Award No. 9107
Docket No. TE-8236

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Roscoe G. Hornbeck, Referee

PARTIES TO DISPUTE:

THE ORDER OF RAILROAD TELEGRAPHERS

GULF, MOBILE AND OHIO RAILROAD COMPANY

STATEMENT OF CLAIM: Claim of the General Committee of The Order of Railroad Telegraphers on the Gulf, Mobile & Ohio Railroad that:

1. The Carrier violated the terms of the Agreement between the parties when on the 3rd day of September, 1949, and continuing thereafter on each Saturday of each week it required and permitted employes not covered by said Agreement to perform regular duties of the Agent at Lincoln, Illinois, thereby improperly relieving such Agent on his assigned rest day, and

2. That this work shall now be restored to employes covered by the Telegraphers' Agreement, and

3. That the occupant of the position of Agent, Lincoln, Illinois be compensated at the rate of time and one-half for each such rest day so improperly relieved.

EMPLOYES' STATEMENT OF FACTS: Effective September 1, 1949 the Agreement between the parties was amended by the adoption of rules to provide for the establishment of the 40 Hour Week.

At Lincoln, Illinois the following personnel was employed by the Carrier in its operation of the Agency at this location:

Position	Hours	Rest Days
Agent	8:00 A. M. to 5:00 P. M.	Saturday and Sunday
Cashier	8:00 A. M. to 5:00 P. M.	Saturday and Sunday
Clerk	7:00 A. M. to 4:00 P. M.	Sunday and Monday
Trucker - Janitor		Saturday and Sunday

Beginning on September 1, 1949 which was the effective date of the new 40 Hour Week Agreement, the Carrier ordered Agent A. T. Peters to take Saturday and Sunday as rest days. Instead of closing the station on these days or providing for proper relief in accordance with the Agreement, the

CONCLUSION

The claim should be denied for the following reasons:

1. The unconscionable delay of almost six years in appealing the claim to this Board.

2. The claim is vague and indefinite and impossible of ascertainment.

3. The claim is not supported by the contract or past practice.

4. The parties to the contract purposely did not define the duties of an agent because of the supervisory nature of his job and to define his duties would result in unnecessary confusion, uncertainty and inefficiency.

5. This Board has many times held that agents do not have the exclusive right to perform clerical duties.

6. There is absolutely no need to employ an agent at Lincoln on Saturdays. It could only result in an unnecessary waste of revenues and manpower.

Carrier reserves the right to make an answer to any further submission of the Organization.

(Exhibits not reproduced.)

OPINION OF BOARD: The Organization charges that in violation of the controlling Agreement between the parties the Carrier required and permitted employes not covered by the Agreement to perform duties of the Agent at Lincoln, Illinois.

At the time the Claim arose there were employed at the Station at Lincoln:

An Agent, Monday through Friday, 8 A. M. to 5 P. M., Rest days Saturday & Sunday.

A Cashier, Monday through Friday, 8 A. M. to 5 P. M., Rest days Saturday & Sunday.

A Clerk, Tuesday through Saturday, 7 A. M. to 4 P. M., Rest days Sunday & Monday.

A Trucker-Janitor.

The Claim arose on September 3, 1949. It was finally denied by the highest officer of the Carrier to handle such matters on February 28, 1950. On January 27, 1951, the General Chairman of the Organization wrote the Carrier, that the decision to deny the Claim was not accepted and that "the claim will be progressed in the usual manner."

On January 3, 1956, a purpose to file the Claim with this Board was noted in a letter from the General Chairman of the Organization to the Carrier.

On December 29, 1955, notice was filed with this Board of an intention to file an ex parte submission which was filed on January 24, 1956.

The unusual delay in presenting the Claim to this Board, with no explanation for the delay, is made the subject of a motion to dismiss for unreasonable delay.

It is alleged that the disputed work involved was performed by a Clerk who operated under a separate Agreement with the Carrier. This development is met by a motion to dismiss or suspend final action until the Clerks Organization be given notice of the pendency of these proceedings with opportunity to appear and be heard.

