Award No. 1565
Docket No. 1457
2-L&N-CM-'52

NATIONAL RAILROAD ADJUSTMENT BOARD
SECOND DIVISION

The Second Division consisted of the regular members and in addition Referee Adolph E. Wenke when award was rendered.

PARTIES TO DISPUTE:

SYSTEM FEDERATION NO. 91, RAILWAY EMPLOYES' DEPARTMENT, A. F. of L. (Carmen)

LOUISVILLE AND NASHVILLE RAILROAD COMPANY

DISPUTE: CLAIM OF EMPLOYES: 1. That under the current agreement the carrier improperly assigned Carman (engine carpenter) J. M. Clayton to a work week, Wednesday through Sunday with rest days of Monday and Tuesday, effective September 1, 1949.

2. That accordingly the carrier be ordered to:

a) Assign this employe to a proper work week, Monday through Friday with rest days Saturday and Sunday.

b) Make this employe whole by compensating him additionally at the applicable overtime rates instead of straight time for the services which he was assigned to perform on each Saturday and each Sunday, retroactive to September 1, 1949.

c) Make this employe whole by compensating him additionally in the amount of eight (8) hours at the applicable rate of pay for each Monday and each Tuesday, retroactive to September 1, 1949 because he was laid off to equalize the time due to the assignment to work his proper rest days.

EMPLOYES' STATEMENT OF FACTS: Prior to September 1, 1949, Carman (engine carpenter) J. M. Clayton, hereinafter referred to as the claimant, worked regularly an assignment of six days per week, Monday through Saturday, second shift, hours 3:00 P. M. to 11:00 P. M., in roundhouse located at Etowah, Tennessee.

On September 1, 1949, this claimant was arbitrarily assigned by the carrier to a position as engine carpenter on the second shift, hours 3:00 P. M. to 11:00 P. M., Wednesday through Sunday, with rest days Monday and Tuesday, at Etowah, Tennessee roundhouse.

There is no assignment of carmen (engine carpenters) on the second shift at Etowah roundhouse, relief or otherwise, other than that now worked by the claimant.

the establishment of a 40-hour work week. However, desirable it may be to have all workers have their rest days on Saturdays, Sundays and holidays, it is obviously **not possible to achieve this result in rail,** air and marine **transportation,** or in other continuous-process industries. 'To live as other men,' which the organizations assert is the purpose of these proposals, railroad workers do not therefore necessarily have to have their week ends off. Plenty of others in continuous industries and many in noncontinuous industries also do not have weekly hours confined to Monday through Friday, and have their rest days on other days of the week than Saturday and Sunday (page 23 of report) . . .

"A staggered work week of 5 days with 2 rest days in 7 automatically eliminates premium pay for Saturdays and Sundays as such, and our recommendations reject the proposed minimum guarantee of 8 hours as well as the raising of penalty pay for Sundays and holidays from time and a half to double time." (Page 25 of report.) (Emphasis added.)

Again, in its letter of February 27, 1949, to the parties to the 40-hour week case, the Emergency Board said—

"The next question relates to the staggering of the work weeks and Saturdays and Sundays as the days of rest. **Obviously, if the work week is staggered some employes cannot have these specific days off.** That the Board expected deviations from this pattern is made abundantly clear by its repeated use of the expressions 'staggered work week,' 'in accordance with operational requirements,' and 'so far as practical.' The great variety of conditions met in the railroad system of the country and even varied conditions on a single railroad require flexibility on this matter. The tenor and substance of the Board's discussions and recommendations show definitely that the Board intended to permit the Carriers to stagger work weeks. In contrast with the obligation of the Carriers to sustain the burden of proof in the matter of non-consecutive rest days, **it is for the Employes here to show that some particular operational requirements of the carriers are not better met by having the work weeks staggered."** (Emphasis added.)

The operation at carrier's Etowah, Tenn. roundhouse is necessarily a continuous operation and the two engine carpenter positions at that point were staggered so that engine carpenter work could be performed 7 days per week, with a maximum delay of only 16 hours on some days and 8 hours on others. That meets carrier's operational requirement at that point, and those requirements could not be met by both engine carpenters working Monday through Friday and both having Saturday and Sunday as off days, thus leaving a period of 56 hours during week-ends when neither would be on duty.

As already shown, these positions were previously filled 7 days per week, therefore, this assignment was entirely proper under paragraph (a), Rule 1, which provides that "on positions which have been filled seven days per week any two consecutive days may be the rest days . . ." Under that rule and the others discussed herein carrier was clearly within its rights under the agreement in establishing claimant's work week Wednesday through Sunday. Consequently, there is no basis for the claim and it should be denied.

