Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD Award No. 8289
SECOND DIVISION Docket No. 8114
2-SOO-CM-'80

The Second Division consisted of the regular members and in addition Referee Richard R. Kasher when award was rendered.

Parties to Dispute: (System Federation No. 7, Railway Employes' Department, A. F. of L. - C. I. O. (Carmen)
(Soo Line Railroad Company

Dispute: Claim of Employes:

1. That under the Controlling Shops Craft Agreement the Soo Line R.R. Co. violated Rules 1-A (a) (b) (c) (f) (g) and Par. 2. Rules 6 and 7 and article V of the April 25, 1970 agreement when the Soo Line R.R. instituted a seven day work week at the shops of Shoreham, Minn., N. Fond du Lac, Wis. Stevens Point, Wis. and Superior, Wis.

2. Claimants who are carmen working at the above locations, effective April 6, 1977 and are forced to work Sundays are claiming 4 hours additional pay each Sunday required to work 4 hours each Monday required to work, 8 hours Str. time pay for each day they are forced to accept as a rest day for claimants as listed

Shoreham, Minn:

For the carmen and the carmen helper whose work week was changed April 6, 1977 and claimants could be changed as employees' who are now being adversly affected may bid off this illegal work week and different employees' will be forced to accept these positions making them claimants.

Stevens Point:

Effective April 10, 1977 claimants are as follows Carmen P. Hedrington, R. Weiland, E. Walkush, K. Lazewski, H. Glodowski, J. Lutz and M. Dennis.

Superior Wis.

Claimant effective April 10, 1977 for claimants Carmen R. Lahti, M. Hautala, L. Maddox, E. Luostari and R. Aspdal.

N. Fond du Lac, Wis.

Effective date April 10, 1977 all carmen and helpers that are forced to work Sundays at Str. time, and have Mondays and Tuesdays as rest days will claim 4 additional hrs. at Str. time pay for working Sundays and 8 hrs. Str. time pay for each Tuesday for not being allowed to work on his rest day Tuesday. (These employes originally had Sunday and Monday off.)

Claimants are Carmen A. Rose, R. Robert, P. Hansen, Lead Carmen, K.

Gerner, Carman helper M. Yanke, Carman Painter L. Wielgosh.

Employees that have Thursday and Friday as rest days are claiming 4 additional hrs. Str. Time for each Saturday and Sunday being forced to work and 8 hrs. Str. time pay for each Thursday and Friday for not being allowed to work on his rest days. Claimants are Carmen R. Birschbach, D. Jacobs, J. Woicek, R. Andrews, Mark Lefeber and L. Holz.

It should be noted this is termed as a continuing violation commencing as dated until dispute is settled and that there will be additional claimants who will be forced to work these illegal positions due to reassignments.

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 waived right of appearance at hearing thereon.

This claim was instituted on behalf of numerous claimants, carmen, employed by the Carrier in its shops at Shoreham, Minn., North Fond du Lac, Wis., Stevens Point, Wis., and Superior, Wis.

The action which gave rise to this claim was the Carrier's institution, during early April of 1977, of new work schedules which included Saturdays and Sundays, thus establishing seven-day operations at these shop facilities.

It is the position of the Organization that the Carrier violated rules of the applicable collective bargaining agreement regarding Establishment of Shorter Work Week (rules 1-A, (a), (b), (c), (f), (g), the Overtime, Rest Days, and Holiday rules (rules 6 and 7), and Article V of the April 24, 1970 agreement pertaining to double time payments to regularly assigned employees performing work on the second rest day of their assignments.

It is the position of the Carrier that the great number of bad order cars and its inability to handle those bad orders in a timely manner created an operational necessity to establish seven-day operations.

The relevant provisions of the collective bargaining agreements provide:

"Rule 1-A. NOTE: The expressions '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 individual employees.

"(a) General
The Carrier will establish, effective September 1, 1949, for all employees, subject to the exceptions contained in this agreement a work week of forty (40) hours, consisting of five (5) days of eight (8) hours each, with two (2) consecutive days off in each seven; the work weeks may be staggered in accordance with the 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:

(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.

