

Award Number 5558
Docket Number CL-5578

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION
Edward F. Carter, Referee

PARTIES TO DISPUTE:

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

BOSTON AND MAINE RAILROAD

CASE NO. 1

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

(1) That the Carrier violated and continues to violate the Agreement between the parties, effective May 14, 1948, as amended by Memorandum of Agreement effective September 1, 1949, when, in establishing a five-day work week, effective September 1, 1949, Monday to Friday, inclusive, with rest days, Saturday and Sunday, for the position of Baggage-man at Somersworth, New Hampshire, rate of pay \$11.036 per day, held by Stephen D. Hourihane, a position upon which the nature of the work is such that an employe is needed six days each week, Monday to Saturday inclusive; the Carrier refused and continues to refuse to either combine the duties of this position on the sixth day (Saturday) with that of a regular 5 day relief position, or to permit the regular occupant of the position, the said Stephen D. Hourihane, to perform said work of this position on the sixth day (Saturday), but instead Carrier hired and assigned Raymond L. Tanguay, who neither came within the scope of the Agreement between the parties nor held seniority rights as a Baggage-man, to cover said position of Stephen D. Hourihane on the sixth day (Saturday) effective Saturday, September 3, 1949.

(2) That the Carrier shall now be required to combine the duties of this position on the sixth day (Saturday) with that of a regular five-day relief position, or permit the regular occupant of the position, the said Stephen D. Hourihane, and any other employes who may have been subsequently assigned to the position, to perform said work of this position on the sixth day (Saturday) and compensate the said Stephen D. Hourihane, and any other employes therefor in accordance with the provisions of the Rules Agreement between the parties.

(3) That the Carrier shall be required to reimburse the said Stephen D. Hourihane and any other employes who may have been subsequently assigned to the position, for the difference between the wages actually received and what they would have received had they been assigned to said sixth day (Saturday) of service retroactive to and including Saturday, September 10, 1949, based upon the straight time rate of the position, \$11.036 per day (plus any subsequent general wage increases applicable to said position).

(4) That the Carrier shall be required to reimburse Raymond L. Tanguay and other employes who may have been subsequently and similarly assigned on the sixth day (Saturday) of Mr. Hourihane's position for the difference between the wages they actually received and five days per week at rate of pay of \$11.036 per day retroactive to and including Saturday, September 10, 1949, (plus any subsequent general wage increases applicable to said position).

EMPLOYEES' STATEMENT OF FACTS: Effective September 1, 1949, the Carrier established a five-day work week for Stephen D. Hourihane holding position of Baggage-man at Somersworth, New Hampshire, with assigned days of service Monday to Friday inclusive, with Saturday and Sunday as his days of rest. However, since the nature of the work of the position was such that an employe was needed six days each week, namely, Monday to Saturday inclusive, the Carrier hired Raymond L. Tanguay and assigned him to cover the work of Mr. Hourihane's position on the sixth day (Saturday), regularly, effective Saturday, September 3, 1949. Prior to the employment and assignment of Mr. Tanguay this man neither came within the Scope of the Agreement between the parties now held any seniority rights thereunder. Mr. Tanguay was not otherwise employed by the Carrier except to cover the aforesaid assignment.

CARRIER'S STATEMENT OF FACTS: Effective September 1, 1949, the Carrier, as required by the National Forty-Hour Week Agreement of March 19, 1949, established a five-day week position as Baggage-man at Somersworth, N. H., which was assigned to Stephen D. Hourihane. As there was need for a Baggage-man at Somersworth on six days a week, an unassigned man was called to fill the position which was not a part of any assignment. Hourihane worked Mondays to Fridays inclusive and the spare man worked Saturdays.

CASE NO. 2

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

(1) That the Carrier violated and continues to violate the Agreement between the parties, effective May 14, 1948, as amended by Memorandum of Agreement effective September 1, 1949, when, in establishing a five-day work week, effective September 1, 1949, Tuesday to Saturday, inclusive, with rest days, Sunday and Monday, for the position of Baggage-man at North Berwick, Maine, rate of pay \$11.228 per day, held by Frank E. McCrillis a position upon which the nature of the work is such that an employe is needed six days each week, Monday to Saturday inclusive; the Carrier refused and continues to refuse to either combine the duties of this position on the sixth day (Monday) with that of a regular five-day relief position, or to permit the regular occupant of the position, the said Frank E. McCrillis, to perform said work of this position on the sixth day (Monday), but instead hired and assigned Wayne M. Wormwood, an employe who neither came within the scope of the Agreement between the parties nor held seniority rights as a Baggage-man, to cover said position of Frank E. McCrillis on the sixth day (Monday), effective Monday, September 5, 1949.

(2) That the Carrier shall now be required to combine the duties of this position on the sixth day (Monday) with that of a regular five-day relief position, or permit the regular occupant of the position, the said Frank E. McCrillis, and any other employes who may have been subsequently assigned to the position, to perform said work of this position on the sixth day (Monday) and compensate the said Frank E. McCrillis, and any other employes therefor in accordance with the provisions of the Rules Agreement between the parties.

