

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Jay S. Parker, Referee

PARTIES TO DISPUTE:

**BROTHERHOOD OF RAILWAY AND STEAMSHIP CLERKS,
FREIGHT HANDLERS, EXPRESS AND STATION EMPLOYES**

UNION PACIFIC RAILROAD COMPANY

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employees:

1. That Carrier's action on July 21, 1949 in changing, effective July 23, 1949 the hours of service assignment of the night warehouse crew from 11:49 P.M. to 8:29 A.M., Mondays to Saturdays, inclusive to 12:00 MN. to 8:30 A.M. Sundays to Fridays, inclusive (less thirty minutes for meal period) at Denver Freight Station, was violative of rules of our current Agreement with Carrier effective April 1, 1945.

2. That involved employees, namely W. P. Lloyd, Night Foreman, et al. (Specifically named in letter to Assistant to Vice President Singent dated January 23, 1950, Employees Exhibit 7) be compensated for wage losses sustained, to-wit:

(a) Eight hours' pay at rate attached to their respective positions for Saturday, July 23, 1949 and all subsequent Saturdays to and including Saturday, December 3, 1949 (improper assignment discontinued December 7, 1949).

(b) Difference between pro rata and overtime rate of pay attached to their respective positions for service performed on Sunday, July 24, 1949 and all subsequent Sundays to and including Sunday, December 4, 1949 (improper assignment discontinued December 7, 1949).

EMPLOYEES' STATEMENT OF FACTS: On March 24, 1949, Carrier established a night platform force at its Denver, Colorado Freight House. The force established consisted of:

- 1 Foreman
- 4 Check Clerks
- 1 Lift Truck-Trucker Operator
- 9 Freight Stowers-Callers

They were assigned by bulletins to an hours of service assignment 11:50 P.M. to 8:29 A.M. (less thirty minutes for meal period) and Sunday as the day of rest, i.e. 11:59 P.M. Sunday to 8:29 A.M. Monday. (Employees' Exhibits 1, 2, 3, and 4.) While each position was designated as a

such regularly assigned seventh day off duty will be paid at the rate of time and one-half time; when such assigned day off duty is not Sunday, work on Sunday will be paid for at straight time rate."

Therefore, in any event, it is obvious that the claims subsequent to September 1, 1949 cannot be considered.

In conclusion, the Carrier has shown that the claim herein is without merit and should be denied.

(Exhibits not reproduced.)

OPINION OF BOARD: Effective March 24, 1949, the Carrier established a night platform force at its Denver, Colorado, freight house, consisting of divers six-day positions, the titles of which are not of importance. The occupants thereof were assigned by bulletins to an hours of service assignment 11:59 P. M. to 8:29 A. M., less thirty minutes for a meal period with Sunday as a rest day. At no time was there continuous operation at the Denver freight office. However, a day force, not here involved, worked intermittent hours from 6:00 A. M. to 6:00 P. M., but there were no assignments between the hours of 6:00 P. M. and 11:59 P. M.

The record is not too clear on the point but it appears that commencing with the date such positions were established the members of the force worked seven days per week and were compensated for service performed on Sunday, the rest day of their position as regularly assigned, at the over-time rate.

On July 21, 1949, the Carrier, without abolishing the positions, gave a notice to the involved employees which, so far as is here pertinent, reads:

"After the night warehouse and platform forces have finished their day's work ending 8:29 A. M. Saturday, July 23rd, this operation will be changed to six days basis with rest day on Sunday.

Starting time will be changed to 12:00 Midnight, shift ending at 8:30 A. M., with 30 minutes out for meal period.

