Award No. 9574
Docket No. TE-8235

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Howard A. Johnson, 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, Eastern and Western Divisions, that:

(a) Carrier violated the terms of the Agreement when it required and continues to require the occupant of the monthly rated agency position at Louisiana, Missouri, to assume and perform the duties of the first trick operator, an hourly rated employe, at that point, in addition to his own duties, on Monday, an assigned rest day of the operator, beginning with the first Monday in September, 1949, which duties are those normally performed by the operator at Louisiana, within his regularly assigned hours, Tuesday through Saturday; and

(b) When it required and continues to require the occupant of the operator position at Louisiana, Missouri, an hourly rated position, to assume and perform the duties of the monthly rated agency position at that point, in addition to his own duties, on Saturday, an assigned rest day of the agent, beginning with the first Saturday in September, 1949, which duties are those normally performed by agent at Louisiana, Monday through Friday; and

(c) Beginning with the first Monday that the violation cited in paragraph 1 was placed in effect and continuing until the violation is corrected the carrier shall compensate the senior available extra employe at the straight time rate of the operator position at Louisiana, or if no extra employe was or is available, the carrier shall compensate the employe who occupied or occupies the position of operator at Louisiana each Monday beginning with the date the violation occurred, at the straight time rate, due to his having been suspended from work on such days and in addition thereto he shall be compensated the difference between the straight time hourly rate of the operator position which he has and is being paid and the time and one-half rate of the monthly rated agency position at Louisiana, for services rendered as agent on Saturday; and

(d) Beginning with the first Saturday that the violation cited in paragraph 2 was placed in effect and continuing until the violation is corrected the carrier shall compensate the senior available extra employe at the straight time hourly rate of the agency position at Louisiana, Missouri, or if no extra

employe was or is available then the carrier shall compensate the employe who occupied or occupies the position of agent at that point, Monday through Friday, for eight hours at the time and one-half rate of pay for each Saturday on which such employe has been or may be required to suspend work.

EMPLOYES' STATEMENT OF FACTS: Effective September 1, 1949 the Agreement was amended by the adoption of rules to provide for the establishment of the 40-hour week.

At Louisiana, Missouri there were the following positions on September 1, 1949: agent, first-shift operator clerk, second-shift operator clerk, and third-shift operator clerk. The agent, W. A. Monroe, was a monthly rated employe and R. B. Clawson, the regularly assigned first-shift operator, was an hourly rated employe. Effective September 1, 1949, the Superintendent assigned Agent Monroe to a work-week beginning on Monday, with Saturday and Sunday as rest days. Operator Clawson was assigned a work-week beginning on Tuesday, with Sunday and Monday as rest days. After this assignment was made it was found by the Employes that both positions were worked six days per week and the agent was required to perform the work of the operator clerk on Saturday, as well as his own work, and on Monday the operator-clerk was required to perform the work of the agent, as well as his own work.

In particular, on Saturday the operator-clerk checks the transfer track and makes a switch list. Both items of work are performed by the agent on the other days of the week. On Mondays Agent Monroe weighs inbound and outbound carloads, rates carload and LCL shipments and revises inbound waybills, which work is done by Operator Clawson during the other days of the week. No relief assignment had been made, nor any extra employe assigned to perform the work on either Saturday or Monday.

The claim was made and progressed to the highest officer designated by the Carrier to handle disputes, and was declined by him.

POSITION OF EMPLOYES: It is the position of the Employes that the Carrier violated Rule 29 (the 40-Hour Week Agreement) when it required the agent, W. A. Monroe, to perform the work of the first-shift operator on each Monday following September 1, 1949, and also violated Rule 29 when it required Operator R. B. Clawson to perform the work of Agent Monroe on each Saturday following September 1, 1949.

Employes point out that the factual situation and the principles involved in this dispute are similar to those in Award 6688. In the Opinion in that award it was pointed out that in establishing a five-day assignment, the Carrier was not obligated to establish a regular relief position if this were not possible or practical, but was given two other alternatives, either to use a qualified extra employe or to use a regularly assigned employe. In that case, as in this case, the Carrier did not use either of the alternatives the agreement specified for preserving to the regularly assigned employe or the extra employe the six days of work that was an integral part of the operator's assignment prior to September 1, 1949. The Carrier simply transferred the Monday work and made it a part of the agent's assignment. Also in that award the referee pointed out that the previous awards of the Third Division; namely, Awards 5736, 5579, 5271 through 5275, and 5967, had found that it would be a violation of the Carrier's obligations under the Agreement to combine the assignments of the two different classifications of employes.