(3) That the Carrier shall be required to reimburse the said Frank E. McCrillis and any other employes who may have been subsequently assigned

The Carrier has shown:

1. That the claims are not supported by any rules cited by the claimants.
2. That the Carrier, in each case, acted in strict conformity to the rules.
3. That the claims of the incumbents of the regular five-day assignments are not properly before the Board.
4. That many of the claims for spare employees are not properly before the Board.
5. That an affirmative award is not justified in any case.

(Exhibits not reproduced.)

The Carrier in establishing 40-hour work week assignments, caused the rest day work of the positions hereinafter described to be performed in the manner set forth in the following statements of the twelve claims made. The Organization contends that the relief work in question was not assigned in accordance with the 40-Hour Work Week Agreement and this affords the basis for the claims. We shall describe, discuss and decide each case by the number assigned to it by the parties in their submissions.

CASE NO. 1

OPINION OF BOARD: Baggage work was regularly assigned at Somersworth, New Hampshire, to S. D. Hourihane. He was assigned Monday through Friday with Saturday and Sunday as rest days. The Saturday relief work was performed by one Raymond L. Tanguay who was not used at this point after December 20, 1949. The position was a six day position within the meaning of the 40-Hour Work Week Agreement for the reason that the nature of the work was such that employees were needed to protect it six days each week. Rule 17½ (c), Current Agreement. The regular assigned employee, Hourihane, was correctly assigned Monday through Friday, with Saturday and Sunday as rest days in accordance with Rule 17½ (c). See Awards 5555, 5556, 5557. The Saturday work was performed by Tanguay, who was not previously an employee of the Carrier, never was within the scope of the Clerks' Agreement prior thereto, and was not otherwise employed by the Carrier other than on this Saturday rest day work.

It is the contention of the Organization that this Saturday work must be included in a regular five day relief assignment or permit the occupant of the regular assigned position (Hourihane) to work it at the time and one-half rate. On this contention we point out that after regular positions existing prior to the effective date of the 40 Hour Week Agreement have been reduced to a five day assignment, in accordance with that Agreement, the work necessary to be performed in addition thereto must be assigned under the provisions of Rule 17½ (e), which provides:

"All possible regular relief assignments with five days of work and two consecutive rest days will be established to do the work necessary on rest days of assignments in six or seven days service or combinations thereof, or to perform relief work on certain days and such types of other work on other days as may be assigned under this agreement. Where no guarantee rule now exists such relief assignments will not be required to have five days of work per week.

"Assignments for regular relief positions may on different days include different starting times, duties and work locations for employees of the same class in the same seniority district, provided they

take the starting time, duties and work locations of the employe or employes whom they are relieving."

The record shows that the Carrier created as many regular relief assignments as were possible that would in any manner affect the position at Somersworth here involved without violating other provisions of the Agreement. After so doing there was one Saturday rest day to be worked at Somersworth, Saturday rest days at Rochester, New Hampshire, and Biddeford, Maine, Monday rest days at North Berwick, Maine, and Durham, New Hampshire, and Saturday and Sunday rest days at Dover, New Hampshire. The distances between these points varied from 5.4 miles to 21.7 miles. It is the tag end work which was left over at these points which constitutes the basis of several of the cases (1, 2, 4, 5, 6, 7) contained in this docket. It is quite evident that the Carrier could not assign a regular five day relief employe at these points, assuming that distances were no bar, for the reason that there were but three days (Saturday, Sunday and Monday) of the week in the same seniority district to be filled under the assignments as made. The Carrier could not, except by agreement, change the rest days on the six day positions from Saturday and Sunday or Sunday and Monday. Under these circumstances the work is correctly described as unassigned work. It will then be assigned pursuant to Rule 17(f), which provides:

"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 extra or unassigned employe who will otherwise not have forty hours of work that week; in all other cases by the regular employe."

(We think the Carrier is in error when it states that "an available extra or unassigned employe" as used in Rule 17(f) includes a person who had no seniority standing under the controlling agreement prior to September 1, 1949. Clearly this provision means that an employe holding seniority who is not working, or one who has worked less than 40 hours of work that week, shall be used before the regular employe can claim the work as his at the rest day rate.) This identical question was determined by this Board in Award 5240. The hiring of persons without any seniority rights for less than five days per week to perform relief work belonging under an agreement because the work was not a part of an assignment under Rule 17(f) could, if sustained, cause serious injury to the rights of employes holding seniority under a collective agreement. No such result was intended by the 40 Hour Week Agreement. To permit persons "off the street" to do such work poses such a grave question involving the value of collective agreements that this Board will sustain it only when the controlling agreement so provides or, in the case before us, if the Emergency Board responsible for the drafting of the 40 Hour Week Agreement interprets it to mean otherwise by a formal interpretation of the intended meaning of the language used. If it was the intention of the parties in drafting the agreement to permit the use of persons holding no seniority rights to perform relief work covered by Rule 17(f), the English language contains adequate words to have plainly expressed such an intent. The language used clearly expresses an intent contrary to Carrier's interpretation of the rule. We hold therefore that Rule 17(f) was violated when a person holding no seniority under the Clerks' Agreement on September 1, 1949, was used on any of the Saturdays of the six positions here involved.

