Award No. 1443
Docket No. 1333
2-IC-BM-'51

NATIONAL RAILROAD ADJUSTMENT BOARD

SECOND DIVISION

The Second Division consisted of the regular members and in addition Referee Frank M. Swacker when award was rendered.

PARTIES TO DISPUTE:

SYSTEM FEDERATION NO. 99, RAILWAY EMPLOYES'

DEPARTMENT, A. F. of L. (Boilermakers)

ILLINOIS CENTRAL RAILROAD COMPANY

DISPUTE: CLAIM OF EMPLOYES: That under the current agreement the carrier improperly compensated Boilermaker C. W. Kesterson and Boilermaker Helper Wilbur Bruce at straight time for work which they were assigned to perform on Saturday and Sunday, October 8 and 9, 1949, on locomotive crane X9870.

That accordingly the carrier be ordered to compensate the above named claimants the difference between straight time and overtime rates for their service on the aforementioned days.

EMPLOYES' STATEMENT OF FACTS: At Paducah, Kentucky, with boilermaker shop closed and roundhouse employes of the boilermakers' craft furloughed, the carrier made the election on October 8, 1949, to repair locomotive crane X9870 and thereupon recalled over the telephone senior Boilermaker C. W. Kesterson and Boilermaker Helper Wilbur Bruce to report for four (4) days' work, Saturday, Sunday, Monday and Tuesday, October 8 thru 11, 1949, specifically to repair the broken circular rail on this crane within the hours of 7:00 A. M. to 12 Noon and from 12:40 P. M. to 3:40 P. M. However, this specific work, for which these claimants were called only for four (4) days of eight (8) hours each, was not completed and there this work laid unfinished for about twenty-nine (29) days, or until the claimants were again restored to service on November 10, whereupon they completed the job in due course, although officers of the carrier, from the bottom to the top, have declined to compensate these claimants for their services on Saturday, October 8, and Sunday, October 9, 1949, at the time and one-half rate.

The agreement of April 1, 1935, as amended effective September 1, 1949, is controlling.

POSITION OF EMPLOYES: It is submitted that the work described in the above statement of facts, to which these claimants were assigned, was not service required on Saturday and Sunday, October 8 and 9, 1949, or during any other hours of the week, except weekly from 7:00 A. M. to 3:40 P. M.,

The claimants had no regular assignments at the time they were called. They had not worked forty hours during that week, and the service performed was maintenance work of a nature usually and customarily performed by mechanics assigned to perform seven-day service during the regular hours of such employes working at the Paducah roundhouse.

Rule 1 (B) NOTE of the applicable agreement reads:

"The expressions 'positions' and 'work' used in this schedule of rules 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."

Rule 1 (B) (e) (2) reads:

"Where work is required by the carrier to be performed on a day which is not a part of any assignment, it may be performed by an available unassigned employe who will otherwise not have forty hours of work that week; in all other cases by the regular employe."

Rule 1 (B) (h) reads:

"To the extent furloughed employes may be utilized, their days off need not be consecutive; however, if they take the assignment of a regular employe they will have as their days off the regular days off of that assignment."

Rule 1 (B) (i) of the applicable agreement reads:

"The term 'work week' for regularly assigned employes shall mean a week beginning on the first day on which the assignment is bulletined to work, and for unassigned employes shall mean a period of seven consecutive days starting with Monday."

There is no basis in the rules for the employes' contention that a furloughed employe used as in this case must be compensated at the penalty rate. In the first place the claimants had no regular assignment, and in accordance with Rule 1 (B) (i), Beginning of Work Week, their work week began on Monday; therefore, inasmuch as they had not worked forty hours that week including the claim date, they were properly compensated at the pro rata rate of pay. There is no rule in the current agreement that provides that punitive rates will be paid for Saturday and Sunday work as such. As furloughed, unassigned or extra employes, the claimants would have, in accordance with the schedule rules, been paid the punitive rate of pay had their services been utilized in excess of forty hours in any one week or for all time worked in excess of eight hours in any one day.

As this claim is not supported by the applicable rules of the agreement, and inasmuch as the carrier is applying the rules as written, there is no violation, and the carrier requests that the claim 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 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.