Many other awards can be cited, upholding this same principle. Compare these statements to the instant case where the Employes have not submitted a scintilla of evidence to in any way indicate that there is any justification for the claim in this case. On the contrary, the Carrier has shown, by the actions of the parties to the contract, supported by written evidence, that the claims are not justified.

CONCLUSION

The instant claim should be denied for the following reasons:

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

2. The claim and the claimants are vague and indefinite and impossible of ascertainment, particularly at this late date.

3. The agreement never contemplated that lines of demarcation be drawn between the duties of an agent and telegrapher-clerks who work under him.

4. To endeavor to try lines of demarcation between the duties of an agent and a telegrapher-clerk could only result in unnecessary confusion, inefficiency, and restrict the agent's right to designate the duties to be performed by his subordinates.

5. The claim is not supported by the agreement and is contrary to the past practice going back to the beginning of the railroad.

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

(Exhibits not reproduced.)

OPINION OF BOARD: At the outset the Carrier objects that according to many Awards this claim has come here with too much delay, having been finally denied on April 27, 1950, and notice of intention having been filed on December 30, 1955, over five years later.

The National Agreement of August 21, 1954, effective January 1, 1955, which set up a general nine-month limitation for appeals to this Board, expressly provided a twelve-month limitation after its effective date for all claims and grievances theretofore finally denied. We shall therefore proceed to consider the merits.

The claim arises out of the readjustment of work under the 40-Hour Week Agreement, effective September 1, 1949. Prior to that time the agent and three operator-clerks had each worked six days per week, all of them with rest day Sunday, except one who worked on that day and whose rest day was Thursday. A fourth operator-clerk worked on Thursday.

Upon the readjustment the agent worked from 8:00 A. M. to 4:00 P. M. (less lunch hour), Monday through Friday, with rest days Saturday and Sunday; the first trick operator-clerk worked from 8:00 A. M. to 4:00 P. M., Tuesday through Saturday, with rest days Sunday and Monday. Admittedly each, when working on a rest day of the other, had theretofore regularly performed

some work which the other performed on his usual work days, and continued to do so. They both had the same qualifications and seniority. While the agent was in general charge of the station and normally did other than telegraph work, he was qualified and entitled to do the latter. The telegrapher-clerk performs the necessary communication work arising on his shift, and also such other work as the agent may assign him, including work of the kind ordinarily performed by the agent himself. Their work shifts were substantially but not exactly the same, but apparently were sufficiently so for the interchange of work.

The claim as first made was that the operator's position had become a five-day position and that his rest days must be Saturday and Sunday. This seems to have been based on the fact that the employe designated as agent worked only five days, and that no relief employe designated as an agent was provided for the sixth day. That claim overlooked the fact that "position" and "work" as used in the 40-Hour Week Agreement refers, "not to the work week of individual employes," but to "service, duties or operations necessary to be performed the specified number of days."

After the denial of that claim it was amended on appeal upon the property to read that the Carrier had violated the Agreement:

(1) When it required the agent, a monthly rated employe, "to assume and perform the duties of the first trick operator, an hourly rated employe, * * * in addition to his own duties, on Monday, an assigned rest day of the operator, * * *;" and

(2) When it required the first trick operator, "to assume and perform the duties" of the agent, "in addition to his own duties, on Saturday, an assigned rest day of the agent * * *."

Thus the claim is that duties of each position were performed on the sixth day.

The Employes' Statement at Hearing on this appeal refers again to the five-day position question raised by the original claim and says: "since the Carrier, by its own action, declared the duties of the position could be met in five days, then it must follow that the days off (rest days) must be Saturday and Sunday."

In other words, although in their amended claim they affirmatively state that the duties of each position were regularly performed by the other employe on the sixth day, thus indicating that it continued to be six-day work, they argue that the Carrier, by not designating an employe to work under the title of agent on the sixth day, turned into a five-day position what had theretofore been a six-day one. Thus they forget again that as used in the 40-Hour Week Agreement the words "position" and "work" refer to services performed and not to the work week of individual employes.