The Organization asserts that Carrier should be required to combine the work of this position on the sixth day (Saturday) with that of a regular five day relief position or permit the regular occupant of the position to work it at the rest day rate. As we have hereinbefore pointed out, there are only three days (Saturday, Sunday and Monday) in the manner in which they were assigned that could be included in a regular relief assignment at Somersworth, Rochester, Biddeford, North Berwick, Dover and Durham, assuming that distances and traveling conditions do not reasonably bar such an assignment. All of the regular assignments at these points have been

made in accordance with the 40 Hour Work Week Agreement. Consequently if a regular assignment is to be established, there must be changes made in the rest days of two or more regular assignments. This can only be done with the concurrence of the Organization as provided in Rule 17½(g). This rule provides that the typical work week is to be one with two consecutive days off in seven and that it is the obligation of the Carrier to provide this. But where an operating problem is met which affects the consecutiveness of the rest days of positions or assignments covered by paragraphs (c), (d) and (e), the procedure for handling is thereafter set out. It seems to us that if a regular assigned relief position is to be established at these five named locations, the operating problem involves positions falling under (c) and (e) and the procedure for their solution is set forth in Rule 17½(g). Paragraph (1) of Rule 17½(g) reasserts that all possible regular relief positions shall be established as required by Rule 17½(e). Paragraph (2) of Rule 17½(g) then provides:

“Possible use of rest days other than Saturday and Sunday, by agreement or in accordance with other provisions of this Agreement.”

On the other hand, if it be asserted that a regularly assigned relief position could have been established by changing the rest days of a seven day position at Dover or Biddeford, it must be shown that such a position could reasonably have been set up under the conditions here existing. While the provisions of Rule 17½(e) require the establishment of all possible regular relief assignments, they must be in the same seniority district and be reasonable as to distances of work locations, available transportation facilities, the time required to move from one work location to another, and any special circumstances connected with such an assignment. No showing is here made that would warrant this Board in directing the establishment of a regular relief position. It seems to us, in any event, that the establishment of such a position should be given consideration by the parties, and, if agreement does not result because of the arbitrary or capricious conduct of either or both of the parties, this Board, with the record thus made before it, might have a basis for determining whether the Carrier had failed in its obligation to establish all possible regular relief positions.

The record is replete with evidence showing a disagreement as to the respective duties of the parties under this provision. It is the duty of the Carrier ordinarily to interpret an agreement in the first instance and put it into effect. The Organization ordinarily must resort to protest or the making of compensatory or penalty claims to secure what it believes to be a proper application of agreement rules. But where the collective agreement requires the agreement of the Carrier and the Organization to carry out the intent and spirit of the agreement, such provisions do not fall within the general rule that the Carrier must unilaterally interpret them and put them in effect. They involve mutual agreement and, necessarily, mutual responsibilities. The Agreement contemplates that the talents of both parties shall be used in the securing of such agreements necessary to the establishment of “all possible regular relief positions.” The duty rests upon the Carrier to suggest possible use of rest days other than Saturday and Sunday on regular assigned positions to permit the establishment of a regular relief assignment as contemplated by Rule 17½(e). On the other hand, the Organization has a similar responsibility to suggest such variances from the rules generally applicable. A stalemate resulting from the failure or refusal of either to take the first step is not consistent with the spirit of the Agreement. Neither does the Agreement contemplate a whimsical refusal to agree to reasonable changes of rest days in regular assignments necessary to the establishment of an additional regular relief position. In the present case neither party performed its duty in this respect on the property even though both assert their willingness to do so in their presentations to this Board. If either of the parties had suggested specific changes of regular assignments to the other which were ignored or declined without reasonable justification, the Board would have had something upon which it could act. But the parties cannot, as here, create an impasse by their own non-action and obtain relief against the other. To do so would be to grant relief to one party because of a condition arising out

of his own dereliction of duty. In other words, under a situation such as we have here, a Carrier will not be directed to establish a regular relief position where changes in regular assignments must be agreed upon, unless specific suggestions have been made which are reasonable and necessary, and which have been arbitrarily refused by the Carrier. On the other hand the Carrier will not be permitted to escape its responsibilities with impunity where the situations are reversed. It is pointed out that two of the positions involved are seven day positions and as such the Carrier may assign any two consecutive rest days as the rest days of the occupants of the positions under Rule 17½(d). In this respect, the Carrier is obligated without conference or agreement with the Organization to fix such rest days in such a manner as to permit the establishment of a regular relief position if it is possible to do so. The record here before us does not show the hourly assignments of the occupants of the positions on which relief is required. We are unable to determine, therefore, if a regular relief position could be established to be worked in several of these named locations. If the daily hourly assignments are such that a regular relief position could be established by changing the rest days of either or both of the seven day positions or by otherwise complying with Rule 17½(e), the Carrier is obligated by that rule to do so. The claim that a regular relief position should be established to be worked at some of the points here named is denied without prejudice.

