Award No. 9217
Docket No. TE-8017

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Roscoe G. Hornbeck, Referee

PARTIES TO DISPUTE:

THE ORDER OF RAILROAD TELEGRAPHERS

THE TEXAS AND PACIFIC RAILWAY COMPANY

STATEMENT OF CLAIM: Claim of the General Committee of The Order of Railroad Telegraphers on The Texas and Pacific Railway, that:

1. Carrier violated Rule 1 and other rules of the Agreement between the parties when Monday, September 6, 1954 (Labor Day) and Thursday, November 25, 1954 (Thanksgiving Day) it failed to use W. H. Shuff, the regular assigned First Shift Operator at "WH" Alexandria, Louisiana, and assigned the duties of his position to employes not subject to the Telegraphers' Agreement.

2. Carrier shall now compensate W. H. Shuff additionally for eight hours at time and one-half rate for September 6 and November 25, 1954, which he was entitled to under the Agreement.

EMPLOYES' STATEMENT OF FACTS: There is an agreement in effect between the parties with effective date of May 15, 1950. At page 40 of the Agreement under Article 29 there are listed the following positions:

"Alexandria 'WH' — Operators — 1.654"

Claimant W. H. Shuff was the regular assigned operator on the first shift position. He has assigned hours from 9:00 A. M. to 5:00 P. M. with Saturday and Sunday as rest days. The following calendars for the period in September and November 1954 are produced for your convenience.

AUGUST 1954

M	T	W	T	F	S	S
30	31					

SEPTEMBER

		1	2	3	4	5
6	7	8	9	10	11	12

(Exhibits not reproduced.)

OPINION OF BOARD: The facts are fully stated by the parties.

At the hearing before this Board the Employes said: "The Carrier poses an issue" (the right to blank the work in question) "which is not presented by the case. The question in this claim is not the right of the Carrier to blank this position on these specific days, the issue is the failure of the Carrier to assign Claimant Shuff to perform the work of his position on two specific days when it required **other employes not covered by the Agreement to perform the work.**" (Emphasis ours.) This, in our judgment, is the issue and the only determinative issue in this submission. However, in the panel discussion it was asserted that the position was not blanked because the work on the two holidays was performed.

Reliance is placed, in part, on the fact that prior to the time involved in the claim a Telegrapher, the Claimant, had been regularly employed on holidays to do the work in question and that Section 5 of Article II of the National Agreement of August 21, 1954, guaranteed the continuance of this right.

The Section provides:

> "Nothing in this rule shall be construed to change the existing rules **and practices thereunder** governing the payment for work performed by an employe on a holiday." (Emphasis by Employes.)

Section 5, heretofore quoted, is the full section. In our opinion, "existing rules and practices thereunder" relates only to those practices governing payment for work performed by an employe on a holiday and does not purport to affect his right to be employed on that day.

If, however, "past practices" as employed in the Section be given the meaning ascribed to it by the Employes, the Carrier submits five affidavits on the subject. All of the affiants had served as Telegraphers on the Carrier's lines long prior to the 1954 Agreement and had also served as Train Dispatchers. All of them say that the practice prior to the 1954 Agreement was identical with that involved in the claim.

The Organization also cites the Rule which provides that where work is required to be performed on a holiday which is not a part of any assignment the regular employe shall be used. This rule is inapplicable because the work performed was a part of a regular assignment.

Before the 1954 National Agreement on many of the railroads when holidays came during an employe's regular assignment, if he worked he was paid at the time and one half rate, if he did not work he received no pay. After the Agreement, if an employe did not work he was paid at regular wage, notwithstanding; if he worked he was paid his regular per diem and in addition at time and one-half rate. It would indeed be unusual if, by the foregoing Agreement, payment at the per diem rate was assured to an employe if he did not work on a holiday, and also work assured him on that day with additional penalty payment. That such a result was not intended by the Agreement of 1954 clearly appears by the presentation of the Employes in its behalf before the Emergency Committee which had it under consideration. It was there many times conceded that employes on regular assignments, who would be benefited by the proposed Agreement affecting pay for holidays whether worked or not, would, at times, be unemployed on such days.

The crux of this claim is found in the contention that the work involved was taken from a Telegrapher, who had the exclusive right to perform it, and assigned to a Train Dispatcher who was not covered by the controlling Agreement.

It is true that the Scope Rule of the Agreement does not name Train Dispatchers as included therein. However, Article 20 (d) is as much a part of the Agreement as any other and being special in its terms, referring only to the handling of train orders, and if any conflict, must be given effect over another couched in general terms.

Article 20 (d) provides:

> "No employe other than covered by this agreement and train dispatchers will be permitted to handle train orders at telegraph or telephone offices where an operator is employed and is available or can be promptly located, except in an emergency, in which case the telegrapher will be paid for the call. * * *"

This Article clearly places telegraphers and train dispatchers in like status in the right to handle train orders. So, here, unless there was some reason other than the alleged disqualification of the Train Dispatcher to do the work he was fully authorized to perform it under Article 20 (d). He was located in the same building as the Telegrapher. He was qualified, eligible and had ample time to do the work involved. Claimant lost no regular pay by the assignment of the holiday work to the Train Dispatcher.

In the situation developed, we find no violation of any Article of the controlling Agreement or of the National Agreement of 1954 in the action taken by the Carrier.

We have examined the Awards cited and find none which conflicts with the principles applied in reaching this Award.

Some suggestion has been made that the Train Master did other work than the handling of train orders which encroached on the Telegrapher's duties under the Agreement. But the Employes say that the issue is sufficiently exemplified without consideration of that additional question and the record does not afford enough facts to enable us to pass upon it.

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 4th day of February, 1960.

DISSENT TO AWARD 9217, DOCKET TE-8017

The majority in Award 9217 erred in several respects, chiefly in applying Article 20 (d) as if it controlled the entire dispute. This is a special rule, having application only to the handling of train orders, and was never intended to be applied in a manner that would result in nullifying other rules.

Another glaring error is the summary dismissal of Article 6, Section 1, paragraph (1) of the parties' agreement. This rule was held to be inapplicable, "because the work performed was a part of a regular assignment". What assignment? If this work was a part of claimant's assignment—as the employes contended—then obviously the claim should have been sustained. If it was thought this work was a part of the relief employe's assignment, little attention was given to the fact that these particular holidays did not fall on work days of that assignment. Surely the majority did not mean to say that this work was a part of the train dispatcher's assignment. The facts clearly will not support such an idea, and furthermore the rule does not apply to train dispatchers. Perhaps this was merely another result of improper application of Article 20 (d).

As a matter of fact, the only way the Carrier could avoid using the claimant would be on an assumption that since holidays are not guaranteed work days under Article 6, Section 4, they can be treated as days which are not a part of any assignment. If so treated, Article 6, Section 1 (1) applies and reserves any work of a position that is required to be performed on such a day to one or the other of two clearly designated employes, neither of which is a train dispatcher. Further, the 40-Hour Week Committee has interpreted this rule to mean that if the unassigned day is a holiday only "the regular employe" shall be used.

All of these rules and interpretations indisputably point to and support the position of the Employes here that the Carrier violated Article II, Section 5, of the August 21, 1954 Agreement when, just after adoption of that agreement it changed the practice of using the claimant to perform the holiday work and paying him under applicable rules of the agreement. The claim, therefore, should have been sustained.

For these reasons I dissent.

J. W. Whitehouse,
Labor Member.