

Award No. 14317
Docket No. TE-13992

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Murray M. Rohman, Referee

PARTIES TO DISPUTE:

TRANSPORTATION-COMMUNICATION EMPLOYEES UNION
(Formerly The Order of Railroad Telegraphers)

ST. LOUIS-SAN FRANCISCO RAILWAY COMPANY

STATEMENT OF CLAIM: Claim of the General Committee of The Order of Railroad Telegraphers on the St. Louis-San Francisco Railway, that:

1. Carrier has failed and refused to compensate W. R. Smith, agent-telegrapher, Gravois, Missouri, for services performed on the following rest days and holidays:

Saturday	December 16, 1961	8 hours at time and one-half rate
Sunday	December 17, 1961	8 hours at time and one-half rate
Saturday	December 23, 1961	8 hours at time and one-half rate
Sunday	December 24, 1961	8 hours at time and one-half rate
Christmas	December 25, 1961	6 hours at time and one-half rate

2. Carrier shall now be required to compensate Mr. Smith for such services as above specified.

EMPLOYEES' STATEMENT OF FACTS: Claimant, W. R. Smith, was the regularly assigned Agent-Telegrapher at Gravois, Missouri, during the period involved in this claim, with an assignment of 9 A. M. to 6 P. M., Monday through Friday, rest days Saturday and Sunday, no holiday assignment.

Claimant found it necessary to open his station on his Saturday and Sunday rest days of December 16 and 17, 1961; also on his Saturday and Sunday rest days of December 23 and 24, 1961, on each of which days he remained on duty eight hours: and, further, on Monday, December 25, 1961, when he remained on duty for six hours, to handle approximately 500 express shipments consisting principally of Christmas merchandise and Christmas gifts, some of which were of highly perishable nature. Claimant rendered time slips to the Carrier for this rest day and holiday service, whereupon the Superintendent wrote him as follows:

"Chaffee, January 2, 1962
1-17-1

Mr. W. R. Smith
Gravois, Missouri

Have just received in my office your CT-95 Std. No. 1 dated December 16 claiming 8 hours at time and one-half, also your CT-95

(REA Express). The assigned hours of such joint agency were 9 A.M. to 6 P.M. exclusive of meal period, Monday through Friday with rest days of Saturday and Sunday with no rest day or holiday assignments. The rate of pay for the agent-telegrapher position occupied by the Claimant was \$2.398 per hour. The Claimant received from the Express Company \$744.40 in express commission for the month of December, 1961.

OPINION OF BOARD: In brief, the facts which precipitated the instant dispute are as follows: The Claimant was the regularly assigned Agent-Telegrapher at Gravois, Missouri, a point located eleven miles south of St. Louis. His scheduled hours were 9:00 A.M. to 6:00 P.M., Monday through Friday, rest days Saturday and Sunday, no holiday assignment. The Claimant, as Agent-Telegrapher, was also required by the Carrier to serve as "Joint Agent" for the Railway Express Agency, such service being superimposed on his position.

Several days prior to December 16, 1961, the St. Louis office of the R.E.A. contacted Claimant to notify him that they were dispatching express shipments to Gravois on the various dates involved in this claim. He, thereupon, opened his station to handle the volume of business, which totalled approximately 500 shipments during the five days in question. These express shipments consisted principally of Christmas merchandise and Christmas gifts, some of which were of a highly perishable nature.

The Carrier does not deny that the work was performed nor does it question the necessity of his presence during those days. Its declination was based on the fact that the Claimant received compensation for handling express from the Express Company and also on various Circulars promulgated to all agents.

The genesis of the Organization's claim is grounded on Award No. 211 (Garrison), between the same parties, dated March 13, 1936. This Board therein stated as follows:

"The Agent is the employe of the Railroad Company. He is not the employe of the Express Company, but merely performs services for the latter on a commission. These commissions are by express terms of the Agreement (See Article XIV), a part of the agent's compensation for his services to the Railroad, and the amount of his wages from the Railroad are determined (subject to a certain minimum) by taking into account the amount of probable commissions. Therefore, when the agent handles express he is doing what the Railroad Company contemplated and is benefiting the Railroad Company as well as the Express Company."