It is apparent that the agent's six-day position was not changed to a five-day position by the readjustment of assignments incident to the adoption of the 40-Hour week.

The Employes' Ex Parte Presentation states as follows:

"It is the position of the Employes that the Carrier violated Rule 29 (the 40-Hour Week Agreement) when it required the agent, W. A.

Monroe, to perform the work of the first-shift operator on each Monday following September 1, 1949, and also * * * when it required Operator R. B. Clawson to perform the work of Agent Monroe on each Saturday following September 1, 1949.

* * * * *

It is the Employes' position that beside the establishment of the 40-Hour Week Agreement by assigning five days work days and two rest days to the regularly assigned employes, the Carrier cannot transfer the work of the individual positions and require the employes of different classes to perform the work on the assigned rest days by combining the work of the other positions with their own. The Agreement provides protection of the rest days to available extra employes when such rest days are not a part of any assignment. In the event neither a regularly assigned relief nor extra employe is available to perform the rest day relief work, the regular incumbents of the positions have the right to be used at the time and one-half rate."

In other words, the contention is that regardless of need, each separate "position" (meaning each individual assignment rather than each kind of work done) as it existed prior to September 1, 1949, if worked at all on rest days, must be filled by a regular relief man, or by a qualified extra, or by the regularly assigned holder of that position, at the punitive rate, and that "positions", however similar the "service, duties or operations necessary to be performed," cannot be staggered so as to take care of the necessary work without the employment of actually unnecessary extra relief. Again, it is apparent that the claim is based upon "position" in terms of "individual employes" rather than upon the "service, duties or operations necessary to be performed," as specified by the Agreement.

There is no question that agents, agent-telegraphers and telegrapher clerks all have common seniority and work in all such capacities according to their seniority, both regularly and for relief purposes. While the statement is made that both the agent and the telegraphers usually perform some duties not ordinarily performed by the other as their respective titles would normally suggest, it is apparent that neither has exclusive jurisdiction over any such work, but that on the contrary the work largely merges and interchanges. In fact, the record shows that each has habitually performed work normally performed by the other.

It is freely conceded that there are two conflicting lines of authority, and that Award 6946 and numerous other previous and subsequent awards are contrary to this claim; but it is contended that the latter are wrong.

The 40-Hour Week Rule (Rule 29, Section 1(a) of this Agreement) provides:

"The Carrier will establish * * * a work week of 40 hours, consisting of five days of eight hours each, with two consecutive days off in each seven; the work weeks may be staggered in accordance with the Carrier's operational requirements; so far as practicable the days off shall be Saturday and Sunday. The foregoing work week rule is subject to the provisions of this agreement which follows:" (Emphasis ours.)

In other words, as pointed out in Award 6946 and many others, the new "work week rule" is not merely a 40-hour week rule; the provision for the staggering of work weeks, is just as much a part of "the foregoing work week rule" as the 40-hour provision. And, as pointed out in the Note at the beginning of Section 1, the "work weeks" which may be staggered are work weeks of "service, duties or operations necessary to be performed," and not the work weeks or positions of "individual employes." Thus it relates to actual work, and not to titles or designations of individual assignments.

The obvious purpose of the agreement was to spread employment as well as to shorten working hours, but not to make unnecessary jobs. It was apparently for that reason that the provisions for both 40-hour work weeks and staggered work weeks were stated together at the outset as constituting the new "work week rule," subject only to the limitations further stated and those necessarily implied, such as the incompatibility of work or the disqualification of employes to perform it because of scope and seniority rules, etc.

Since the parties imposed no other limitations on the new provision for staggered work weeks this Board can add none. But in putting it into effect the Carrier is necessarily limited by physical or factual incompatibility or impossibility, such as those imposed by seniority or scope rules, but not by titles or designations of individual positions.