Claim is here made in behalf of the person used on the Saturday work at Somersworth on the theory that his assignment to work Saturdays was a regular assignment and therefore within the guarantee rule. The contention of the Organization in this docket has been that Tanguay was not an employee of the Carrier at all. If this be so, he has no rights under the Clerks' Agreement and is in no position to assert the rules thereof in his own behalf. But assuming that he was an employee with rights under the Clerks' Agreement, he has no basis for a claim. He is not the occupant of a regular assigned relief position. Such a position must be assigned five days each week, eight hours per day. The fact that he worked a Saturday rest day of a position regularly does not change its character as relief work, nor does it make it a regular relief position wrongfully assigned for less than five days. Award 5463. The guarantee rule provides:

"Employees who have regular positions and are a part of the regular force and who do not lay off of their own accord will not be paid less than five days per week, except as provided in Rules 21, 26 and 27." (Rule 11(e), current Agreement.)

The exceptions therein stated have no relation to this dispute. The guarantee rule applies only to regular assigned positions, including regular assigned relief positions. Decisions Nos. 1, 3 Forty-Hour Week Committee. The Saturday work here involved was not bulletined nor otherwise treated as a regular assigned position. The contention of the Organization that all employees assigned to relief positions who were assigned to relieve the same employees on the same days and hours each week, came under the five day guarantee rule is without merit. The difference between a relief assignment and a regular assignment, relief or otherwise, is grounded on more considerations that the Organization has advanced.

The Carrier asserts that monetary claims were not handled on the property as required by Rule 39(a), Current Agreement, which provides:

"Claims for compensation of any nature will not be valid unless presented in writing to immediate superior officer within sixty (60) days after the cause of claim."

We point out this dispute was jointly submitted by the parties. The monetary claims were plainly set forth therein. The Carrier without reservation joined with the Organization in submitting the issues. Under such a situation, neither party is in a position to assert irregularities of procedure.

They are waived when the parties agree upon the issues to be submitted by joining in the submission without reserving procedural irregularities in the agreed upon statement of facts for the consideration of this Board. Awards 3891, 3256.

Lastly, the claim of the occupant of the regular position at Somersworth will be sustained at the pro rata rate. It not appearing that an extra or unassigned employee who would otherwise not have forty hours of work that week was available to do the work, the regular employee should have been assigned. The penalty for work lost is the pro rata rate of the position under the current awards of this Board.

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 Employees involved in this dispute are respectively Carrier and Employees 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 Agreement was violated.

AWARD

Claim (1) sustained in part, denied in part. (2) Sustained in part, denied in part. (3) Sustained at pro rata rate. (4) Denied.

CASE NO. 2

OPINION OF BOARD: Baggage work was regularly assigned at North Berwick to Frank E. McCrillis. He was assigned Tuesday through Saturday with Sunday and Monday as rest days. The Monday relief work was performed by one Wayne M. Wormwood. The position was a six day position within the meaning of the 40 Hour Work Week Agreement for the reason that the nature of the work was such that employees were needed six days per week. Rule 17½ (c), Current Agreement. The regularly assigned employee, McCrillis, was correctly assigned Tuesday through Saturday, with Sunday and Monday as rest days in accordance with Rule 17½ (c). See Awards 5555, 5556, 5557. The Monday work was performed by Wormwood, who was not previously an employee of the Carrier although he was used to cover relief work at Dover and Plattsburgh regularly and other spare work as needed. The issues in this claim are therefore identical in principle with those set forth in Case 1 and they will be disposed of in conformity with the reasoning of that award.

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 Employees involved in this dispute are respectively Carrier and Employees 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 Agreement was violated.

AWARD

Claim (1) sustained in part, denied in part. (2) Sustained in part, denied in part. (3) Sustained at pro rata rate. (4) Denied.

CASE NO. 3

OPINION OF BOARD: Baggage work was regularly assigned at Plymouth to Andrew J. Conway. He was assigned Monday through Friday with Saturday and Sunday as rest days. The Saturday and Sunday relief work was performed by one Dennis Conway. The position was a seven day position within the meaning of the 40 Hour Work Week Agreement for the reason that the service required that the position be worked seven days per week. Rule 17½ (d), Current Agreement. The regularly assigned employee, Andrew J. Conway, was correctly assigned Monday through Friday with Saturday and Sunday as rest days in accordance with Rule 17½ (d). See Awards 5555, 5556, 5557. The Saturday and Sunday work was performed by Dennis Conway, who was previous an employee of the Carrier with a seniority date of August 9, 1949, as a baggageman. The relief work was therefore performed by an extra or unassigned baggageman within the meaning of Rule 17 (f). Consequently no basis for an affirmative award exists under the principles announced in Case 1.