(c) Six-day Positions
Where the nature of the work is such that employees will be needed six days each week, the rest days will be either Saturday and Sunday or Sunday and Monday.

(d) Seven-day Positions
On positions which have been filled seven (7) days per week any two (2) consecutive days may be the rest days with the presumption in favor of Saturday and Sunday.

(f) Deviation from Monday -- Friday Week
If in positions for work extending over a period of five (5) days per week, an operational problem arises which the Carrier contends cannot be met under the provisions of this agreement, Rule 1-A, Paragraph (b), and requires that some of such employees work Tuesday to Saturday instead of Monday to Friday, and the employees contend the contrary, and if the parties fail to agree thereon, then if the Carrier nevertheless puts such assignments into effect, the dispute may be processed as a grievance or claim under current agreement effective January 1, 1954.

(g) Nonconsecutive Rest Days
The typical work week is to be one with two (2) consecutive days off, and it is the Carrier's obligation to grant this. Therefore, when an operating problem is met which may affect the consecutiveness of the rest days and positions or assignments covered by Paragraphs (c), (d), and (e), the following procedure shall be used:

(1) All possible regular relief positions shall be established pursuant to Paragraph (e) of this Rule.

(2) Possible use of rest days other than Saturday and Sunday, by agreement or in accordance with other provisions of the agreement."

"Overtime, Rest Days, Holiday and Work

Rule 6

1. Service performed on an employee's rest days and the following legal holidays, namely: New Year's Day, Washington's Birghday, Decoration Day, Fourth of July, Labor Day, Thanksgiving Day, and Christmas (provided when any of the above holidays fall on Sunday, and observed by the state, nation or proclamation shall be considered the holiday) shall be paid for the rate of time and one-half.

2. Existing provisions that punitive rates will be paid for Sunday as such are eliminated. The elimination of such provisions does not contemplate the reinstatement of work on Sunday which can be dispensed with. On the other hand, a rigid adherence to the precise pattern that may be in effect immediately prior to September 1, 1949, with regard to the amount of Sunday work that may be necessary, is not required. Changes in amount or nature of profit or business and seasonal fluctuations must be taken into account. This is not to be taken to mean, however, that types of work which have not been needed on Sundays will hereafter be assigned on Sunday. The intent is to recognize that the number of people are necessary Sunday work may change."

"Rule 7

1. For service rendered immediately following and continuous with the regular work days hours, employees will be paid time and one-half on the actual minute basis with a minimum of one (1) hour for any such service performed.

2. Employees shall not be required to work more than two (2) hours without being permitted to go to meals. Time taken for meals will not terminate the continuous service period and will be paid for up to thirty (30) minutes.

3. Employees called or required to report for work an reported but not used will be paid a minimum of four (4) hours at straight time rate.

4. Employees called or required to report for work and reporting will be allowed a minimum of four (4) hours for two (2) hours and forty (40) minutes or less, and will be required to do only such work as called for, or other emergency work which may have developed after they were called and cannot be performed by the regular force in time to avoid delays in train movement.

5. Employees will be allowed time and one-half on minute basis

"for service performed continuously in advance of the regular working period with a minimum of one (1) hour the advance period to be not more than one (1) hour.

6. (a) All service beyond sixteen (16) hours, computed from the starting time of the employees' regular shift, shall be paid for the rate of double time.

(b) If an employee is required to render service beyond twenty-four (24) hours computed from the starting time of his regular shift, double time payment will be continued. An employee will not be required to render service beyond such twenty-four (24) hour period except to complete the assignment.

(c) When employees have been relieved and they desire to work their regular work period, such period, if worked, will be paid for at straight time rates.

7. Work in excess of forty (40) straight time hours any work week shall be paid for at one and one-half times the basic straight time rate except when moving from one assignment to another, or to or from a furloughed list, or where days are being accumulated under Rule 1-A, Paragraph (g) by action of the company, or as a result of bidding in a new assignment."