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

The carrier or carriers and the employe or employes involved in this dispute are respectfully carrier and employe within the meaning of the Railway Labor Act as approved June 21, 1934.

This Division of the Adjustment Board has jurisdiction over the dispute involved herein.

The parties to said dispute were given due notice of hearing thereon.

The carmen of System Federation No. 91 contend carrier improperly assigned engine carpenter J. M. Clayton, effective September 1, 1949, to a work week of Wednesday through Sunday whereas it should have assigned him Monday through Friday. It asks that Clayton be so assigned and compensated accordingly, retroactive to September 1, 1949.

The facts out of which this dispute arises are as follows:

Prior to September 1, 1949 carrier maintained two engine carpenter positions at its Etowah, Tennessee roundhouse which positions had been filled seven days each week, one shift being from 7:00 A. M. to 3:00 P. M. and the other from 3:00 P. M. to 11:00 P. M. Claimant occupied the latter. To put in effect the forty-hour week carrier, as of September 1, 1949, continued the two engine carpenter positions but assigned them five-day work weeks as follows:

One from 7:00 A. M. to 3:00 P. M., Monday through Friday, and the other from 3:00 P. M. to 11:00 P. M., Wednesday through Sunday. The latter is the position occupied by claimant.

All of the questions here raised are answered by Award 1528 of this Division. Were it not for other previous awards of this Division to the contrary we would merely cite Award 1528 as controlling and say no more.

The "Note" to Rule 1 of the parties' controlling agreement provides:

> "The expressions 'positions' and 'work' used in this rule refer to service, duties, or operations necessary to be performed the specified number of days per week, and not to the work week of individual employes."

By this "Note" the agreement plainly provides that "positions" and "work" refer to service, duties or operations necessary to be performed the specified number of days per week and not to the work week of the individual. Consequently, our former concepts to the effect that a position meant the work week of the individual are no longer applicable. The plain meaning of sections (a), (b), (c) and (d) of Rule 1 is that a position is a five, six or seven-day position, for the purpose of fixing rest days, if the services, duties, or operations to be performed are necessary to have performed on five, six or seven days a week, as the case may be. This is so even though the assignments made are only for five days for the reason that all assignments under the forty-hour week agreement, with certain exceptions not here material, must be for five days and that fact has no relation to the question of whether the position performs services, duties, or operations necessary to have performed on five, six or seven days per week.

This thought is well expressed in Award 5556 of the Third Division as follows:

> "All regular assignments under the agreement are for five days each week. Six and seven-day assignments no longer exist. Whether a position is a five, six or seven-day position is not affected by the individual assignment of an employe."

Rule 1 (a) provides:

> "General.
>
> This Carrier will establish, effective September 1, 1949, for all employes, subject to the exceptions contained in this agreement, 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 this 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 follow:"

When carrier complied with the foregoing it could stagger the work week of its employes in accordance with its operational requirements provided it was done in accordance with the other provisions of Rule 1 applicable thereto.

Rule 1 (d) provides:

"Seven-day Positions.

On positions which have been filled seven days per week any two consecutive days may be the rest days with the presumption in favor of Saturday and Sunday."

The facts are that before making the adjustment required by the forty-hour week the operations of carrier, which are herein involved, had been sustained at its Etowah roundhouse on this basis. That is, duties and services of engine carpenters were performed each day of the week and, necessarily so, to properly conduct carrier's operations. In view thereof claimant's position was subject to Rule 1 (d) as to the assignment of his rest days. Carrier assigned them within the provisions thereof.

There is nothing in the agreement making the establishment of relief positions to cover rest days a condition precedent. The one is not conditioned on the other. Just so long as the status of the operations to which claimant is assigned remains unchanged and the need for employes seven days a week to perform the duties and services of such operations continues the rest days can be assigned accordingly.

While not here controlling the following awards of the Third Division relate to the issues herein involved and come to a like solution, to wit: 5545, 5555, 5556 and 5581.

AWARD

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Second Division

ATTEST: Harry J. Sassaman
Executive Secretary

Dated at Chicago, Illinois, this 1st day of August, 1952.

LABOR MEMBERS' DISSENT TO AWARD NO. 1565

The opinion of the majority states that Award 1528 of the Second Division answers all the questions here raised, but nevertheless finds it necessary to go beyond the citation of this precedent because of "other previous awards of this Division to the contrary." It is thus recognized that Award 1528 was itself a departure from the theretofore established line of authority in this Division. Why the deviation rather than the previously established line of precedents should be followed is not explained. In these

circumstances we can only conclude that the majority's decision in this case was not based on precedent at all, but it is sought to bolster the majority's conclusion by invoking that one among the several applicable precedents with which the majority in this case happens to agree.