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 Employees involved in this dispute are respectively Carrier and Employees 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 no violation of the Agreement has been shown.

AWARD

Claim denied in accordance with Opinion and Findings.

CASE NO. 4

OPINION OF BOARD: Baggage work was regularly assigned at Durham to John M. Duffy. He was assigned Tuesday through Saturday with Sunday and Monday as rest days. The Monday relief work was performed

by Malcolm H. Wormhood. The position was a six day position within the meaning of the 40 Hour Work Week Agreement for the reason that the nature of the work was such that employees were needed six days per week. Rule 17½ (c), Current Agreement. The regularly assigned employee, Duffy, was correctly assigned Tuesday through Saturday with Sunday and Monday as rest days in accordance with Rule 17½ (c). See Awards 5555, 5556, 5557. The Monday work was performed by Wormhood who was, prior to September 3, 1949, an employee of the Carrier with seniority as a baggageman as of August 6, 1949. The relief work was therefore performed by an extra or unassigned baggageman within the meaning of Rule 17 (f). Consequently no basis for an affirmative award exists under the principles announced in Case 1.

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 Employees involved in this dispute are respectively Carrier and Employees 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 no violation of the Agreement has been shown.

AWARD

Claim denied in accordance with Opinion and Findings.

CASE NO. 5

OPINION OF BOARD: Baggage work was regularly assigned at Dover to Donald S. Dyer. He was assigned Monday through Friday with Saturday and Sunday as rest days. The Saturday and Sunday relief work was performed by one Malcolm H. Wormhood. The position was a seven day position within the meaning of the 40 Hour Work Week Agreement for the reason that the service required that the position be worked seven days each week. Rule 17½ (d), Current Agreement. The regularly assigned employee, Dyer, was correctly assigned Monday through Friday with Saturday and Sunday as rest days in accordance with Rule 17½ (d). See Awards 5555, 5556, 5557. The Saturday and Sunday work was performed by Wormhood who was an employee of the Carrier with a seniority date as a baggageman as of August 6, 1949. The relief work was therefore performed by an extra or unassigned baggageman within the meaning of Rule 17 (f). Consequently no basis for an affirmative award exists under the reasoning contained in Case 1.

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 Employees involved in this dispute are respectively Carrier and Employees 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 no violation of the Agreement has been shown.

AWARD

Claim denied in accordance with Opinion and Findings.

CASE NO. 6

OPINION OF BOARD: Baggage work was regularly assigned at Rochester to Harry E. Otis. He was assigned Monday through Friday with Saturday and Sunday as rest days. The Saturday relief work was performed by one William B. Lymbourg. The position was a six day position within the meaning of the 40 Hour Work Week Agreement for the reason that the nature of the work was such that employees were needed six days per week. Rule 17½ (c), Current Agreement. The regularly assigned employee, Otis, was correctly assigned Monday through Friday with Saturday and Sunday as rest days in accordance with Rule 17½ (c). See Awards 5555, 5556, 5557. The Saturday work was performed by Lymbourg until May 13, 1950, at which time one R. P. Wilson assumed the performance of the work. Lymbourg held a part time position as a crossing tender before assuming the relief work here described, his seniority rights being in a different class than that of a baggageman. Wilson never previously worked for this Carrier. The issues in this claim are therefore identical in principle with those set forth in Case 1 and they will be disposed of in conformity with the reasoning of that award. See Awards 5117, 5195, 5240.

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 Employees involved in this dispute are respectively Carrier and Employees 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 Agreement was violated.

AWARD

Claim (1) sustained in part, denied in part. (2) Sustained in part, denied in part. (3) Sustain at pro rata rate. (4) Denied.

CASE NO. 7

OPINION OF BOARD: Baggage work was regularly assigned at Biddeford to Lawrence E. Elwell. He was assigned Sunday through Thursday with Friday and Saturday as rest days. The Saturday relief work was performed by one Albert P. Dubois. The position was a seven day position within the

meaning of the 40 Hour Work Week Agreement for the reason that the service required that the position be worked seven days each week. Rule 17½ (d), Current Agreement. The Friday relief work was covered by a regular relief assignment. The regularly assigned employee, Elwell, was correctly assigned Sunday through Thursday with Friday and Saturday as rest days in accordance with Rule 17½ (d). See Awards 5555, 5556, 5557. The Saturday work was performed by Dubois who held no seniority under the Clerks' Agreement, but held seniority in the Freight Handlers' Seniority District, a class separate and distinct from that of a baggageman. Many cases of this Division hold that relief employees must be obtained from the same class in the same seniority district. Awards 5117, 5195, 5240. The issues are therefore identical in principal with those set forth in Case 1 and they will be disposed of in conformity therewith.