The record before us indicates that the Carrier complied with Paragraph (f) of Rule 1-A when it met with the general chairman prior to instituting a deviation from the Monday to Friday work week. This Rule in the agreement does not require that the parties concur regarding the Carrier's allegation of an operational necessity to change work week assignment changes, consistent with other provisions in the agreement, and risk the institution of claims where violations of the agreement may occur. Thus, we find at the threshold that the Carrier met its first responsibility of conferring with the Organization prior to the institution of the work week changes. We also find that the Carrier sufficiently demonstrated that there were operational needs for changing work week assignments. The build up of bad order cars heightened by the institution of more demanding regulations published by the Federal Railroad Administration created a bonafide operational need.

Thus, the Carrier's changing work week assignments from Monday through Friday to Tuesday through Saturday was consistent with the language and the intent of the applicable agreements.

However, the Organization has convincingly argued that deviation from Monday to Friday work week assignments to Tuesday to Saturday schedules is the only change permitted and is specifically referenced in sub-paragraph (f) of Rule 1-A, cited above. Further, the Organization states that seven (7) day positions under sub-paragraph (d) of Rule 1-A can only be established where such positions have been filled previously in this manner. The record before us does not

indicate that any of the positions at the shop facilities on the repair tracks have previously been filled on a seven (7) day position basis. Therefore, we conclude that although the Carrier had the right to change work week assignments, this right was limited by the specific language of the agreements referred to above. Establishing work weeks with Sunday as one of the five (5) days contemplated in an employee's standard work week assignment violated the terms of the agreement. The remedy for this violation is dictated by the terms of Rule 7 which would require that where Sunday is one of the rest days, existing rules providing for compensation on Sunday shall apply.

A W A R D

Claim sustained in part consistent with the above findings.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Second Division

Attest: Executive Secretary
National Railroad Adjustment Board

By Rosemarie Brasch
Rosemarie Brasch - Administrative Assistant

Dated at Chicago, Illinois, this 26th day of March, 1980.

Carrier Members' Dissent to Second Division Award 8289

Referee Richard R. Kasher

This dispute involved the right of the Carrier to establish seven day positions, under the Forty Hour Work Week Agreement of 1949. The Carrier, in the handling on the property, and in their submission before the Board, did a thorough and most impressive job of proving a bona fide operational need for a seven day operation. There was a tremendous build up of bad order cars over the weekends at the points involved, customers were complaining about shipping delays, and competition for the traffic from several other carriers was proven. As the Carrier also noted, if it was unable to deter and improve the delays in car movements caused by bad orders being unduly delayed on the repair tracks at the involved locations, the result would be that it would lose the traffic. Losses in traffic are no small concern for a common carrier today, and, they should be of no small concern to the employes, <u>for traffic losses mean job losses.</u>

The Majority did find that Carrier had proven an operational need for the change:

> "We also find that the Carrier sufficiently demonstrated that there were operational needs for changing work week assignments. The build up of bad order cars heightened by the institution of more demanding regulations published by the Federal Railroad Administration created a bonafide operational need."

Where the majority seriously erred, however, was in its further conclusion that the Carrier was precluded, under the Forty Hour Work Week Agreement, from establishing Seven Day Assignments where a bonafide operational need was shown. Based on the precedents of this Board and the contractual construction of the Agreement, such a conclusion was clearly outside the confines of the Board's jurisdiction.

The Majority concluded:

> "However, the majority has convincingly argued that deviation from Monday to Friday work week assignments to Tuesdau to Saturday schedules is the only change permitted and is specifically referenced in sub-paragraph (f) of Rule 1-A, cited above. Further, the Organization states that seven (7) day positions under sub-paragraph (d) of Rule 1-A can only be established where such positions have been filled in this manner. The record before us does not indicate that any of the positions at the shop facilities on the repair tracks have previously been filled on a seven (7) day position basis. Therefore, we conclude that although the Carrier had the right to change work week assignments, this right was limited by the specific language of the agreements referred to above. Establishing work weeks with Sunday as one of the five (5) days contemplated in an employee's standard work week assignment violated the terms of the agreement."

It is this conclusion which is without any basis in reason or fact, based both on the contractual provisions involved and the many precedents of this Board.