We are mindful of the many Claims which have been dismissed by the Board for delay in perfecting the appeal. We find none where the delay has been as long as here found. However, the Organization cites an Agreement between the parties of August 21, 1954, which made provision for the appealing of all claims which arose prior to January 1, 1955. We find no appeal wherein this Agreement has been considered. We do not deem it necessary upon the situation here presented to make a complete study of the import of this Agreement and full construction of its meaning.

In view of the conclusion we reach as to the proper Award neither the Carrier prejudiced because of the delay nor the Clerks Organization because of the failure to give it notice. We, therefore, overrule both motions. In so doing, it is to be understood that these rulings are restricted to the developments in this submission and the Award that is to be made.

We then consider the Claim on its merits. If we consider the Claim more at length than the simple facts seem to warrant, it is done because of the fervor with which the presentation was made to the Board and discussed in panel.

Although the work of the Agent at Lincoln was for longer hours prior to the advent of the 40 hour week Rule than at the time this Claim was instituted, the operation was a small one. There were but three employes whose work is involved in this submission. At the peak of business at the Station there were an Agent and eight other employes, during the depression an Agent and a Cashier only. When the Claim arose there were an Agent and two employes covered by the Clerks' Agreement, the fourth employe is not involved here.

It is the Claim of the Organization that the Clerk, whose work week included Saturday, did work on that day which was done by the Agent during his work week and to which he was entitled on his rest day, Saturday.

Reliance is placed on what is cited as Section 1 (m) of Rule 29, which provides:

> "Where work is required by a 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 employe * * *; in all other cases by the regular employe."

No extra employe or unassigned employe of the Telegraphers' craft was available at Lincoln.

The Clerk, as a part of his 5 day work week, was assigned to work on Saturdays. So that the work which he performed on Saturdays was a part of an assignment. The question then is whether it could properly be assigned to the Clerk.

In panel discussion, the labor member broadens somewhat the basis of the Claim from that originally asserted and in support advances two propositions. 1.—The station at Lincoln having an Agent on duty on Saturdays before the effective date of the 40 hour week Rule, it follows that there must remain thereafter work to be done on those days which he alone had theretofore done. 2.—It is not incumbent on the Organization to establish that the Agent had the exclusive right to perform the work involved.

We cannot accept either thesis. As to 1.—The work which the Agent alone did when he worked on Saturdays may have been omitted after the change in the schedule. As to 2.—There are numerous Awards of this Division of the Board to the contrary. We mention a few of them: Nos. 3931, 4696, 4992, 5318, 5662, 5663, 5867, 6689 and 8161.

The Organization in its original submission adopted the correct rule. For instance, it is said:

> "In the Statement of Facts we have enumerated the various items of work that are **exclusively** performed by the Agent during his assigned work days in his work week. All of this work is being performed by the Clerk at Lincoln."

And in its statement at the oral hearing before the Board:

> "The issue is not that the employes insist that the Agent alone is the only employe who could have performed the work on the Saturday,—rest days but rather is the Carrier's transfer of work **exclusively** reserved to employes under Telegraphers Agreement to other employes on the Saturday rest day of the position at Lincoln, Ill." (Emphasis ours.)

The Organization has set up seven specifications of duties which it asserts it was the right of the Agent to perform on Saturdays but which were performed by the Clerk who was on duty on those days. The burden is upon the Organization to support by proof the specific charges, one or more, which it makes. There are two essentials of proof. That the duties specified, one or more, were performed by the Agent during his work week and that it was his exclusive right to perform such duties.

Letters are in the record from Mr. D. W. Sullivan, a Clerk, who worked in the Freight House and Agency at Lincoln, from 1919 to 1948. Mr. S. R. Tucker, Cashier at Lincoln Freight House, February 12, 1948 to February 21, 1950, the date of his letter. Mr. J. E. Sarles, a Clerk, whose letter is not dated nor period of service shown. Mr. J. B. Jiskra, Agent at Lincoln, letter not dated nor period of service shown. There is no statement of Mr. A. T. Peters, who was the Acting Agent when the claim arose.

All of the foregoing letters were offered by the Carrier.