In Award 6946 the circumstances were substantially similar to those here present. This Division said in part:

> "The situation at Stillwater, briefly is: The Telegrapher-Clerk was assigned Tuesday through Saturday and the Agent-Telegrapher was assigned Monday through Friday, after September 1, 1949. On Mondays and Saturdays each was required to do whatever work was necessary to be done, including some of the duties of the other. 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. The positions were not identical and the rates of pay were different. The Organization asserts that the assignments are violative of agreement rules and claim is made for reparations on that basis.
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> The record and briefs are long and the awards cited are numerous. We cannot hope to exhaustively discuss each phase of the case in detail. We shall confine the opinion to a statement of our conclusions and a concise exposition of the reasons upon which they rest.
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> It will be noted that the staggering of work weeks is an integral part of Article III, Section 6. It is clearly of equal importance with the establishment of the 40 hour week itself. In other words, the establishing of the 40 hour week with two rest days in seven and the staggering of work weeks in accordance with the carriers' operational requirements are the two primary provisions of the 40 Hour Week Agreement even though they are subject to other provisions of that agreement. 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 car-

riers when they agreed to the 40 hour work week with the same pay as the previous six day week. Award 5545.

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. If these are the proper concepts contained in the 40 Hour Week Agreement, and we think they are, the Carrier had the right to stagger the two positions in the dispute before us. The fact that Carrier changed the duties of the positions as of September 1, 1949, in order that the positions could be staggered to meet operational needs is not a material fact. Either party may do these things which the contract permits for any reason that he deems sufficient.

The claim that the rest days of six day positions must be filled under the circumstances here shown is without merit. It was clearly contemplated that work weeks could be staggered in accordance with the carriers' operational requirements in order to reduce the costs of operation. It is only when carriers' operations require rest days to be worked that the rules governing rest day work come into play. When work on rest days of six and seven day positions is required, the carriers are obligated under Section 10-a to establish all possible relief assignments with five days of work. Such regular relief assignments are not required to be established except where carriers' operational requirements make them necessary.

Where work remains to be performed on unassigned days remaining after all regular relief assignments have been made which are possible to be made, Section 14 provides that it may be performed by an available extra or unassigned employe who will otherwise not have 40 hours of work that week and, in all other cases, by the regular employe. This rule means just what it says, as we have consistently held, and when the work involved falls within its terms, the Carrier has no alternative method of getting the work done. But in the case before us, the Carrier procured the performance of all necessary work on the days involved by the expedient of staggering the work weeks of the Agent-Telegrapher and the Telegrapher-Ticket Clerk. Under such circumstances the rules governing regular relief assignments and work on unassigned days have no application. We have repeatedly held, and correctly we think, that the assignment of regular relief positions and of work on unassigned days is not a condition precedent to the staggering of work weeks. The meaning of the 40 Hour Work Week Agreement is quite the contrary; the Carrier may procure the performance of all necessary work that it can by the staggering of work weeks before the assignment of rest day work comes into the picture. It is clear therefore that the Carrier did not violate the Agreement under the facts and circumstances shown in the present case.

The foregoing conclusions are sustained generally by Awards 5545, 5555, 5557, 6001, 6002, 6042, 6075, 6184, 6212, 6216, 6232, 6602. Awards 1528, 1565, 1566, 1644, 1669 Second Division."

Award 6946 then proceeded to discuss Awards 6688 and 6690, here relied upon by the Employes, and said:

"We point out that no effect is given to the right of Carrier to stagger work weeks in Award 6688. The award holds: 'We cannot agree that it does have the right so to combine the two assignments of different classifications so that on Saturday one employe will perform the duties of both'. We quite agree with this controlling provision if the 'different classifications' do not have common seniority. This is the meaning given the provision in Award 6184 which we think is the correct one. It must be borne in mind that classifications of employes may be made on trifling differences for many different reasons. The classifications which are of interest here are those which have some relation to the issue before us. A classification for pay purposes or the exercise of orderly displacements is not such. It is classifications for purposes of seniority only that have application here. It appears from Award 6688 that the employes involved were of the same craft, in the same seniority district, carried on the same seniority roster, were in classes having common seniority, and were qualified to perform the work involved. Under such circumstances, we cannot agree with the result reached. We think the right to stagger work weeks in accordance with carriers' operational requirements contemplates that such positions may be staggered for the very purpose of avoiding the assignment of rest day work which is not necessary to the economic and efficient operation of the railroad. We cannot agree with the holdings of Award 6688 with reference to carriers' right to stagger work weeks or with the interpretation placed upon classes or classifications of work. Award 6690 appears to have adopted the same erroneous conclusions. We think the foregoing awards fail to consider the overall purpose of the 40 Hour Week Agreement. They fail to consider all of the provisions of that Agreement and give stress to particular provisions which create an illusory result. A part of the bargain for a five day week at the then existing pay for six days' work, was the right of the Carrier to eliminate the necessary rest day work to the extent that it could by the expedient of staggering work weeks.

