

Award No. 16069

Docket No. TE-15237

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

John J. McGovern, Referee

PARTIES TO DISPUTE:

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

CENTRAL RAILROAD COMPANY OF NEW JERSEY

STATEMENT OF CLAIM: Claim of the General Committee of The Order of Railroad Telegraphers on the Central Railroad of New Jersey, that:

1. The Carrier is violating the provisions of the Telegraphers' Agreement when it requires or permits an employe, holding no seniority in the telegraphers of service on the railroad to perform rest day relief work at Jersey City Telegraph Office each Saturday and Sunday.

2. Carrier shall pay the senior idle extra telegrapher on the seniority district a day's pay for not being used on each of the rest days each week, commencing June 29, 1963 until the violation is corrected.

3. In the absence of an idle extra telegrapher on each of these days each week, the Carrier shall be required to compensate the incumbent of the position, E. L. Thompson, or his successor, at the rate of time and one-half for work denied on his rest days, Saturday and Sunday each week, commencing June 29, 1963 until violation is corrected.

EMPLOYEES' STATEMENT OF FACTS: The below related factual background information is deemed necessary for the claim cause:

On March 19, 1949, a so-called National Agreement was entered into by and between representatives of the Eastern, Western and Southeastern Carriers' Conference Committees and employes represented by Employes' National Conference Committee, Sixteen Cooperating Railway Labor Organizations. Said National Agreement provided, among other things, for the establishment of a forty hour work week, effective September 1, 1949.

In connection therewith, on July 27, 1949 Signal Engineer F. W. Bender addressed a letter to former General Chairman H. Gerke, wherein he advised of the manner in which he intended to assign rest days to each position in the "JC" Telegraph Office at Jersey City, and he further explained therein the set up of a relief cycle position to cover said rest days, all to become effective on September 1, 1949. Copy of said letter is attached hereto as ORT Exhibit 1.

etc. of our telegrapher force as result of adopting the forty-hour work week. (See Exhibit A.) Specific reference was made therein to the manner in which a telegrapher's position in the Jersey City, N. J. telegrapher office would be covered on Saturdays and Sundays, rest days of the regular incumbent, by either using an extra employe under the scope of the O.R.T. or including the two days in a five-day cycle assignment.

On July 30, 1949, the General Chairman acknowledged the letter and concurred in the arrangement of the force, and regarding the two rest days above referred to stated as follows:

"With reference to your request that we agree to placing two left over relief days in 'JC' Telegraph in a cycle with some of Mr. Moran's positions, I will agree to this set-up. No signed memorandum from me is necessary, **your job is to find a telegraph operator qualified to fill the job in 'JC.'**" (Emphasis ours.)

Inasmuch as the proposed cycle assignment did not materialize, Carrier procured the performance of necessary work to be done on those days by employing a qualified telegrapher. This method of filling the vacancy had been followed for a period of fifteen years without protest from the Employees. In fact, the present incumbent, John Horne, was employed September 1, 1956 and has been working the positions in question in Jersey City Telegraph Office on Saturdays and Sundays since that time.

(Exhibits not reproduced.)

OPINION OF BOARD: Because of the Forty Hour Agreement, effective September 1, 1949 Carrier's Engineer sent a letter to the General Chairman outlining the details of assignments of the Telegrapher force at Carrier's Jersey City, New Jersey Station. He made specific reference to the manner of providing a replacement for a telegraph operator's position on Saturday and Sundays, the rest days of the regular incumbent. He suggested that either an extra employe under the Scope of the Telegraphers' Craft be used, or include these two rest days as part of a five day cycle assignment. The General Chairman replied by letter agreeing in principle to the suggestions made.

The Cycle Assignment never materialized. Carrier thereupon went outside the Company to find qualified operators to work at the Jersey City Telegraph office on rest days of Saturday and Sunday. This method of filling this position on these rest days has been followed for 15 years. The most recent such operator, Horne, began such employment September 1, 1956. He is also employed by another Carrier, the New York Central. The claim is made that Carrier violated the Agreement and in consequence of which, appropriate compensation should be paid to either the senior idle extra telegrapher or in his absence, the incumbent of the position or his successors for all work performed on rest days commencing June 29, 1963.

The fundamental argument propounded by the Petitioner is that Carrier has violated the Agreement by assigning an employe who holds no seniority in the telegraphers' craft and cite a number of rules to support its argument. This is, to say the least, a most unusual situation. As we view the record before us, it would appear that a separate Agreement was consummated between Carrier's representative and the General Chairman regarding the rest

day assignments of the position in question. This separate Agreement was followed for a period of 15 years. In fact, Horne, the latest rest day incumbent, began this employment in 1956 and has continued up to 1963, when this claim was filed. We have reviewed the correspondence exchanged between the parties over the years, but do not consider it as a protestation of Carrier's method of filling the vacancy. Rather, we conclude from an analysis of this record that the Organization has in effect acquiesced to Carrier's action in this case. It therefore is estopped from claiming a violation of the Basic Contract. Carrier is simply doing that which both parties agreed to some 15 years ago. Consequently, we can find no violation on Carrier's part and will deny the Claim.

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 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 29th day of January 1968.

DISSENT TO AWARD 16069, DOCKET TE-15237

The conclusion of the majority was reached, quite obviously, without due regard for the unambiguous rule primarily involved, and without giving effect to the principles of construction which were applicable and which have always been observed by this Board. The award, therefore, is palpably erroneous, and I dissent.

J. W. Whitehouse
Labor Member

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