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 Employees involved in this dispute are respectively Carrier and Employees 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 Agreement was violated.

AWARD

Claim (1) sustained in part, denied in part. (2) Sustained in part, denied in part. (3) Sustained at pro rata rate. (4) Denied.

CASE NO. 8

OPINION OF BOARD: Yard Clerk's work was regularly assigned at Woodsville, New Hampshire, to G. H. McGaw. He was assigned Tuesday through Saturday with Sunday and Monday as rest days. The Sunday and Monday relief work was performed by Yard Clerk Alfred F. Kendall, an employee holding seniority as a yard clerk with a seniority dating of March 26, 1945. The position was a seven day position within the meaning of the 40 Hour Work Week Agreement for the reason that the service required that the position be worked seven days each week. Rule 17½ (d), Current Agreement. The regularly assigned employee, McGaw, was correctly assigned Tuesday through Saturday with Sunday and Monday as rest days in accordance with Rule 17½ (d). See Awards 5555, 5556, 5557. The Sunday and Monday relief work was performed by Kendall, who held seniority as a yard clerk as of March 26, 1945, and was therefore an extra or unassigned yard clerk. As such he was properly assigned to perform this relief under the provisions of Rule 17 (f), hereinbefore quoted under Case 1. No basis for claim exists on that phase of the dispute. Otherwise the claim is controlled by principles announced in Case 1. A denial award is in order.

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 Employees involved in this dispute are respectively Carrier and Employees 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 no violation of the Agreement has been shown.

AWARD

Claim denied in accordance with Opinion and Findings.

CASE NO. 9

OPINION OF BOARD: Telephone Information Switchboard work was regularly assigned in the Travel Bureau, North Station, Boston, Massachusetts, to the occupants of four positions on five day assignments. The Carrier assigned the Sunday relief work of Clerk Robert W. Currie to a regular relief position and used Agnes A. Nestor to perform the work on Saturday. The Sunday and Monday relief work of the position occupied by Clerk Annie C. Leahy was also assigned to Agnes A. Nestor. The positions were seven day positions within the meaning of the 40 Hour Work Week Agreement for the reason that the service required that the positions be worked seven days each week. Rule 17½ (d), Current Agreement. No contention is made that the regular positions were not properly assigned in accordance with the provisions of Rule 17½ (d). The four positions required relief for eight tricks. Five of the eight tricks were assigned to a regular assigned relief clerk. The remaining three relief tricks were assigned to Agnes A. Nestor as heretofore shown. The three day assignment of Agnes A. Nestor is not a regularly assigned relief position within the meaning of the 40 Hour Work Week Agreement for the reasons stated in Case 1. The guarantee rule does not apply and Agnes A. Nestor has no valid claim. The only question is whether she was entitled to perform the work. The Organization alleges that Agnes A. Nestor was a junior spare employee. The Carrier alleges that she was a senior spare employee. Her seniority date is not shown. As this Carrier generally refers to spare employees as new or "off the street" employees, we are obliged to say, under the record here made, that the relief work was improperly assigned to Agnes A. Nestor and the regular occupant of the position should have been used on his rest day under the provisions of Rule 17 (f). The allegation of the Organization with reference to the lack of seniority on the part of Agnes A. Nestor remains undisputed. If Agnes A. Nestor had a seniority date prior to September 1, 1949, it would have been a simple matter for the Carrier to have so shown by its own records.

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 Employees involved in this dispute are respectively Carrier and Employees 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 Agreement was violated.

AWARD

Claim (1) sustained in part, denied in part. (2) Sustained in part, denied in part. (3) Sustained at pro rata rate. (4) Denied.

CASE NO. 10

OPINION OF BOARD: Yard Clerks' work was regularly assigned at Portsmouth to John E. Atwood. He was assigned Monday through Friday with Saturday and Sunday as rest days. The Saturday relief work was performed by one Charles E. Maguire, an employe holding seniority as a yard clerk as of July 4, 1949. The position was a six day position within the meaning of the 40 Hour Work Week Agreement for the reason that the nature of the work was such the employes were needed six days per week. Rule 17½ (c), Current Agreement. The regularly assigned employe, Atwood, was correctly assigned Monday through Friday with Saturday and Sunday as rest days in accordance with Rule 17½ (c). See Awards 5555, 5556, 5557. The Saturday relief work was performed by Maguire who held seniority as a yard clerk as of July 4, 1949, and was therefore an extra or unassigned yard clerk. As such he was properly assigned to perform this relief work under the provisions of Rule 17 (f), hereinbefore quoted under Case 1. No basis for a claim exists on that phase of the dispute. Otherwise the claim is controlled by principles announced in Case 1. A denial award is in order.

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 Employes involved in this dispute are respectively Carrier and Employes 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 no violation of the Agreement has been shown.