We hold that Carrier assigned the Agent-Telegrapher and the Telegrapher-Ticket Clerk at Stillwater in accordance with Agreement provisions. No basis for an affirmative award exists."

We find no essential difference between Award 6946 and this docket. As was said in that award:

"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. The positions were not identical and the rates of pay were different. * * * 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."

As noted above, the agent's work prior to September, 1949, was a six-day position and it continued to be such, since it was regularly performed on the sixth day. The Employes contend otherwise. They also contend that five-day and six-day positions cannot be staggered, although the Rule imposes no such limitation, and it is not apparent from the above principles why work normally performed five days a week cannot be staggered with work normally performed six or seven days a week, if compatible and permissible under scope and seniority rules. Awards 8286, 8531 and 8563 are relied upon as authority that such staggering is not permissible.

Award 8286 is not authority for that proposition, which was not even discussed. There, as here, both positions had been six-day positions prior to the 40-Hour week readjustment. There, as here, the Employes considered one position to have become a five-day position, giving as their reason the fact that "the position is not included in the schedule of a regular relief assignment." Obviously if it had been, the claim would not have arisen; but it does not follow that the six-day position had thereby become a five-day one. At any rate, that was not the basis for either the claim or the award.

That claim was that:

> "The Carrier violated the Rules Agreement * * * when work performed five days a week, Monday through Friday, by the Claimant (Henderson), was improperly assigned to another regularly assigned clerk (Huesman) * * * **on an overtime basis,** on rest days of the Claimant." (Emphasis and parentheses ours.)

In other words, the claim was not directed against the staggering of work at all, but against the improper assignment of overtime. The Position of Employes stated:

> "Here, the General Manager has agreed with our position that Huesman did perform the duties of the Claimant on Saturdays **on an overtime basis as stated in our claim. Therefore, inasmuch as** Clerk Huesman **could not perform the extra duties** assigned to him on Saturdays **within his regular eight hours tour of duty,** it is obvious that **the work was overtime work** that should have been performed by the Claimant on his rest day * * *.
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> * * * * *
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> It is agreed in the present case that work which was performed by the Claimant five days a week on his regular position, FC-107-F, was performed on the dates of the claim by the Clerk regularly assigned to Position FC-105-F, **on overtime,** after he had completed his regular eight hour assignment. * * * When the Clerk on Position FC-105-F was **unable to perform these duties within his regular tour of duty,** the work should have been assigned to the Claimant as provided in the Rule."

In other words, the basis of the claim was not that Henderson's work was staggered with Huesman's on Saturday, but that it was done by Huesman as overtime, after he had performed his own work. On Monday Huesman's work was staggered with Henderson's, but no objection was made to that in the claim. Overtime, and not staggering, was the issue presented and decided by Award 8286. The Award said:

"It is the claim of the Division Chairman that on this and subsequent Saturdays, Huesman had been worked overtime by reason of assuming duties that would normally be performed by Henderson.

Carrier seeks to avoid payment of the claim on its right to stagger the work since both employes are of the same class and craft in the same seniority district * * *.

The difficulty with this however is that the Carrier only staggered the work of Huesman, not that of this claimant, * * *."

In other words, Award 8286 was decided on the basis that Henderson's Saturday work was not actually staggered with Huesman's, but was added to his work as overtime. Thus it certainly is not authority for the proposition that Henderson's work could not have been staggered with Huesman's.

Award 8531 related to three positions which had been six-day ones. In the 40 hour week reorganization relief positions were set up for two of the positions, but not for another, for which, as here, the Carrier relied upon the new staggering provision. The Award found that the first two positions remained six-day positions, but that "Position 520 became a five-day position. * * * A five-day position may not properly be staggered with a six-day position."