Rule 1-A of the Agreement, the 40 Hour Week Agreement, first of all contemplates that "the work weeks may be staggered in accordance with the carriers' operational requirements; so far as practicable the days off shall be Saturday and Sunday." Rule 6, Paragraph 2 of the agreement between the parties, which is also drawn verbatim from the 40 Hour Week Agreement, provides (underscoring added):

> "Existing provisions that punitive rates will be paid for Sunday as such are eliminated. The elimination of such provisions does not contemplate the reinstatement of work on Sunday which can be dispensed with. On the other hand, a rigid adherence to the precise pattern that may be in effect immediately prior to September 1, 1949, with regard to the amount of Sunday work that may be necessary, is not required. Changes in the amount or nature of traffic or business and seasonal fluctuations must be taken into account. This is not to be taken to mean, however, that types of work which have not been needed on Sundays will hereafter be assigned on Sunday. The intent is to recognize that the number of people on necessary Sunday work may change.

It is clear from these, and other relevant portions of the 40 Hour Work Week Agreement

that there is no contractual bar to the establishment of seven day positions, and, no contractual bar to establishing such assignments with Sunday as a regularly assigned day of work. Rule 1 (d), the strongest element of support for the majority's conclusion, speaks to seven (7) day positions:

> "On positions which have been filled seven days per week, any two (2) consecutive days may be the rest days, with the presumption in favor of Saturday and Sunday."

An analysis of the rule does not indicate that it prohibits the establishment of seven day assignments - where none have existed previously. It first of all clearly notes that rest days may not necessarily be Saturday and Sunday - but the presumption is in favor of those days. And, when read in conjunction with Rule 6, Paragraph 2, also from the 40 Hour Work Week, it is established beyond a doubt that this was not the intent. Firstly, the rule eliminated existing provisions that provided payment of punitive rates for Sunday work - as such - clearly showing that Sunday could be a regularly assigned day. Secondly, and in significant part, the rule provided that "...a rigid adherence to the precise pattern that may be in effect immediately prior to September 1, 1949, with regard to the amount of Sunday work that may be necessary, is not required. Changes in the amount or nature of traffic or business and seasonal fluctuations must be taken into account.....The intent is to recognize that the number of people on necessary Sunday work may change."

Significantly, upon presentation of this dispute to the Board, the Organization cited not one previous decision which supported their position - the sum and substance of their position was based upon oral and written argument stating their position and interpretation of the agreement. Contrarily, the Carrier cited numerous previous decisions, all involving the 40 Hour Week, and all directly

on point with the facts of the instant case, to wit, the establishment of seven (7) day positions, with Sunday scheduled as a regular day of work and compensable at the applicable straight time rates. We will again review some of these decisions herewith, and, it should be noted that they consistently have interpreted the same 40 Hour Work Week Agreement as the Carrier did in the instant case. These decisions, which date as far back as 1951 on the Second and Third Divisions of this Board, have consistently recognized that, based upon the language of the 40 Hour Week agreement, the sole criterion to be determined, and the sole evidentiary test which the Carrier must meet, is whether their existed a bonafide operating need for the change in scheduling and the seven (7) day assignments with Sunday as a regularly assigned day. It was not necessary to prove, and is not necessary to prove, that such seven (7) day assignments had previously existed:

(Second Division Award 1644 - Referee Edward Carter, 1953):

"The agreement does not prohibit the assignment of a type of work on Sunday after September 1, 1949, even though it was not so assigned prior to that date, if such work is necessary to be performed on Sundays. The proof required must, however, be sufficient to overcome the presumption that it is not necessary to be performed on Sunday because of the fact that it was not so performed prior to the advent of the Forty-Hour Work Week Agreement."

* * * * * * * * *

The burden is upon the employes to show that the carrier misapplied the agreement in establishing seven day positions at Fort Worth for the employees assigned to the work of making running repairs on cars coming into that point. Awards 1599, 1617, Second Division and Awards 5555, 5556 and 5557, Third Division. This it has failed to do by the greater weight of the evidence. We necessarily conclude that the assignments in question were properly made and that a denial award is in order."

