, 5190, 5949, 8136, 8369, 8209 and many others.

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 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 12th day of January, 1959.