It may be that the conclusion that the third position became a five-day position was based on evidence, and not merely upon the fact that no rest day relief was established for it as such. But assuming that the conclusion was correct, no reason, rule or authority whatever was assigned for the flat statement that a five-day position may not properly be staggered with a six-day position, and the flat unsupported conclusion is of little, if any, weight.

In Award 8563 it was said: "The Carrier seeks to stagger a five-day position with a seven-day position. This cannot properly be done and the point is not tenable. See Awards 8286, 8531." No reason or rule was assigned for that flat pronouncement, and the only awards cited are 8286, which as above noted, did not deal with the question at all, and 8531, which was based on no stated reason, rule or award. Certainly some better ground is needed for such a conclusion. There may well be one, but none has been suggested to us.

No other awards, have been cited or found to the effect that such positions cannot be staggered, and we find nothing in the rules limiting the staggering of work weeks to other than five-day positions. Consequently, even if a five-day position is involved here, we conclude that Award 6946 and many other awards are determinative of this claim. These include Awards 5545, 5555, 5556, 5557, 5912, 6001, 6002, 6023, 6042, 6075, 6184, 6232, 6602, 6947, 6948, 7073, 8003, 8136, 8137, 8138, 8139, 8278, 9030, 9042, 9043, 9105 and 9119, severally participated in by Referees Elson, Carter, Douglass, Daugherty, Parker, Whiting, Begley, Wenke, Stone, Sharpe, Bailer, Elkouri, Lynch, Hornbeck and Weston. There are awards to the contrary, but the great weight of authority is as above stated.

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 was not 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 October, 1960.

DISSENT TO AWARD 9574, DOCKET TE-8235

By adopting the fallacies of Award 6946 and finding no essential difference between that award and the present case, the majority here has not only compounded error but has materially contributed to the erosion of employes' contractual rights and thus to an ultimate situation wholly contrary to the purposes of the Railway Labor Act.

From the beginning of collective bargaining in the railroad industry the parties have recognized certain rights of the employes with respect to work that is necessary to be performed on rest days of their positions. As more employes were granted rest days these rights became more and more certain. For many years prior to adoption of the forty-hour week these rights had become so well defined that little controversy remained.

In a practically unbroken line of decisions this Board and its predecessors had established the principle that work of each position required to be performed on a rest day of such position must be assigned in one or another of three ways: First, to the occupant of a regular relief assignment if such an assignment had been established and if the occupant were available; second, if the regular relief employe was not available or if no relief assignment had been created, to an extra (or under some agreements a furloughed or unassigned) employe; and, third, if neither the regular relief employe nor an extra employe were available, to the regular incumbent on an overtime basis.

No other methods were provided, and our decisions clearly held that since no other methods were provided by the rules, assignment of such rest day work in any other manner amounted to violation of the agreement.

The principle is well illustrated by our Award 4728 in which we said:

> "We believe it is clear from the provisions of the National Rest Day Rule and Awards of this Board interpreting the same that work on rest days should be assigned in the first instance to a regularly assigned relief man if there be such, secondly, to an extra man, then, if an extra man is not available, to the regular occupant of the position on an overtime basis . . .".

The "regularly assigned relief" employes were those occupying relief positions established by agreement provision to afford rest day relief to employes whose work weeks were staggered to accommodate such assignments.

When the forty-hour week came to the railroads the employes attempted to secure it on a rigid, non-staggered Monday to Friday basis. The employes' attempt to change the typical work week from a staggered basis where some employes had to accept an undesirable combination of work and rest days, to a non-staggered form where all employes would have the desirable rest days of Saturday and Sunday, failed.

And to make its intention plain the Emergency Board spelled out in the new rule that the work weeks could be staggered. The Board also made it plain that because of retention of the staggered work week feature, and other rules, there would be no necessity to change the rules relating to work on Sundays, holidays, or other rest days. (Page 25, Report of Emergency Board No. 66).

These were the very rules, interpreted by a host of awards like 4728, which required such work to be assigned by one or another of the three methods previously discussed. They were not changed. The 40-Hour Week Committee's "Supplement to Decision No. 5" clearly evidences this fact.

