Award No. 1528
Docket No. 1351
2-SP(T&NO)-MA-'52

NATIONAL RAILROAD ADJUSTMENT BOARD
SECOND DIVISION

The Second Division consisted of the regular members and in addition Referee Jay S. Parker when award was rendered.

PARTIES TO DISPUTE:

SYSTEM FEDERATION NO. 162, RAILWAY EMPLOYES' DEPARTMENT, A. F. of L. (Machinists)

SOUTHERN PACIFIC LINES IN TEXAS AND LOUISIANA (Texas & New Orleans Railroad Company)

DISPUTE: CLAIM OF EMPLOYES: 1—That under the current agreement the assignment of Machinist R. M. Fraim was improperly changed from working Monday through Friday, with rest days Saturday and Sunday to working on a newly created position Wednesday, Thursday and Friday as a Machinist and Saturday and Sunday as a Relief Foreman effective February 10, 1950.

2—That accordingly the carrier be ordered to:

(a) Restore this employe to his former work-week assignment of Monday through Friday, with Saturday and Sunday as rest days.

(b) Make this employe whole by additionally compensating him at overtime rate instead of straight time for the services which he was assigned to perform on each Saturday and each Sunday, retroactive to February 11, 1950.

(c) Make this claimant whole by additionally compensating him eight hours at the applicable rate of pay for each Monday and each Tuesday that he was not permitted to work, retroactive to February 13, 1950.

EMPLOYES' STATEMENT OF FACTS: Machinist R. M. Fraim, hereinafter referred to as the claimant, was regularly employed by the carrier at Del Rio, Texas and effective on September 1, 1949, this claimant was assigned to a work week of Monday through Friday with rest days of Saturday and Sunday, a copy of which is submitted herewith and identified as Exhibit A. This assignment continued until February 6, 1950, when a notice was posted abolishing this claimant's assignment effective with the close of work on his shift February 10, 1950 and a copy thereof is submitted herewith and identified as Exhibit B. On February 6, 1950 Bulletin No. M-1 was posted for one machinist to work from 8:00 A.M. to 4:00 P.M., Wednesday through Sunday, with rest days of Monday and Tuesday to which the claimant was assigned, a copy of which is submitted herewith and identified as Exhibit C. Since this new position was created, the claim-

ment, the Carrier properly established an assignment with work days of Wednesday to Sunday, inclusive. The Claimant bid in that job voluntarily and without any compulsion from the Carrier. The Carrier cannot be compelled to establish an assignment for another machinist from Monday to Friday and arbitrarily give that position to Fraim. Positions are not selected in the railroad industry or under this agreement in any such fashion. The selection of positions depends upon the exercise of seniority. As set forth above, Fraim had sufficient seniority to displace junior machinists if he had cared to do so. He elected not to do so, but voluntarily bid in the new assignment from Wednesday to Sunday. In this seven-day operation the Carrier had a perfect right to establish such an assignment and Fraim voluntarily and in the exercise of his seniority selected it. He was used temporarily as a foreman from time to time in accordance with the provisions of Rule 31 of the agreement and the long-established practice under that rule. When he worked as a foreman, he was paid the foreman's rate and he worked the regular hours of the foreman, all in accord with the requirements of Rule 31.

Consequently, there is absolutely no basis upon which this Carrier could be compelled to establish an assignment from Monday to Friday when it had no need for such an additional assignment. There is no basis upon which the Carrier can be compelled to pay Fraim at overtime rates of pay for the days on which he relieved the foremen since as a machinist he did not work any overtime or beyond forty hours a week at straight time rates of pay. Fraim's assigned rest days subsequent to February 10th were Monday and Tuesday. There is no basis for compelling this Carrier to pay him for Mondays and Tuesdays subsequent to February 10th when he performed no service for the Carrier. In fact, the Organization makes no argument to support any such claim. Obviously, no loss of pay was suffered by Fraim because he did not work on his rest days of Monday and Tuesday.

It is submitted, therefore, that this claim should be denied.

Respectfully submitted,

T. C. Montgomery
Manager of Personnel

January 9, 1952, Chicago, Illinois."

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

The carrier or cariers and the employe or employes involved in this dispute are respectively 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.

Prior to September 1, 1949, carrier assigned three machinists to work around the clock, seven days per week, in the roundhouse at its Del Rio, Texas subdivision terminal. On that date, with the inauguration of the 40 hour week, machinists were assigned to work at the same location as follows:

MACHINIST	HOURS OF ASSIGNMENT	DESIGNATED REST DAYS
R. M. Fraim	8 A.M. to 4 P.M.	Sat. & Sun.
G. D. Froust	12 Mn. to 8 A.M.	Mon. & Tues.
R. D. Connor	4 P.M. to 12 Mn.	Wed. & Thurs.
J. J. Meneghetti	8 A.M. to 4 P.M., Sundays 12 Mn. to 8 A.M., Mon. & Tues. 4 P.M. to 12 Mn., Wed. & Thurs.	Fri. & Sat.

Effective February 10, 1950, the position filled by Claimant Fraim was abolished, the carrier creating a new machinist's job which was bulletined as such and bid in by him. The assigned days of this job were Wednesday through Sunday, hours 8:00 A. M. to 4:00 P. M., with Monday and Tuesday as rest days. Other machinist assignments were not disturbed. Nor was a machinist asisgned to work claimant' rest days.