An analysis of the facts developed as they relate to the work set out in the seven specifications of the Organization, discloses the following:

1. Outboard Billing. Tucker and Sarles say they did it, as does Jiskra.

2. Make out switch lists for local train. Tucker and Sarles say they did it. Jiskra says that the switch list was made up but not by whom. Inferable that he did some of it.

3. Take car orders and see that shippers get cars they order. Jiskra says he contacts car load shippers. No proof whether it was done on Saturdays.

4. Make out all cancelled damage inspections of merchandise after consignee reports damage when shipment unpacked. Not touched in the proof.

5. Ascertain and compute freight rates. Tucker says it was his duty.

6. Compile telegraph car reports. Sarles only says he does this regularly.

7. Opens and handles Agent's correspondence and sundry other duties. Jiskra says he did it. No proof that any other employe did it at any time.

In the letter of Mr. Sullivan, former Cashier, he states that when there was only an Agent and a Cashier at the Station they would intermingle the work. No division of work. Mr. Tucker, Cashier, says, "I have, at one time or another, performed each of the various duties, which have to be done at a freight station of this type, with the exception of checking the yards, which is done by the Yard Clerk." Mr. Jiskra, the Agent, does not say that the Clerk on duty on Saturday did any of the work which he alone did during his work week.

It is clear then that of the work set up in the seven specifications of duties upon which there is any proof whatever, none of it done exclusively by the Agent during his work week was done by the Clerk on Saturdays.

We recognize that there might be work which it was the exclusive right of the Agent to perform which at times may have been done by others. If the Agent had the exclusive right to perform it and it was done by employes of another craft, it was a violation of the Agreement. But the Agent being in charge with supervisory duties, it is to be presumed that he would protect his assignment and would not assign such work to employes of another craft. Likewise, presumably, the Agent would not direct work to be done by a Clerk which properly belonged to the Telegraphers. If such work was done he should have so stated.

To determine what work properly belonged to the Agent under the Telegraphers' Agreement several tests have been approved by the Awards of this Board.

1. The scope rule of the controlling Agreement.

It is silent as to the specific duties of the craft.

2. Duties assigned by the Carrier to those covered by the controlling Agreement.

No such assignment appears.

3. Custom and tradition, if duties are not defined by Nos. 1 and 2.

It is to this 3rd test that recourse must be had on this record.

There are, of course, certain duties which by tradition are incorporated in the work of the Telegraphers, such as in the field of communications. Likewise, it is obvious that an Agent has supervisory duties. Although Telegraphers may do clerical work incident to their position and to fill out an assignment, many clerical duties are in the twilight zone. Some of the duties set out in the seven specifications of the Organization, in subject matter, suggest that they might fall within the concept of the clerical duties.

One Award, at least, No. 6447, this Board, Ferguson, Referee, holds that some of the duties involved in this submission came within the protection of an Agreement between the Clerks' Organization and its Carrier.

Award 6688, this Board, Leiserson, Referee, is cited by the Organization.

This is a controversial Award which has been in several instances repudiated by this Board. However, for the purposes of this opinion it may be distinguished. It was grounded, in the main, upon the theory that there was an attempt to stagger among employes of different classes and crafts work which it was the exclusive right of one class to perform. Here, the decisive question is whether the work involved was reserved to the Telegraphers by their Agreement with the Carrier.

The Organization also cites Award 6693, Leiserson, Referee. We call attention to the facts which distinguish that Award from the claim here involved, as appear from the opinion.

The employes involved were a Clerk and an Agent. The Clerk was the last to be named. Both had 5 work day assignments with Saturdays and Sundays as rest days. Thus, the work done on Saturday and Sunday was unassigned work. Then too, the work involved was claimed by the Organization and found by the Board to be in the field of communication. The opinion was based on three propositions, that the work under consideration was unassigned, that the Agent was the regular employe and that the work involved inlcuded communications.

The Organization has failed to make proof of its claim as asserted in its submission and urged in its arguments to this Board.

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 Agreement has not been violated.

AWARD

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 7th day of December, 1959.

DISSENT TO AWARD 9107, DOCKET TE-8236.