But the carriers immediately began to contend that the spelling out of their right to stagger work weeks gave them an additional method of assigning necessary work of a position on its rest days. They contended they had acquired a right to combine the work of two positions so that only one employe would be required to do the work of both positions. This combining of work they called "staggering."

Disputes resulted and were submitted to this board. Awards 5271, 5272, 5273, 5274, 5275 for example. In all of these awards this Board held that such combining of the work of different positions was not permitted by the 40-hour week rules. Numerous other awards held the same. In Award 5475 the same Referee who wrote Award 6946 reaffirmed the retention of the three traditional methods of assigning rest day work. He said:

> "The principle is no different since the advent of the forty-hour week, there being simply two rest days instead of one."

But the carriers persisted, and finally succeeded in convincing some referees that the 40-hour week rules had changed the situation to the extent that "staggering" now had acquired a meaning different from what was formerly permitted under staggered work week assignments.

They succeeded to the extent that Referee Carter, in Award 6946 said that ". . . positions . . . may properly be staggered . . ." as quoted by the majority here.

Now I submit that nothing in the Emergency Board Report, nothing in the 40-Hour Week Agreement, nothing in decisions of the 40-Hour Week Committee, nothing in the earlier awards of this Board on the subject, so much as mention the staggering of "positions" or "work" either as a means of avoiding the assignment of rest day work in the traditional manner, or otherwise.

It was here that the awards began falling into error. And now that error is being made more grave by applying it to a distinctly dissimilar factual situation.

In Award 6946 both employes occupied six-day positions, the service, duties and operations of both being required every day except Sunday. Both employes performed the rest day work of the other's position one day a week. The Referee held this evenly reciprocal arrangement to be staggering of the positions, erroneously holding that it was permitted by the rules.

But here the agent's position, since it is covered by Rule 17, Section 3, (b) 1, certainly is a five-day position. And the telegrapher-clerk's position just as clearly is a six-day position.

The majority discusses the awards cited as authority for the proposition that even if the staggering of positions were permissible it could only be done with the same kind of positions.

In that discussion the majority displays what I believe to be unsound reasoning, if not studied vacillation. The majority relies upon Award 6946 as authority for holding that the two "positions" were staggered, but in this discussion it shifts to description of the occurrence as a staggering of "work".

It must be kept clearly in mind that the agreement provides only for the staggering of "work weeks". And further that the "Note" preceding the general 40-hour week rule clearly distinguisshes the work weeks of individual employes (which may be staggered) from both positions and work (which may not be staggered).

The awards discussed in this part of the Opinion can, of course, be distinguished factually from our present case, but the principle is applicable. It will be noted that no award is cited as authority for the staggering of unlike positions.

Then, with respect to the two awards, 8531 and 8563, which it is conceded support the Employes' viewpoint, the majority rejects them in this manner:

> ". . . No reason, rule or authority whatever was assigned for the flat statement that a five-day position may not properly be staggered with a six-day position, and the flat unsupported conclusion is of little, if any, weight."

I believe I may be forgiven for observing at this point that the majority has not here assigned any reason, rule or authority for its equally flat statement that such dissimilar positions may be staggered. I doubt that this unsupported conclusion is possessed of any greater weight than its author ascribes to those of Awards 8531 and 8563.

At any rate, it seems to me that a self-evident fact, such as the impossibility of truly staggering unlike objects—bricks, boards, or positions—needs no citation of authority to support it.

For all of the reasons indicated, I consider Award 9574 to be erroneous, and I hereby register my dissent.

J. W. Whitehouse
Labor Member

ANSWER TO LABOR MEMBER'S DISSENT TO AWARD NO. 9574, DOCKET NO. TE-8235

Award 9574 correctly followed Award 6946 in holding, among other things, that the Forty-Hour Week Agreement makes provision for the staggering of work weeks without distinguishing between classes included in the same seniority district or between five and six-day positions, and subject only to the specific limitations stated in the rules. Also see Carrier Members' Answer to Labor Member's Dissent to Award 9575.

/s/ C. P. Dugan

/s/ R. A. Carroll

/s/ W. H. Castle

/s/ J. E. Kemp

/s/ J. F. Mullen