AWARD

Claim denied in accordance with Opinion and Findings.

CASE NO. 11

OPINION OF BOARD: Yard Clerks' work at Rochester and Dover was regularly assigned to three yard clerks as follows: to C. H. Smith at Rochester, Monday through Friday with Saturday and Sunday as rest days; to R. T. Chase at Dover, Tuesday through Saturday with Sunday and Monday as rest days; and to R. A. Martin at Dover, Monday through Friday with Saturday and Sunday as rest days. The three rest days of these three positions necessary to be worked were protected by W. A. Marshall, an employe holding seniority as a yard clerk as of September 6, 1945. The positions were six day positions within the meaning of the 40 Hour Work Week Agreement for the reason that the nature of the work was such that employes were needed six days each week. Rule 17½ (c), Current Agreement. The regularly assigned employes were correctly assigned in accordance with that rule. The three days of relief work on these three positions was performed by Marshall who was an extra or unassigned yard clerk within the meaning of Rule 17 (f). The result is therefore controlled by the reasoning contained in Case 10. A denial award is required.

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 Employees involved in this dispute are respectively Carrier and Employees 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 no violation of the Agreement has been shown.

AWARD

Claim denied in accordance with Opinion and Findings.

CASE NO. 12

OPINION OF BOARD: Carrier assigned the telephone operators on the CAP. 7-6000 Switchboard, General Office, Boston, Massachusetts, to the regular occupants of those positions on five day week assignments. A regular relief position was assigned, leaving one eight hour trick as unassigned work. These eight hours of relief work were assigned to Anna J. Davis as the third trick on Thursday of each week of the position regularly assigned to Catherine McCarthy. The correctness of the assignments of the regular occupants of these seven day positions under the 40 Hour Work Week Agreement is not questioned. Nor is the assignment of the regular relief position involved. The only question for determination is the correctness of the Carrier's action in using Anna J. Davis on the remaining eight hour trick. This work is clearly not a part of any assignment within the purview of Rule 17 (f), and can properly be performed by an extra or unassigned employee who would otherwise not have 40 hours of work in that week. The seniority date of Anna J. Davis is not shown by the record. The Carrier could have shown by its own records, if it were a fact, that Anna J. Davis held seniority prior to September 1, 1949, the effective date of Rule 17 (f) of the 40 Hour Work Week Agreement. The allegation with reference thereto made by the Organization remains undisputed. Under the record made, Anna J. Davis was improperly used.

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 Employees involved in this dispute are respectively Carrier and Employees 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 Agreement was violated.

AWARD

Claim (1) sustained in part, denied in part. (2) Sustained in part, denied in part. (3) Sustained at pro rata rate. (4) Denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: A. I. Tummon
Acting Secretary

Dated at Chicago, Illinois this 12th day of November, 1951.

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**INTERPRETATION NO. 1 TO AWARD NO. 5558
DOCKET CL-5578**

NAME OF ORGANIZATION:

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

NAME OF CARRIER:

BOSTON AND MAINE RAILROAD

Upon application of the representatives of the employees involved in the above award, that this Division interpret the same in the light of the dispute between the parties as to its meaning and application, as provided for in Section 3, First (m), of the Railway Labor Act, approved June 21, 1934, the following interpretation is made:

Cases 1, 2, 6, and 7 involve the assignment of persons to perform tag end relief work who had no seniority under the controlling agreement at the time they were assigned. The Carrier paid the regular incumbents one day's pay at the straight time rate for the first day each of such persons worked, but has declined to make further payments on the theory that each had attained seniority under Rule 5 (a). This rule in effect provides that seniority begins at the time the employee's pay starts. In other words, it is the position of the Carrier that even if it improperly used a person holding no seniority on a rest day of one week, nevertheless such person thereby acquired such seniority as to make him an available extra or unassigned employee within the meaning of Rule 17 (f). Neither the award nor the rule is susceptible to such meaning. There must be an accrued seniority in the employee assigned under Rule 17 (f) prior to the time the need for the assignment arose. The Carrier cannot avoid a continuing violation by the claim that the person used acquired seniority while being improperly used in direct violation of Rule 17 (f). Ordinarily one will not be permitted to assert a right arising under a wrong he has himself committed. The condition precedent that he must be an available extra or unassigned employee is not met by the simple expedient of using such person improperly on two rest days instead of one. To do so is a continuing violation of Rule 17 (f) until such time as an employee is assigned who has acquired seniority before his assignment to such position. We therefore interpret the award as it affects Cases 1, 2, 6 and 7, as meaning that a continuing violation existed until an extra or unassigned employee was assigned who, at any time prior to such assignment, had acquired seniority under the controlling agreement. Unless and until such an assignment is made, the regular employee whose rest day is involved is entitled to perform the work.