This award is erroneous for so many reasons that a full discussion of all of them would require much more time than I have at my disposal. In fairness to the employes I represent, and responsive to the public trust reposed in this Board by Congress, however, I feel obliged to record some of the most glaring of its many faults.

First, and most painful to contemplate, is the attitude of hostility to the Employes' position so clearly apparent in the approach of the Referee to the issues raised by the various contentions of the parties. The claim was not appealed to the Board for quite a long time after it was first declined by the Carrier. But in the interim the parties renewed their consideration of the dispute without any objection being raised by the Carrier to such handling. Upon appeal here, though, the Carrier contended that the delay—in which it had willingly participated—was fatal to the claim.

The Employes replied to this argument by citing numerous awards which reject similar contentions, and point out the fact that the Railway Labor Act contains no limitation of time in which to make an appeal to the Board. They also cited the specific provisions of Article V of the August 21, 1954 Agreement which give Employes a period of twelve months from January 1, 1955 in which to submit to the Board claims which had been ruled upon by carriers' highest officers prior to the effective date of the rule, January 1, 1955. They also pointed out that an effort had been made as late as July 7, 1955, during a conference between the highest officers of both the Carrier and Organization, to reach a satisfactory settlement of the claim.

In spite of these facts disclosed by the record, and before any discussion was had with the Board members forming the panel for discussion of the case, the Referee clearly intimated a disposition to rule in favor of the Carrier's contention that the claim had suffered a fatal delay.

This attitude was so clearly evident at the oral hearing before the Referee on November 3, 1959, that I determined to make sure that he would have before him a comprehensive sampling of the decisions bearing on the two points involved, that is, the general effect, if any, on the power of this Board to decide claims which have been subject to delay; and the intent of the August 21, 1954 Agreement with respect to the one-year provision for submitting old claims.

Accordingly, I spent many days in research and the writing of a memorandum to the Referee, covering both aspects of the issue. There I showed that: (1) There is no federal or other statute of limitation applicable to cases

submitted to the Board; (2) the doctrine of laches is not properly applicable to such cases; (3) that the United States Supreme Court has held that neither delay, in and of itself, nor the doctrine of laches should operate to defeat such a claim; and (4) that the parties themselves have specifically provided, in the cited portion of the August 21, 1954 Agreement, for submission of old claims to the Adjustment Board.

In support of my first point I referred to reports of hearings before both the Senate and House of Representatives—at the time the 1934 amendments to the Railway Labor Act were being considered—to show that an effort of the carrier representatives to have a two-year limitation on submission of disputes to the Board written into the Act was rejected. I noted the language used by Congress to preserve or create the Employes' right to submit to the Board ". . . cases pending and unadjusted . . .", no matter how old. I cited Awards 53, 685, 1521, 2211, 6308, 6721, and 6863. These awards, in turn, cite many others, all holding that since no statute of limitation against submission of disputes to the Board is contained in the Railway Labor Act no such limitation may properly be applied by the Board.

In support of my second point I quoted a definition of the term "laches" from **21 Corpus Juris, 210,** and discussed inapplicability of the doctrine to Board cases, citing Awards 2925, 4129, 6504, 6921, and 8484, all supporting my opinion that the doctrine of laches has no application to disputes referable to the Adjustment Board under the Railway Labor Act.

In support of my third point I reviewed the dispute covered by our Awards 298 and 548, and then cited the decision of the United States Supreme Court concerning the validity of those awards (Order of Railroad Telegraphers v. Railway Express Agency, 64 S. Ct. 582; 321 U. S. 342). That decision clearly holds that neither delay alone, nor the more refined doctrine of laches can be applied to defeat a claim which is otherwise properly referable to the Adjustment Board. This decision applied to a case where the delay in handling was practically the same as that suffered by the claim in the present case.

In support of my fourth point I quoted and discussed that part of Article V, Section 2, of the August 21, 1954 Agreement which reads as follows:

> ". . . except that in the case of all claims or grievances on which the highest designated officer of the Carrier has ruled prior to the effective date of this rule, a period of 12 months will be allowed after the effective date of this rule for an appeal to be taken to the appropriate board of adjustment as provided in paragraph (c) of Section 1 hereof before the claim or grievance is barred."