Dockets 1333 and 1356 will be discussed together, because they are both controlled by the same construction of the 40-hour week agreement. In

Docket 1333, the claimants were furloughed men. They were recalled under the provisions of Rule 28 for the purpose of making immediately required repairs to a crane. They were called for a period of four days, Saturday to and including Tuesday. The operation to which they were attached was a running repair shop—a seven day per week continuous operation. In Docket 1356, the claimants were the occupants of newly established positions of car inspectors, which positions were established to work five days per week, Wednesday through Sunday inclusive. At the train yard where these positions were established, there were already thirteen positions of car inspectors in continuous operation seven days per week. Because of the five-day assignment of the occupants it was necessary to have eighteen men to supply the full quota of work. When the five new positions were established, Monday and Tuesday were blanked and accordingly no relief was required, the five assignees of positions performing all the work. The seven-day positions and the five-day positions at this operation were distinctly identified.

The claim in each case is for punitive time based on Rule 1 (B) (b) "Five-day positions—

> On positions the duties of which can reasonably be met in five days, the days off will be Saturday and Sunday."

That rule is clear and definite and nowhere is an exception to be found to it. Paragraphs (c) and (d) govern six-day positions and seven-day positions. Note (b) relied on by the carrier as creating a basis for an exception to Rule (b) does not do so. Provision is made in the agreement for staggering assignments covered by the six and seven-day positions. There is nothing in the rule that permits staggering five-day positions and there could be no reason for such inasmuch as the assignments being for five days there is no occasion for any relief on such positions. The agreement fully recognizes as did the Emergency Board which recommended it, that certain operations of the carrier must be continuous, operated seven days per week. This concept is not a novelty born of the 40-hour week agreement. Long before that agreement there were many agreements, particularly of other crafts, which while in general providing for punitive pay for Sunday work made an exception as to continuous service positions. Such positions operating seven days per week were commonly filled by six-day assignments, relief being afforded one day a week by other relief positions. When such relief for one day in seven was afforded the occupant of the position, he could be required to work Sunday at straight time. Where there were a number of employes at a single operation, 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:

> "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.

So far as the car inspection positions are concerned, the carrier has the right to utilize these inspectors at car repair work when not needed on inspection work, and they could have met the difficulty, and avoided punitive time, by making seven-day position bulletined as inspectors, with a note that they would be used on repairs when not needed for inspection. Apparently, that is what the carrier has now done as it no longer blanks the position for two days. As to the crane repair men, it is plain they were not engaged on any continuous operation, or even six-day position. They were simply recalled for the minimum number of days they could be under Rule 28.

From the foregoing, it follows, that in both cases, the claimants are entitled to punitive time for their work on Saturday and Sunday.

AWARD

Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Second Division

ATTEST: Harry J. Sassaman
Executive Secretary

Dated at Chicago, Illinois, this 28th day of March, 1951.

DISSENT OF THE CARRIER MEMBERS TO AWARD NO. 1443, DOCKET NO. 1333.

The findings of the majority in Docket No. 1333 present a curious and unfortunate mixture of anomaly, confusion, inconsistency, contradiction and error, resulting in misinterpretation of the principles underlying the 40-hour week agreement and in misapplication of the specific terms of that agreement.

The majority find that "In Docket 1333, the claimants were fuloughed men. They were recalled under the provisions of Rule 28 for the purpose of making immediately required repairs to a crane. They were called for a period of four days, Saturday to and including Tuesday. The operation to which they were attached was a running repair shop—a seven day per week continuous operation." The majority further find that "As to the crane repair men, it is plain they were not engaged on any continuous operation, or even six-day position. They were simply recalled for the minimum number of days they could be under Rule 28."

From these findings the majority, through some tortured but unexplained flight of imagination, reach the conclusion that claimants should be compensated at the applicable overtime rate for service performed on Saturday and Sunday. This conclusion presumably, although not so stated, reflects the claim, based on Rule 1 (B) (b), which provides that "On positions the duties of which can reasonably be met in five days, the days off will be Saturday and Sunday."

What are the applicable rules?

Rule 28 reads:

> "Rule 28. When the force is reduced, seniority as per Rule 32 will govern, the men affected to take the rate of the job to which they are assigned. Four days' notice will be given the men affected

before reduction is made, and list will be furnished the local committee. This will not apply during temporary work afforded employes while forces are furloughed.

In the restoration of forces, senior laid off men will be given preference in returning to service, if available within a reasonable time, and shall be returned to their former position if possible. The local committee will be furnished list of men to be restored to service. In the reduction of force the ratio of apprentices shall be maintained.