First shift on the new assignment will start work at 12:00 Midnight Monday (or one minute after 11:59 P. M. Sunday) and ending 8:30 A. M. Monday, July 25th"

Prior to the change as noticed the day paid for was the day on which the shift commenced, i. e., the shift commencing on Friday at 11:59 P. M. was paid for as work performed on Friday. Thereafter, the day paid for by the Carrier was the day the work was actually performed. The Carrier asserts and concedes the first shift worked by the force subsequent to the change was on Monday, July 25, 1949, from 12:00 Midnight to 8:30 A. M. Thereafter similar hours were worked Mondays through Fridays, with rest days on Sunday until September 1, 1949. Following that, the positions were placed on a five-day basis, in conformity with the Forty Hour Week Agreement, with Saturdays and Sundays assigned as rest days until December 7, 1950, when the night platform force was discontinued entirely, thus eliminating the 12:00 Midnight to 8:30 A. M. assignments.

Soon after the change heretofore mentioned the Employees protested the Carrier's action on the ground it violated the rules of the current Agreement. When their claim with respect to such matter was finally denied on the property they filed the instant claim with this Board wherein they seek to recover all wage losses sustained by the incumbents of the involved positions as a result of the change in the starting time of their assignments.

There are other issues involved in this case but the principal one, and which should be met squarely can be stated in the form of a question, as

follows: Is time worked by employees between the hours of 12:00 Midnight and 8:30 A.M. to be considered as a day's work on Sunday or Monday?

To avoid questions which might otherwise suggest themselves we deem it advisable to establish certain matters not seriously, if at all, controverted by the parties.

On the date of the alleged violation the current Agreement contained, among others, Rule 38, prohibiting the suspending of employees to absorb overtime, Rule 23 providing the assignment of regularly assigned daily rated employees should not be reduced below six days per week, Rule 40 requiring payment of the overtime rate for work performed on Sundays and the most important of all, Rule 34, which reads:

"Rule 34. Starting Time. (a) Regular assignments shall have a fixed starting time and the regular starting time shall not be changed without at least thirty-six hours notice to the employees affected.

(b) No shift will start or end after 12:00 o'clock midnight or before 6:00 A. M."

If in fact they do not actually do so, the Employees impliedly concede, (1) that the Carrier's action in making the change as herein indicated was not in violation of Section (b) of the rule just quoted, (2) that the Carrier has the right under Section (a) of such rule to change the starting time and that notice was given of the involved change within the time provided by its terms, (3) that the Carrier was not required to establish seven-day assignments for the night shift force.

After reviewing the record we have concluded that under the confronting facts and circumstances (1) the existing night shift positions were actually established as six-day positions and that the work performed on Sunday, the designated rest day, was extra for which compensation was payable at the rate of time and one-half, (2) that the Carrier was not required to perform night work at the freight house at the overtime rate and that it had a right to arrange the starting time of that force in such manner as to avoid payment of that rate if it could do so in a way that would not result in a violation of existing terms of the Agreement and (3) that in making the change in question the Carrier was attempting to accomplish that result.

Under our decisions the following rules must be regarded as established. First, that the work of a continuous twenty-four hour assignment, consisting of three shifts, commencing on Saturday and ending on Sunday, is to be regarded as work performed on Saturday. (See, Awards Nos. 7, 398 and 1817.) Second, the work of a single assignment, on a position not in continuous twenty-four hour service, commencing on Saturday and ending on Sunday, is considered as work performed on Saturday. (See, Awards Nos. 5051 and 5058.) Otherwise stated, when the work of an assignment continues through portions of two calendar days it is to be classified as work of the day on which it started. (See, Awards Nos. 1817 and 2204.)

Having disposed of preliminary matters as indicated, we now give our attention to a decision of the issue raised by the question as heretofore stated.

The Employees insist that time worked between the hours of 12:00 Midnight Sunday and 8:30 A. M. Monday must be considered as Sunday work while the Carrier insists that it must be regarded as Monday work. More simply stated, the essence of the Employees' position on this point is that work commencing at Midnight Sunday starts on Sunday and hence, under our decisions must be regarded as Sunday work.