Immediately upon assuming the duties of this new job, and until July 12, 1950, when he was returned to his former assignment, claimant was used to relieve roundhouse foremen, employes not covered by the terms of the current agreement. During this interim, except for Saturday, February 18, and Sunday, April 16, he relieved the day foreman on Saturdays and the night foreman on Sundays. He was also assigned to relieve foremen on other dates, sometimes on his rest days.

Having outlined the salient facts we turn to the claim and the record. Reference thereto makes it appear the over-all decisive issue involved in the dispute hinges upon the propriety of the carrier's action in changing the claimant's assignment of Monday through Friday, with rest days Saturday and Sunday, to Wednesday through Sunday, with rest days Monday and Tuesday.

The first contention advanced by the claimant in support of his position the carrier's action violated the agreement is based upon the premise that prior to such action he had been assigned to and was the occupant of a five-day position and hence, under the provisions of Article II, Section 1 (b) of the 40-Hour Week Agreement, was entitled to Saturday and Sunday as rest days. This contention, in our opinion, cannot be upheld for the reason it erroneously assumes claimant was filling a five-day position at the time his rest days were changed by the new assignment. It is clear from the record that prior to the adjustment, made necessary by the 40-Hour Week Agreement, claimant was assigned to a three shift, around the clock, seven-day operation. It is equally clear that upon making the required adjustment the status of such operation was maintained. Thereupon, as definitely contemplated by Section 1 (Note), Section 1 (a) and Section 1 (d) of Article II of such agreement, when claimant was continued in his assignment after the adjustment he became the occupant of a seven-day position, the work week of which, including the rest days thereof, could be changed in accordance with the carrier's reasonable operational requirements so long as the status of the operation to which he was assigned remained unchanged and the need for employes seven days a week on such operation continued. This we may add is so even though, after creating the new job, the carrier in disposing of its operational problems has not found it necessary to fill claimant's presently assigned rest days. Since it is not here contended the status of the operation to which claimant is assigned has been changed it necessarily folows, from what has been heretofore related, that the carrier's action did not violate any of the 40-hour week provisions of the current agreement.

Finally claimant contends (a) that inasmuch as he was used repeatedly as a relief foreman his assignment cannot be considered as a seven-day machinist position, and (b) that it was improper and a violation of the controlling agreement to use a machinist less than five days a week on work of his classification. Aside from what has already been stated the short and decisive answer to each of these contentions is to be found in the agreement itself which clearly contemplates that employes (machinists) may be used to temporarily relieve foremen. In fact Rule 31 thereof expressly provides that employes used temporarily to relieve foreman will receive the foreman's rate of pay and shall work the regular hours of the foreman while so used. The record discloses claimant was so used and that he was paid in conformity with the rule. Under such circumstances we can discern no sound ground for holding the agreement was violated. Therefore these two contentions, like the one previously discussed and disposed of, cannot be upheld.

AWARD

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Second Division

Attest: (Sgd.) Harry J. Sassaman
Executive Secretary

Dated at Chicago, Illinois this 25th day of February, 1952.

DISSENT OF THE LABOR MEMBERS TO AWARD NO. 1528

The findings of the majority in Docket No. 1351, Award No. 1528, are very confusing and contradictory. In Award No. 1444, in the findings this Board said, and we quote:

> "* * * Where there were a number of employes at a single operaton, facility or location, the rest day would be bulletined and seniority would control the choice of that day. To qualify as such continuous operation positions, they must be worked every day of the week (not by one employe however). The position could not be blanked on any day when service was not needed without taking it out of the continuous operation category and subjecting it to punitive time for Sunday. All the 40-hour week agreement purported to do was to make provision to apply the same principles insofar as seven-day positions were concerned, to permit of their being operated by five-day assignments and make a similar provision to be applicable to six-day positions. To do this, it was likewise necessary to provide for staggered work-weeks with varying rest days. The inclusion of the words:
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> 'Note (B) * * * or operations necessary to be performed the specified number of days per week * * *,'
>
> has given rise to the theory of defense in these cases, namely, that if the operation, or facility, where the work may be located has any seven or six-day positions, that then the staggering and different rest days can be applied to all of the positions at the operation or facility. To place such a construction on that language would mean that, although there might be distinctive five-day, six-day, and seven-day positions at the facility, the five-day positions would not be regarded as such, but would be subject to the same staggering and different rest days as would the six and seven-day positions at that facility. In other words, the contention in effect is that although there are indisputable five-day positions at the facility, Rule (b) has no application to them. As a matter of plain construction, to warrant any such result it would be necessary that Rule (b) carry an exception within itself, based on subsequent provisions supposed to modify it. Nowhere in the agreement, as a whole, or in the Emergency Board's Report, is anything found to warrant an inference that there was any exception to be made to the absolute requirement that Saturdays and Sundays must be the rest days of five-day positions."

It will be noted from the above quoted portion of the findings in Award No. 1444, this Board said, that in order to classify a position as a seven-day position in under the 40-hour week agreement, it could not be blanked on any day when service was not needed and that no exception is made to the

requirement that Saturdays and Sundays must be the rest days of five-day positions.

In the findings of Award No. 1528, the majority admit that the record shows that up until February 10, 1950, this position was blanked on Sunday and subsequent to that date, when the rest days were changed to Mondays and Tuesdays for said position, on such said rest days the position was blanked. Therefore, in accordance with what we said in Award No. 1444, this position, subsequent to February 10, 1950, was a five-day position and rest days assigned were improper and in violation of the 40-hour week agreement, we think the majority erred in making this award and therefore, we dissent.

/S/ R. W. Blake

/S/ A. C. Bowen

/S/ T. E. Losey

/S/ Edward W. Wiesner

/S/ George Wright