The crucial issue in this case is whether the position to which the claimant is assigned is a seven-day position as that term is used in the current agreement. If it is a five-day position, as claimant contends, there apparently is no dispute that under the agreement the rest days must be Saturday and Sunday, and thus in violation of the agreement the claimant has, since September 1, 1949, been worked on his rest days and laid off two work days of his work week.

To establish that claimant's position is a seven-day position the majority relies on the "Note" to Rule 1 providing as follows:

> "The expressions 'position' and 'work' used in this rule refer to service, duties, or operations necessary to be performed the specified number of days per week, and not to the work week of individual employees."

The majority points out the indisputable fact that by this note positions are differentiated from the work week of individual employes. It then proceeds to assume without any foundation whatever that because a position is something different from an individual's work week the term bears no relationship at all to any ordinary concept of "position" and refers only to the type of service required by the carrier.

In elaboration of this **non-sequitur** the majority says, "Consequently, our former concepts to the effect that a position meant the work-week of the individual are no longer applicable." It is not stated who formerly had any concepts to any such effect. The undeniable fact is that before the forty-hour-week agreement the term "position" generally did not mean the work week of an individual, though it may perhaps occasionally have been loosely used in that sense. In this very case the carrier points out in its arguments that before September 1, 1949 both engine carpenter positions in its Etowah roundhouse were seven-day positions; yet the work week of the regular incumbent of each position was six days and each position was filled on the seventh day from the overtime board. There were then two separate identifiable positions, one on first shift and one on second. The carrier then apparently found it necessary to have "service, duties or operations * * * performed" on each of these positions seven days per week; each position was filled seven days per week, and fourteen man-days of service were performed on the two positions each week.

After September 1, 1949, there continued to be two separate identifiable engine carpenter positions, one on first shift and one on second. But from then on the carrier no longer found it necessary to have "service, duties, or operations * * * performed" on either position for seven days per week; each was filled only five days; only ten man-days of service were performed on the two positions each week; and the duties of each not only "can reasonably be met in five days" but are in fact met in five days. Hence both positions are governed by Rule 1 (b) which requires that "On positions the duties of which can reasonably be met in five days, the days off will be Saturday and Sunday."

That the duties of each position are met in five days per week cannot be disputed. The carrier's only complaint is that its requirements on the second shift cannot be met in the particular five days required by Rule 1 (b) as the work week of five-day positions. The available remedy is to re-establish a seven-day position. To do so it must have "service, duties, or operations * * * performed" on that position seven days per week. This does not mean that the claimant would have a seven-day work week. The position would presumably be filled on the regular incumbent's rest days by a relief

employe, since apparently there is not a sufficient number of positions of this class at this location to meet the problem through staggered work weeks.

The only possible basis for contending that claimant's position is a seven-day position is the fact that the first-shift position works on the days that claimant's position is not filled. But a contention based on that fact is untenable because it would determine the nature of one position by the service requirements of another. Nothing in the agreement can be cited as making the question of whether claimant's position is a five-day or seven-day position dependent upon whether there is a position of the same class on another shift and if so what days such other position is filled. Yet the majority's conclusion that claimant's is a seven-day position must depend on the fact that the first shift position is filled on Mondays and Tuesdays or else the majority would be saying in substance that Rule 1(b) means nothing and that a position becomes a seven-day position merely by the carrier's arbitrary action in assigning rest days other than Saturday and Sunday.

We have pointed out earlier that the majority's construction of the "Note" to Rule 1 proceeds on the unfounded assumption that since "position" does not mean the work week of an individual it must refer only to the type of service required by the carrier and lose all relationship to any ordinary concept of the term. Why such a violent assumption is made is nowhere explained. As was pointed out in the opinion of this Division in Award No. 1444, long before the forty-hour-week agreement many agreements took cognizance of positions which were continuously filled although the normal work week of the incumbents of such positions was six eight-hour days. In light of that background, particularly, the only reasonable interpretation that can be put on the "Note" to Rule 1 is that it spelled out the common meaning of "position" as theretofore used in the industry and made clear that this was not to be confused with the work week of individual employes. Its purpose was to make sure that subsequent references to six-day and seven-day positions would not be taken to imply that individuals would have work week assignments of six or seven days after the forty-hour week became effective.

Actually it appears that the majority have not really convinced themselves that the term position now refers only to the service requirements of the carrier without regard to the number of days a specific identified position is filled, for in Award No. 1563, Docket No. 1466 these same members of the Board repeatedly use the term "position" in its traditional sense. Yet in the present case that traditional, natural meaning of the term is arbitrarily excluded by assumption for no stated reason other than that position does not mean the work week of an individual employe.

/s/ Edward W. Wiesner

/s/ R. W. Blake

/s/ A. C. Bowen

/s/ T. E. Losey

/s/ George Wright