This does not mean that a carrier may not augment its forces in the same manner as before the advent of the 40 hour work week. While the 40 hour work week agreement changed the concept of what constitutes a posi-

tion, it did not change the seniority rules or employment practices in securing new employes. But work to be performed on a day that is not a part of any assignment, such as the tag end relief work here involved, must be performed by employes designated in Rule 17 (f) for the reasons stated in the award. The date, September 1, 1949, as used in the award is significant only in that it was the day the assignments in question were made. The fact that it was also the effective date of the 40 hour work week agreement is merely a coincidence.

In Cases 9 and 12, it appears that Carrier has refused to make any payments under the award for another reason. It now appears that the positions there involved were filled by available extra or unassigned employes. But the record on which the award was rendered did not disclose that they had acquired seniority prior to their assignment to the work. We must again point out that an award is necessarily based upon the record before the Board and a request for an interpretation cannot be used to supply new facts or to secure a reconsideration of the old. The sole purpose of an application for an interpretation is to secure an explanation or clarification of an award that has already been made,—not to make a new one. Unless this be so, finality of awards would never be attained and the settlement of disputes would never be concluded. The award as it applies to Cases 9 and 12 should be complied with in the same manner as in Cases 1, 2, 6 and 7.

The Carrier contends that some or all of the claims before us in this award were made more than 60 days after the claims arose, contrary to Rule 41, Current Agreement, which provides:

“Claims for compensation of any nature will not be valid unless presented in writing to the immediate superior officer within sixty (60) days after cause of claim.”

The holding of the award is that Carrier waived the time limits of this rule by entering into a joint submission of the dispute without reserving the question of the timeliness of making the original claim. The award is clear and unambiguous on this point and it is not subject to construction. But even so, the words “will not be valid” after 60 days indicate nothing more than a cut-off period. It is the time limit that makes them invalid, not the nature of the claim. This constitutes it a cut-off rule which the Carrier may waive. There is no merit to Carrier’s contention on this point.

A point is raised in Case 7 that is worthy of comment here. It appears that the employe improperly used was a spare freight handler called for the tag end relief work as a baggageman. His name was placed on the baggagemen’s roster. Twelve months later an agreement was made by which his name was removed from the freight handlers’ roster and left in the baggagemen’s roster as of the first day he worked as a baggageman at Biddleford, Maine. Even though this is new evidence which may not be considered in interpreting an existing award, we point out that he had no seniority as a baggageman when he was first assigned as a baggageman to the tag end relief work in question and consequently was improperly assigned under Rule 17 (f) irrespective of the agreement subsequently made.

Referee Edward F. Carter, who sat with the Division as a member when Award 5558 was adopted, also participated with the Division in making this interpretation.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: (Sgd.) A. Ivan Tummon
Secretary

Dated at Chicago, Illinois, this 21st day of July, 1953.

DISSENT TO SERIAL NO. 133—INTERPRETATION NO. 1 TO
AWARD NO. 5558 DOCKET CL-5578

The majority here admit that after the 40 Hour Work Week was effective that (1) Carrier could augment its forces in the same manner "as before the advent of the 40 Hour Work Week" and (2) "it did not change the seniority rules or employment practices in securing new employees."

Then, totally disregarding these statements of principle, a conclusion to sustain claims is reached and it is stated:

"* * * But work to be performed on a day that is not part of any assignment, such as the tag end relief work here involved, must be performed by employees designated in Rule 17 (f) for the reasons stated in the award. * * *"

Rule 17 (f) flowed from the 40 Hour Work Week Agreement and provides:

"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 extra or unassigned employee who will otherwise not have forty hours of work that week; in all other cases by the regular employee." (emphasis added)

This Rule 17 (f) simply provides that when work is to be performed on a day which is not part of any assignment "it may be performed by an available extra or unassigned employee * * * ." The use of the words "extra or unassigned" while undefined simply followed the general pattern so well known and so often used in the railroad industry. Rule 17 (f) does not provide the conditions under which a carrier may augment its working forces, nor does it provide how new employees hired will gain seniority rights because these matters are controlled by other rules which with the advent of the 40 Hour Work Week, as the majority here admit, remained unchanged.

Unquestionably the record in this matter proves beyond any possible doubt that the employees who were used to perform the work involved in cases 1, 2, 6 and 7 were actually bona fide employees of the Carrier hired as new employees in line with the existing employment practice. All were subject to the Agreement here and, except for one who resigned from service, are still employed by this Carrier.

In cases 9 and 12 it is freely admitted by the Petitioner that employees used were already "spare employees" of this Carrier. These spare employees are likewise still employed.

The award by the majority simply expands and/or revises the Rule 17 (f) negotiated by the parties by reading into it words that are not there so as to give to the Rule an entirely different meaning. To do so is not the function of this Board because that is a matter for negotiation under the Railway Labor Act, amended.

For these reasons we dissent.

/s/ R. M. Butler

/s/ W. H. Castle

/s/ E. T. Horsley

/s/ C. P. Dugan

/s/ J. E. Kemp