I then cited Awards 7593, 7959, 8043, 7833, 7961, 8035, 8040, 8267 of this Division; and 2285, 2287, 2292, 2293, 2294 of the Second Division. All of these awards rule on precisely the question here involved, and all of them decide that question in the manner here urged by the Employes and contrary to the Carrier's contention.

My treatise, running to 21 typewritten pages, was carefully read and explained to the referee, along with other material dealing with merits of the case, in a two-day session of panel argument. The Carrier Member reserved the right to comment on my document after he had had time to study it and submit it to his legal advisors, but so far as I am aware he did not exercise that right.

Notwithstanding this mass of unrefuted material in favor of the position of the Employes the Referee proposed an award which clearly manifested a disposition of sympathy with the Carrier's argument. The Carrier Members, of course, voted with the Referee for adoption of the proposed award.

The first several paragraphs, after describing the claim, discuss its handling and culminate with this statement:

> "The unusual delay in presenting the claim to this Board, with no explanation for the delay, is made the subject of a motion to dismiss for unreasonable delay."

The Referee then carefully noted that his only reason for overruling the Carrier's contention was because the claim was going to be denied anyway.

Now let us consider the following paragraph of the Award:

> "We are mindful of the many Claims which have been dismissed by the Board for delay in perfecting the appeal. We find none where the delay has been as long as here found. However, the Organization cites an Agreement between the parties of August 21, 1954, which made provision for the appealing of all claims which arose prior to January 1, 1955. **We find no appeal wherein this Agreement has been considered.** We do not deem it necessary upon the situation here presented to make a complete study of the import of this Agreement and full construction of its meaning." (Emphasis added.)

The first two sentences of this paragraph plainly show that the Referee was not interested in the probably larger number of cases where the Board has rejected the defense of unreasonable delay.

But the strangest comment, and one which raises serious doubt of the Referee's objectivity, is that of the sentence I have emphasized by emphasizing. There the Referee calmly states as a fact that he found no "appeal" where the effect of the previously quoted portion of the August 21, 1954 Agreement had been considered. That statement was made shortly after I had spent considerably more than the usual time in acquainting the Referee with some of the background data which led the parties to adoption of the quoted exception, together with quotations from Third Division Awards 7593, 7959, 8043, and citation of our Awards 7833, 7961, 8035, 8040, and 8267, as well as Second Division Awards 2285, 2287, 2292, 2293, and 2294. All of these awards deal with "appeals" where carrier contentions regarding dealy were rejected solely because the Agreement of August 21, 1954 was considered and applied precisely as the Employes here contended it should be applied. The Referee's failure to find any such consideration bespeaks either gross inattention to my presentation, or a preconceived determination that such material would be ignored. And I think it goes without saying that Congress intended no such attitude on the part of the "neutral persons" it decreed should have the final word in cases where the partisan members were deadlocked.

With such an approach there could be little hope that the Referee would be favorably impressed by anything the Employes or their representative Board member might have to say about the merits of the dispute.

In this connection I will mention only two examples. First, the Referee, after noting the Employes' reliance upon Rule 29, Section 1(m), the "work

on unassigned days" rule, declares that the work in question was a part of the Clerk's assignment, inferring that in such a case the mandatory portion of the rule providing for use of the "regular employe" could not—or need not—be applied to the claimant. Such a weird notion would not ordinarily merit comment. But when it comes from a referee it must be challenged. The rule, of course, came from the Forty Hour Week Agreement, and when it was incorporated into the various individual agreements it became individual itself, applying to the work of the particular individual agreement and the employes subject thereto. The application which this Referee apparently seeks to establish would completely nullify the rule, and give carriers an opportunity to "assign" any work to any employe. Carriers have failed on many occasions to secure such a "right". In attempting such a change in the meaning of the rule, this Award grossly exceeds the power granted the Board by Congress; is absurdly erroneous and, therefore, a nullity.