We also held in that award that:

" * * * it is clear that the agent would have been held responsible by his employer for failure to handle the property when it arrived, and that in handling it he was obligated to do what his employer expected him to do. Under these circumstances he should be compensated by his employer for extra time spent. See U. S. Railroad Board decisions No. 3956 (docket 4573) and 3204 (docket 3309), which are in point and sustain the conclusion herein arrived at."

Immediately thereafter, the Carrier issued instructions to all agents that they were not to work overtime handling express without specific authority (Circulars 6465, 6545 and 7745). Hence, the Carrier assails these claims on the

ground that the Claimant was neither assigned to work on his rest day or holiday nor was he expected to be available on such days. The Carrier further insists that notification or a call is a condition precedent to perform such work.

In Award No. 2603, the Carrier declined payment on the ground that, "this is work for which you receive commissions outside of your salary as agent." In the instant dispute, the Superintendent, in his letter of declination dated January 2, 1962, stated:

"Investigation developed that you worked due to handling express business and not railroad business. You receive compensation from the Express Company for handling express, therefore these four time slips are respectfully declined."

Thus, this Board has already established the principle, via Award No. 2603, that the Carrier is liable for payment of overtime when an employee performs service for the Express Agency after his regular hours.

In addition, the following rules promulgated by this Carrier are relevant herein:

"Rule 1024:

No station agent is excusable for allowing property to perish on his hands, when such shipments are not delivered immediately on arrival. Matter must be handled in accordance with instructions of the Superintendent of Freight Loss and Damage Claims.

Rule 750:

An employee, who through carelessness or negligence, causes or permits damage to property of the railroad, of that of the public entrusted to its care, will be subject to such action as the circumstances may warrant."

It is also noteworthy, that in Award No. 9834, the same argument was raised by the Carrier, namely, that the work was wholly Railway Express business. Again, the claim was sustained on the ground that, "The Claimant there went to the station and performed the duties which were necessary."

We recognize the Carrier's argument that it is vested with responsibility to administer the Agreement and that it has the prerogative to determine when and where work is to be performed, especially on overtime. However, this prerogative must yield to the degree, under the circumstances evidenced herein, that it imposes a duty on its employees to perform the type of work in question. These employees are obligated and duty-bound to care for shipments delivered to them. The Carrier cannot establish a rule which would assess penalties against employees for laxness, and in the same breath, assert that it will not be liable for work performed to care for such goods.

Hence, it is our conclusion, that the work was required to be performed on the claimed dates.

FINDINGS: The Third Division of the Adjustment Board, upon the whole record and all the evidence, finds and holds:

That the parties waived oral hearing;

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 Agreement was violated.

AWARD

Claim sustained.

**NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION**

**ATTEST: S. H. Schulty
Executive Secretary**

Dated at Chicago, Illinois, this 12th day of April 1966.

CARRIER MEMBERS' DISSENT TO AWARD NO. 14317, DOCKET NO. TE-13992

Award 14317 is in error to the extent that it overrides specific instructions of the Carrier that were promulgated in 1936 following Award 211 of this Board that employees are not to work overtime handling express without advance authority from their supervisor to do so. In this instance the Agent was informed by a representative of the Express Agency of the anticipated arrival of traffic sufficiently in advance to permit handling with his supervisor for necessary authority to work overtime. However, he ignored the Carrier's instructions and proceeded to work overtime without authority in violation of specific instructions to the contrary. This erroneous award condones such action and takes from the Carrier the right to decide as to when work is to be performed and which right has been recognized in numerous prior decisions of this Board.

The Award is also in error in its dependence upon the Operating Rules referred to therein. The quoted rules went out of existence and were supplanted by new rules as of March 1, 1957, more than four and one-half years prior to claim dates. Carrier directed the Board's attention to the Rules quoted by the Organization being outdated, but such information was disregarded.

/s/ G. C. White

/s/ R. E. Black

/s/ T. F. Strunck

/s/ P. C. Carter

/s/ D. S. Dugan

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