In support of their position the Employees place great weight on Award No. 4501 and argue that the Opinion holds that work commencing at 12:00

Midnight and ending 8:00 A. M. Monday was to be considered and treated as Sunday work. We have examined the record in that case and, while it is true the decision holds the work was Sunday work, find that there the assigned shift involved was the third of three continuous round-the-clock shifts, the first of which commenced at 8:00 A. M. on Sunday, and that our decision was based upon that premise in conformity with the Awards first above cited and not on any theory that work of a single shift commencing at Midnight on Sunday was to be regarded as Saturday work. Moreover, an entirely different rule was held to be decisive. Therefore, Award No. 4501 is clearly distinguishable and does not sustain the Employees' position.

An Award more in point and which holds contrary to the Employees' contention in this case is Award No. 2204. There the Carrier contended that a single assignment, commencing at 12:00 Midnight Monday and ending at 8:00 A. M. on Tuesday constituted Monday work. That contention it will be observed, except for the days involved, is identical with the one raised by the Employees here. There we held the work in question did not start on Monday but was all performed within the calendar day of Tuesday and was not to be considered as work done on Monday.

The Employees argue that the notice here involved must be construed as requiring the starting of the work in question on Midnight Sunday, therefore the work of the shifts in question must be regarded as commencing on Sunday. We do not believe the confronting facts warrant any such conclusion. It will be noted the notice of change, heretofore quoted, states the "first shift on the new assignment will start work at 12:00 Midnight Monday (or one minute after 11:59 P. M. Sunday) and ending 8:30 A. M. Monday". One minute after 11:59 P. M. Sunday can only be construed to mean the moment when the toll of the bell announces the closing of one day and the commencement of a new calendar day—in this case Monday. Therefore, based on that and an inherent belief that in railroad parlance Midnight, like Noon, is a definite demarcation for the beginning or ending of an assignment, also on what was said and held in the Award last cited, we hold that commencing with the effective date of the notice of change the work performed by the Employees herein involved from 12:00 Midnight on Monday, as stated in such notice, to 8:30 A. M. Monday, July 25, 1949, was work performed within the calendar day of that date and cannot be regarded as work which commenced on Sunday.

The conclusion just announced does not mean there is to be no sustaining Award in this case. Heretofore we have called attention to the fact the employees had been regularly assigned to work on Sunday. We have also called attention to the fact, indeed our decision holds, the first shift permitted to work after the effective date of the notice of change worked Monday, July 25, 1949. We have also indicated the Carrier's action was taken for the purpose of avoiding the payment of overtime on Sunday. It should now be pointed out that the operation existing before the change was declared by the notice ended after the platform forces had finished their day's work ending 8:29 A. M. Saturday, July 23rd. Under the rule heretofore announced that work is to be regarded as Friday work for it commenced at 11:59 P. M. on that day. Therefore, it appears the consequence flowing from the Carrier's action were to blank the next two days (Saturday and Sunday) of the positions which, under the existing conditions and circumstances, the involved employees were entitled to fill until the change as made went into force and effect on Monday, July 25th. The practical result is that the regularly daily rated employees were reduced below six days per week during one week in violation of Rule 23, and both those employees and the hourly rated employees involved were suspended from their regularly assigned work on Saturday and Sunday, July 24 and 25, 1949, for the purpose of avoiding overtime in violation of Rule 38 of the Agreement. In view of what has just been stated and held the Claimants are entitled to compensation for time lost by them because of the violations indicated for the Saturday and Sunday last above mentioned at the pro rata

rate, reparation on Sunday being so limited because Rule 40 of the Agreement only requires payment of overtime on Sunday for work performed on that day. It is so ordered.

FINDINGS: The Third Division of the Adjustment Board, after giving the parties to this dispute due notice of hearing thereon, and upon the whole record and all the evidence, finds and holds:

That the Carrier and the Employee involved in this dispute are respectively Carrier and Employee within the meaning of the Railway Labor Act, as approved June 21, 1934;

That this Division of the Adjustment Board has jurisdiction over the dispute involved herein; and

That the Carrier violated the Agreement under conditions and circumstances which require compensation for two (2) days at the pro rata rate.

AWARD

Claim sustained in part and denied in part, as per the Opinion and Findings.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: A. I. Tummon
Acting Secretary

Dated at Chicago, Illinois, this 6th day of September, 1951.