Second, the Referee carefully noted ". . . the fervor with which the presentation was made to the Board and discussed in panel . . .", and stated that the lengthy consideration was based on recognition of that "fervor". Then the Referee proceeded with his consideration at length with a single reference to the one award which was most heavily relied upon for support of the Employes' position, Award 6689.

That award involved these same parties, the same rules, and a factual situation which was for all practical purposes identical with that of this case; where not a single item of work was held to be "exclusively" reserved to the Employes. Moreover, that award was written by the man who had not only acted as Chairman of the Emergency Board which recommended adoption of the 40-hour week in the railroad industry, but who had also actually written the very rules involved. His opinion clearly was entitled to recognition at least, even if only to state the present Referee's reasons for disagreeing with it.

This Board sometimes reaches a conclusion different from an earlier award involving the same parties, rules and issues. But as far as I can determine never before have we taken such action without an attempt, at least, to show why the earlier decision was wrong. Award 6689 is barely mentioned here, along with others, no attempt being made to show why it should not be followed; and this despite the fact that both the Employes' representative at the oral hearing and the undersigned Board member strongly urged that Award 6689 must be considered as a decisive precedent for the present case.

Such failure of the Referee to consider such a presentation, after noting its "fervor", makes his resulting award highly suspect and renders it wholly in error and without value as a precedent in other cases.

Because of these and other equally obvious errors in Award 9107, I take this means of recording my dissent.

J. W. Whitehouse,

Labor Member.

REPLY TO LABOR MEMBER DISSENT TO AWARD 9107 (DOCKET 8236—TE v. GM&O)

The dissenting Labor Member premises his 4½ page objections to this **Award 9107** on four principal points—that its author (1) improperly considered Carrier's contention that the case should be dismissed because of the unconscionable and unreasonable delay on the Organization's part in progressing the claim to this Division following Carrier's final declination, (2) improperly held the disputed duties to have been regularly assigned to the Saturday clerical position hence not accruing to the Agent on his Saturday rest day as the regular employe under the Unassigned Day Rule, (3) improperly declined to follow prior **Award 6689** relied upon in support of the claim, and (4) improperly denied the claim after noting in his Opinion the "fervor" with which he (the dissenting Labor Member) had made his presentation.

We shall comment on each of these four points, as follows:

(1) The dissenting Labor Member has consumed, entirely without point, approximately 3½ pages (17 paragraphs) condemning the author of this Award for considering a Carrier contention on procedure that was not considered in the decision on the merits of this dispute and, therefore, did not influence the decision on the merits of this dispute. In any event, the statement contained therein that—"We find no appeal wherein this Agreement (August 21, 1954 National Agreement) has been considered"—is in error because that Agreement has been previously so considered. See **Award 7593.**

(2) While the dissenting Labor Member is obviously displeased with this Award, he should be aware that its author properly found, similarly as the Division has found in many other cases involving like factual circumstances, that the record contained no evidence, other than mere allegations without substantive proof, that the incumbent of a 5-day clerical assignment (Tuesday through Saturday) performed any work on the Saturday rest days of the incumbent of a 5-day agent assignment (Monday through Friday) that was reserved for performance, exclusively, by the agent position, and that the work performed by the Clerk in question on Saturdays was clerical work that was part of his regular assignment on such days although participated in by the Agent as well as other Clerks on work days common to them all.

(3) By reason of his findings, as outlined in the preceding item (2), this Referee properly declined to follow **Award 6689,** for the very simple reason that the Referee in **Award 6689** found to the contrary in the record before him—Each based his Award on the showing in the record before him as to the exclusive right of the claimants to the work involved.

(4) Surely, this dissenting Labor Member does not seriously think that this invalid claim should be sustained merely because of any statement by the Referee that he (dissenting Labor Member) presented his case with "fervor".

This blatant Dissent, if it can be termed a dissent, together with other recent so-called Dissents (particular attention is directed to Dissents to **Awards 9217** and **9218**), furnishes an outstanding example of the pleasure one may find in his writings whether or not of merit.

/s/ C. P. Dugan

/s/ J. E. Kemp

/s/ R. A. Carroll

/s/ W. H. Castle

/s/ J. F. Mullen