Note: The words 'If available within a reasonable time' in third paragraph of this Rule, are interpreted to mean 'within fifteen (15) days from date of letter or telegram sent to employe's last filed address, unless *proof of disability is furnished within said* limits.' "

No question has been raised regarding the carrier's application of Rule 28.

Rule 1 (B) (e) (2) reads:

"(e) Regular Relief Assignments—

* * *

(2) Where work is required by the carrier to be performed on a day which is not a part of any assignment, it may be performed by an available unassigned employe who will otherwise not have forty hours of work that week; in all other cases by the regular employe."

The majority find that "In Docket 1333, the claimants were furloughed (and hence unassigned) men." No question has been raised regarding the carrier's application of Rule 1 (B) (e) (2).

Rule 1 (B) (h) reads:

"(h) Rest Days of Extra or Furloughed Employes—

To the extent furloughed employes may be utilized, their days off need not be consecutive; however, if they take the assignment of a regular employe they will have as their days off the regular days off of that assignment."

The majority find, as previously stated, that "In Docket 1333, the claimants were furloughed men." Yet in the light of this finding they ignore the specific provisions of Rule 1 (B) (h) and then proceed further to violate it by the apparent but unwarranted assumption that the rest days of these furloughed employes, recalled for only four days, arbitrarily should be Saturday and Sunday. They obviously gag at calling a four-day recall a five-day position but escape through the subterfuge of saying that the claimants "were not engaged on any continuous operation, or even six day position."

Rule 1 (B) (i) reads:

"(i) Beginning of Work Week—

The term 'work week' for regularly assigned employes shall mean a week beginning on the first day on which the assignment is bulletined to work, and for unassigned employes shall mean a period of seven consecutive days starting with Monday."

Again the majority find that "In Docket 1333, the claimants were furloughed men." Thus their work week was "a period of seven consecutive

days starting with Monday." In the further light of Rule 1 (B) (h) quoted above, providing that the days off of furloughed employes need not be consecutive, there is no basis whatsoever for the majority's apparent though unwarranted assumption that the rest days of these furloughed claimants must be Saturday and Sunday.

Rule 3 (C) reads:

> "(C) Hourly rated employes required to work in excess of forty straight time hours in any work week shall be paid for at one and one-half times the basic straight time rate except where such work is performed by an employe due to moving from one assignment to another or to or from a furloughed list, or where days off are being accumulated under paragraph (g) of Rule 1 (B)."

Here, again, the majority find that "In Docket 1333, the claimants were furloughed men." Working only 32 hours in portions of two work weeks starting on Mondays, they were not "required to work in excess of forty straight time hours in any work week" and hence were not entitled to be paid at the rate of time and one-half for any service performed. The majority award has not only overlooked but has violated the specific provisions of Rule 3 (C).

Rule 3 (D) reads:

> "(D) Hourly rated employes worked more than five (5) days in a work week shall be paid one and one-half times the basic straight time rate for work on the sixth and seventh days of their work weeks, except where such work is performed by an employe due to moving from one assignment to another or to or from a furloughed list, or where days off are being accumulated under paragraph (g) of Rule 1 (B)."

Once more, the majority find that "In Docket 1333, the claimants were furloughed men." Working only four days in portions of two work weeks starting on Mondays, they were not "worked more than five (5) days in a work week" and hence were not entitled to be paid at the rate of time and one-half for any service performed. The majority award not only has disregarded but has broken the specific provisions of Rule 3 (D).

The quoted findings of the majority, in juxtaposition to the application rules of the current agreement, support a denial award rather than a sustaining one.

For the reasons set forth above, we dissent.

J. A. Anderson
C. S. Cannon
R. P. Johnson
M. E. Somerlott
A. G. Walther

STATEMENT OF LABOR MEMBERS IN ANSWER TO DISSENTING OPINION OF CARRIER MEMBERS IN AWARD NO. 1443, DOCKET NO. 1333.

The findings of the Board set forth the governing rules of the agreement and the reasons why those are the applicable rules and why those rules require the award made. It is not our purpose to reiterate them or to elaborate upon them. The dissenting opinion, however, introduces a number of irrelevancies and inconsistencies with respect to which some comment may be useful in avoiding confusion.

The dissenting members state: "The majority find that 'in Docket 1333, the claimants were furloughed (and hence unassigned) men.'" The parenthetic phrase "(and hence unassigned)" is an interpolation of the dissenting members and does not appear in the sentence purportedly quoted. By this

device there is injected the confusing suggestion that rules referring to unassigned employes are pertinent. The findings of the Board nowhere suggest that the employes here involved were unassigned employes and the record shows that they were not.