Precedents on the Second Division cited included Awards 1645 to and including Award 1655, Awards 1599, 1608 to 1616, Award 1669, Award 1883, 1712,1714, 2585 and 3094. Later precedents of the Division were equally consistent. 2nd Division Award 7066, Referee Eischen, met this same issue head on, and, in citing Third Division Awards 18504, 10622, 18328 and 5555, concluded, after a long discussion of the issues, that Carrier's action in establishing seven (7) day positions at its car shops, because of bona fide operating needs, was in conformance with the agreement. In Award 7149, Referee Zumas addressed the same issue in deciding that the Carrier had a right to establi sh a position with Wednesday and Thursday rest days:

> "It is clear from this rule that the length of the work week is to be determined by an examination of the necessary service to be performed, and not by the work week of the individual.
>
> The record herein shows that the McComas Street Piers operations have for many years been on a seven day schedule, and that operational requirements cannot be met on a Monday through Friday schedule. Under the circumstances, the claim must be denied."

Third Division Award 20207 also squarely addressed the issue, and, after a thorough discussion of the issues and numerous previous awards, concluded that the Carrier could establish seven (7) day assignments, with Sunday as a regularly assigned day and compensated for at the straight time rates (see page four of the decision for authority and discussion on this subject). In that case, all decisions involving this issue were discussed and distinguished, and, in addition to Third Division decisions on the point, Award 12 of Public Law Board 249 was cited for support.

Other Third Division decisions directly on point, and of more recent vintage than those cited above, include Awards 18504, 18505 and 18328.

Despite the fact that no contrary decisions were presented by the Organization in support of its positions, and, in the face of all of these decisions, directly on point, that were presented to the Referee for his review, study and comparison,

the Referee lead in a clearly erroneous decision supported by the Organization upon moving for adoption. As we said before, in the face of the agreement language, the precedents, and the clear lack of evidence presented by the organization in their submission and at the Board during hearing, this decision is, without a doubt, outside the confines of the jurisdiction of the Board - based on a conclusion that cannot be supported by the arguments, the evidence, the precedents and the agreement language itself.

Aside from the foregoing, there is another tragedy in the findings of this decision, and, the very fact that the organization would process and litigate what has heretofore been a totally settled issue in the industry. The tragedy is, very simply, that with the rail industry in the state of economic disarray, carriers need the ability to compete and perform competitive services at the most efficient and economical level. Failure to do so has resulted in the proven financial collapse of once healthy carriers, and, as this is written, two once healthy midwestern carriers have either completely ceased operations or substantially paired down operations - due to bankruptcy. While many factors entered into their predicaments, one is most certainly apparent - restrictive and costly labor contracts made them unable to effectively compete with other railroads and other modes of transportation. The resultant impact upon the employees of those carriers is astounding, and there are close to 14,000 rail employees in the midwest who have lost, or possibly will lose, employment simply due to these bankruptcies. No doubt, many of these employees would be extremely happy if they even had the opportunity to work a regular assignment, which, while scheduled on weekends to meet operating requirements of their employer, provided them a livelihood and a solid economic base so that their families and personal lives would not be stressed or interrupted because of the financial insolvency of

their employer. There comes a time in the course of events when labor organizations and their employees should recognize the economic and personal long term implications of stressing issues which clearly, based on the evidence of record, would place the employer in an adverse competitive and economic situation. For, the long term results could have a profound affect on their lives - as has been demonstrated by the midwestern rail bankruptcies of recent years.

While the organizations certainly have every right to litigate issues involving collective bargaining matters, once issues have been well settled by authoritative decisions, as this issue clearly has been, sound labor relations and the very economic well being of the employer should weigh heavily in considering whether to attempt to relitigate an issue which has been clearly settled for at least twenty, or perhaps close to thirty years. In the face of all of the carrier's evidence in this case, and the many precedents settling the issue on a consistent basis, it is at most questionable that an attempt to try the issue another time, before another referee, was in the best interests of sound and progressive labor relations, the economic and competitive well being of the carrier, and, equally important, the future interests of stable employment of the employees involved.

Summarily, we think that this issue has been firmly resolved by previous decisions of both the National Railroad Adjustment Board and other minor dispute tribunals, and that the clearly contrary decision in this case was in error and not within the Board's jurisdiction. We are compelled to so record our sentiments by issuing this strong dissent.

John W. Gohmann

John W. Gohmann

P. E. LaCosse

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James E. Mason

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David M. Lefkow

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Carrier Members