Award No. 3264
Docket No. 3061
2-SOU-CM-'59

NATIONAL RAILROAD ADJUSTMENT BOARD

SECOND DIVISION

The Second Division consisted of the regular members and in addition Referee Roscoe G. Hornbeck when award was rendered.

PARTIES TO DISPUTE:

SYSTEM FEDERATION NO. 21, RAILWAY EMPLOYES' DEPARTMENT, A. F. of L.-C. I. O. (Carmen)

SOUTHERN RAILWAY COMPANY

DISPUTE: CLAIM OF EMPLOYES:

1. That under the current agreement the Carrier improperly established a seven (7) day operation on repair track, car department, Memphis, Tennessee, and Carmen G. C. Goins, E. L. Bryant, G. D. Stokes, C. S. Padgett, L. J. Porter, J. L. Weatherby, R. L. Fossee, O. W. Thomason and Carman Helper J. R. Ware, are improperly assigned to a work week, with rest days other than Saturday and Sunday, or Sunday and Monday.

2. That the Carrier be ordered to:

(a) Assign these employes to a proper work week, Monday through Friday, with rest days Saturday and Sunday, or Tuesday through Saturday, with rest days Sunday and Monday.

(b) Make these employes whole by compensating them additionally at the applicable overtime rates instead of straight time for service which they were assigned to perform on their proper rest days retroactive to and including October 20, 1957, and compensate them additionally in the amount of eight (8) hours at applicable pro rata rates for each day they were improperly assigned to rest retroactive to and including October 20, 1957.

EMPLOYES' STATEMENT OF FACTS: At Memphis, Tennessee, the carrier operates a repair track whereat they employ carmen and carmen helpers. Prior to December 5, 1954, carmen and carmen helpers were not assigned to work on Sundays. Under date of November 30, 1954, carrier's Master Mechanic M. W. Sheehan posted a bulletin advising that the repair track would be changed to work seven days per week on both the first and

dispute involved in Award No. 6695 and the NMB Arbitration Case No. 212 had been presented to either Board by employes of the Southern, denial awards in both cases would have been made. This is true because the situation on this carrier was entirely different than on the NYC. Then too, as indicated, clerical employes on this carrier have conceded that there was no violation of the agreement by this carrier operating its six principal LCL freight transfers on a seven day per week basis.

CONCLUSION

Carrier has shown that:

(a) Claim is barred and the Board has no jurisdiction over it and should, therefore, dismiss it for want of jurisdiction. Furthermore, the claim which the brotherhood here attempts to assert was dismissed by Award No. 2642.

(b) The effective agreement in evidence has been complied with to the letter and there is no basis for the monetary demand here made.

(c) Prior awards of the Board have denied claims identical in principle. Furthermore, the point here at issue has heretofore long since been conceded by the brotherhood. There are identical operations at other locations.

(d) Neither Third Division Award No. 6695 nor the award of the Arbitration Board, in NMB Case No. 212 involving the NYC and its clerical employes support the claim which the brotherhood here attempts to assert.

On the record claim should be dismissed by the Board for want of jurisdiction as it is barred by the agreement. If, despite this, the Board assumes jurisdiction, it must deny the claim.

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 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.

Parties to said dispute were given due notice of hearing thereon.

Employes claim violation of the 40 Hour Work Week Agreement in that nine named Carmen and a Carman Helper were assigned to a work week with rest days other than Saturday and Sunday or Sunday and Monday.

The carrier asks dismissal of claim because it was set up in Docket No. 2401, Award No. 2642, and dismissed.

We hold against the Carrier on this claim. Sec. 3, Art. V, Chicago Agreement, August 21, 1954.

At the outset, the organization frankly concedes that the awards in this Division have been against their claim here made, and cite in its behalf Award

No. 6695, Third Division, and National Mediation Board Case No. 212, arbitration between New York Central Railroad Company and Brotherhood of Steamship Clerks, etc.

The former award, the Utica case, held that no work had been done by the Carrier prior to the effective date of the 40 Hour Work Week Agreement and also that Sunday work was not necessary to be performed on the property of the Carrier.

The opinion in the Arbitration award was more restrictive, holding that the test of the right of the Carrier to set up a seven day per week schedule was whether "the Carrier has been filling the types of positions in question on Sunday, prior to the effective date of the Forty Hour Agreement."

In this submission, we are not required to express an opinion if the foregoing is the only test, but, restricting the facts here to that test, we hold that this Carrier has not violated the Forty Hour Week Agreement.

It fairly appears that the Carrier had prior to the Forty Hour Week Agreement filled positions in its operations in the same types of work seven days per week although probably not bulletined.

In most of the following awards of this Division the same issue we have was presented, although in some of these there were other issues. They are uniform in holdings and well considered. Awards Nos. 1599, 1608 to 1616, Daugherty, Referee; 1644 to 1655, inclusive, 1669, Carter, Referee; 1883, Bailer, Referee; 1712, 1714, Wenke, Referee; 2585, Shake, Referee; and 3094, Ferguson, Referee.

AWARD

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of SECOND DIVISION

ATTEST: Harry J. Sassaman
Executive Secretary

Dated at Chicago, Illinois, this 23rd day of June 1959.

DISSENT OF LABOR MEMBERS TO AWARD NO 3264

The majority in their findings state that "It fairly appears that the carrier had prior to the forty hour week agreement filled positions in its operations in the same types of work seven days per week." This is not in accord with the record which discloses that none of the instant positions were filled seven days a week prior to the posting of the following bulletin by the carrier on November 30, 1954. The only Sunday work performed prior to the posting of the bulletin was emergency work on a call basis:

> "Effective with the beginning of the first shift, 7:30 A. M., Sunday, December 5, 1954, the rip track at Forrest Shop, Memphis, Tenn. will be changed to work seven days on both the first and second shift, instead of the present six days."

Thus, regardless of the majority's statement to the contrary, it is obvious that the majority did not apply the test of the right of the carrier to set up

a seven day per week schedule to the facts in this case. In Arbitration Case No. 212 it is stated

> ". . . the test as to whether a position may be regularly filled seven days per week is the simple one set forth in Section 1 (d) and in essence repeated in Section 1 (j), namely, has the Carrier been filling it seven days per week . . ." (prior to the Forty Hour Week Agreement).

Had the majority applied the foregoing test to the facts in the instant case they would have held that the carrier had violated the agreement and that the claimants should be restored to their proper work week assignments on the six-day positions established under Rules 1 (a) General and 1 (c) of the current agreement.

James B. Zink

R. W. Blake

Charles E. Goodlin

T. E. Losey

Edward W. Wiesner