Furthermore, the quotation of the sentence out of context may raise misleading implications. The two sentences immediately following the quoted sentence read: "They were recalled under the provisions of Rule 28 for the purpose of making immediately required repairs to a crane. They were called for a period of 4 days, Saturday to and including Tuesday." In this context the quoted sentence cannot reasonably be read as a finding that these men were furloughed men after they had been recalled and were working on the positions to which they had been recalled. The sole issue in this case concerns the kind of positions to which these men were recalled. Irrespective of whether the positions to which they were recalled were 5, 6 or 7-day positions they were obviously no longer furloughed men after their recall and the findings of the Board do not intimate that they were. Nevertheless it is crucial to the argument of the dissenting members first to make the unwarranted and false assumption that furloughed men are "unassigned men" and then to apply to these formerly furloughed men, after their recall and while they were working the jobs here in question, rules referring to the utilization of or the work week of "unassigned employes". It is only by this series of distortions that the dissenting members are able to attribute any relevance to Rule 1(B)(e)(2), Rule 1(B)(h), and Rule 1(B)(i) on which they rely. The fact is that it appeared perfectly plainly at the hearing before the Referee that this carrier does not have in this craft any so-called extra or unassigned employes and is not permitted to use furloughed men to serve such a purpose—that when furloughed men are recalled they can be recalled only to regular positions that are subject to the 4-day notice requirement for layoffs under Rule 28; hence Rules 1(B)(e)(2), 1(B)(h) and 1(B)(i) have no relevance to this case and for that reason are not discussed in the findings of the Board.

The argument of the dissenting members is further misleading and confusing in introducing as pertinent Rules 3(C) and 3(D)—the weekly overtime rules. The dissenting members argue that since these employes did not work in excess of 40 hours or in excess of 5 days in a work week they are not entitled to any compensation at the penalty rate under the weekly overtime rules—as though the award were based on an application of those rules. It is perfectly clear from a reading of the findings of the Board that the award of compensation at the overtime rate for the Saturday and Sunday work was based on the finding of the Board that under the agreement Saturday and Sunday were the rest days of the positions and hence any work on the assigned rest days was compensable at the penalty rate. Rules 3(C) and 3(D) are not involved.

The carrier and the representative of the employes here involved have not yet agreed upon the revisions to be made in the local agreement to conform to Article II, Section 3(b) of the March 19, 1949 agreement between the Carriers' Conference Committees and the Sixteen Cooperating Railway Labor Organizations. In these circumstances that section of the March 19, 1949 agreement (which by the terms of the agreement is itself a contract between each represented carrier and its employes) is controlling. That section reads in pertinent part as follows: "Service rendered by employes on assigned rest days shall be paid for under existing call rules unless relieving an employe assigned to such day, in which case they will be paid under existing rest day rules. Where Sunday is one of the rest days existing rules providing for compensation on Sunday shall apply." It will be noted that the operation of this provision is with respect to all service on rest days and is in nowise conditioned upon the number of hours or days previously worked in the work week. In fact, although the carrier has vigorously urged that Saturday and Sunday were not rest days for these employes, it has never disputed that their service on those days would require compensation at the penalty rate if those days actually were their rest days, as the Board has found them to be.

Finally, it should be noted that the dissenting members in their argument concerning the application of the weekly overtime rules become completely inconsistent with and thoroughly demolish the basis of their earlier contention that Saturday and Sunday were not rest days for these employes. The dissenting members say: "Working only four days in portions of two work weeks starting on Mondays, they were not 'worked more than five (5) days in a work week' and hence were not entitled to be paid at the rate of time and one-half for any service performed." The analysis that these employes worked in portions of two work weeks starting on Mondays is correct and is in accordance with the findings of the Board. It is here acknowledged that the work weeks of these employes started on Mondays. A 5-day work week starting on Mondays is necessarily a Monday through Friday work week and in such work weeks the rest days are Saturdays and Sundays. It is thus clear that upon the analysis employed by the dissenting members themselves these employes were recalled to service for a period which began with the two rest days of the work week in which they resumed service. It is precisely for that reason that the Board has awarded them compensation at the time and one-half rate for service performed on those days.

(s) **R. W. Blake**
George Wright
A. C. Bowen
T. E. Losey
E. W. Wiesner