Award No. 6303

Docket No. CL-6262

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Curtis G. Shake, Referee

PARTIES TO DISPUTE:

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

GULF, COLORADO AND SANTA FE RAILWAY COMPANY

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood that:

(a) Carrier violated the Clerks' Agreement when on September 1, 1949, it failed to include the Sunday assignment on Position No. 158, Temple Passenger Station, in a relief position and, instead, required the regular occupant of Position No. 158 to work four (4) hours on each Sunday, one of his assigned rest days, to sell tickets and work passenger trains; and,

(b) The Sunday assignment of Baggageman-Ticket Clerk Position No. 158, Temple, Texas, shall be eight (8) hours instead of four (4) hours; and,

(c) C. W. Hamilton and/or other employes occupying Position No. 158, Temple, Texas, and required to work the short assignment on Sunday shall be paid eight (8) hours at the time and one-half rate of the position, less what they were paid for the Sunday assignment on Position No. 158, for each Sunday from September 1, 1949, until violation is corrected.

EMPLOYES' STATEMENT OF FACTS: Prior to September 1, 1949, Baggageman-Ticket Clerk Position No. 158, Temple, Texas, which position is assigned to sell tickets and work passenger trains, was classified as a position necessary to the continuous operation of the Carrier and assigned 11:00 A. M. to 8:00 P. M., with one (1) hour meal period, seven (7) days per week, the regular occupant thereof being assigned one regular day off duty in seven.

Effective with the inauguration of the 40-Hour Week on September 1, 1949, Carrier assigned the regular occupant of this seven (7) day position at Temple, Texas, to eight (8) hours per day, five (5) days per week, Monday through Friday, relieving him on his Saturday rest day each week by the use of a regular assigned relief employe, but requiring him to regularly report for duty and work (4) hours, 12:00 noon to 4:00 P. M. on each and every one of his Sunday rest days. It will thus be seen that this employe has a **regular assignment of forty-four (44) hours per week.**

All that is contained herein is either known or available to the Employes and their representatives.

(Exhibits not reproduced.)

OPINION OF BOARD: Immediately prior to the inauguration of the 40-Hour Week on September 1, 1949, Baggage-Ticket Position No. 158 at Temple, Texas, was a 7-day operation, hours 11:00 A. M. to 8:00 P. M., with one hour for meal period, there being no regularly assigned rest day relief on the position. The incumbent worked on Sundays for which he received eight hours' pay at time and one-half.

On September 1, the assignment was reduced to five days, Monday through Friday. Work on Saturdays was covered by a regularly assigned relief employe. On Sundays the Carrier called the regular occupant for four hours, noon to 4:00 P. M., and later 2:00 to 6:00 P. M., for which hours of employment he was compensated at time and one-half. This continued until September 30, 1951, when the Saturday and Sunday work was included in a regular relief assignment. The claim is that the employes performing work on Sundays from September 1, 1949, to September 30, 1951, under the above circumstances, be paid for eight hours at time and one-half instead of four.

The Rules involved are Article VII, Sections 1 (f) and 2; the Supplemental Agreement, signed at Chicago on May 7, 1949, effective September 1, 1949; Decision No. 5 of the 40-Hour Week Committee, and Article VI of the effective Agreement. The Organization contends that the above rules, properly interpreted and applied, required the Carrier to fill the Sunday work of the position by the assignment of regular 8-hour relief, or by the employment of the regular incumbent on a full time basis at the overtime rates, and that the effect of the Carrier's practice, here complained of, was to require the Claimant to work a 44-hour week in violation of the 40-Hour Week Agreement and to deprive him of full eight hours' pay at the punitive rate for the work performed on his rest day, to which he was entitled under Article VI. The Carrier says that the Decision of the 40-Hour Week Committee is not applicable here because the parties to this controversy were not parties to the proceeding from which said Decision resulted; that the adoption of the 40-Hour Week Agreement has had the effect of nullifying the previously existing obligation of the Carrier to compensate employes necessary to continuous operations for a full eight hours at time and one-half rate when they were used on their seventh day; and that a proper construction of Sections 1 (f) and 2 of Article VII places no restrictions on the Carrier's right to assign and compensate the Claimant precisely as was done in this case.

By Decision No. 5 of the 40-Hour Week Committee it was declared that—

> "Such rights as existed before September 1, 1949 (the effective date of the 40-hour week) to make regularly recurring calls or part-time assignments on assigned days of rest with respect to any craft or class on any Carrier have not been restricted, enlarged or changed except that such rights are now applicable to two rest days where formerly they applied to only one."

Conceding that the parties to this dispute were not parties to the controversy that resulted in Decision No. 5, it is, nevertheless, highly persuasive with respect to the proper application of Article VII, Sections 1 (f) and 2. Even more cogent is the philosophy that prompted the adoption of the 40-Hour Week. It seems inconceivable to us that an innovation admittedly calculated to shorten the work week, provide longer rest periods and spread opportunities for employment should have the practical effect of defeating those objectives.

The Organization leans heavily on Award 5797, which we have carefully read along with the Dissent of the Carrier Members and the Opinion of the

Referee on Consideration of the Petition for a Rehearing. Award 5797 involved a situation comparable to that with which we are presently concerned, except as to certain details which do not appear to be highly important. No award is stronger than the logic that supports it and the author of this Opinion acknowledges no servile reverence for precedents as such. On the other hand, when a case has been thoroughly considered, as Award 5797 apparently was, it should not be ignored or overruled unless it clearly and positively appears that the wrong result was reached. The vitality and usefulness of this agency largely depends upon its consistent record for putting an orderly end to controversies. In the light of what has already been said in the course of this Opinion with respect to what we believe to have been the objectives sought to be attained by the inauguration of the 40-Hour Week and the consequences that would flow from a denial of this Claim, we have concluded to follow Award 5797. We find no compelling reason for doing otherwise.

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 the Carrier violated the Agreement.

AWARD

Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: (Sgd.) A. Ivan Tummon
Secretary

Dated at Chicago, Illinois, this 6th day of August, 1953.

DISSENT TO AWARD NO. 6303, DOCKET NO. CL-6262

The sole issue in this docket is whether the Carrier has the right to require regular part-time work on rest days; in other words, the right to make recurring calls. The claimant was given a regular call on Sunday—one of his rest days—for which he was paid 4 hours at the overtime rate under the call rule. He claims a minimum of 8 hours at the overtime rate. Notwithstanding that this precise question has been answered favorably to the position of the Carrier on two previous occasions by authoritative decisions which are not subject to review by this Board, the referee in this docket has undertaken to rule otherwise.

The identical question involved in this docket was first presented to, and decided by, the Emergency Board which recommended the adoption of the 40-hour week on American railroads and whose report and findings formed the basis of the contract here in dispute. As fully explained in this record, the original request of the Non-Operating organizations which gave rise to that report was for a straight Monday to Friday work week, with assigned rest days of Saturday and Sunday, and **for a minimum guarantee of 8 hours**

at punitive rates for any work performed on Saturdays and Sundays. These proposals were specifically rejected by the Emergency Board, which recommended:

> "That the Organizations' requests for punitive pay on Saturdays and Sundays as such and **for a minimum guaranty of 8 hours for service on Saturdays, Sundays, and holidays be denied.**" (Emphasis added.)

In explaining its recommendation, the Board said:

> "A staggered workweek of 5 days with 2 days rest in 7 automatically eliminates premium pay for Saturdays and Sundays as such, and our recommendations **reject the proposed minimum guarantee of 8 hours** as well as the raising of penalty pay for Sundays and holidays from time and a half to double time.
>
> "Eliminating the minimum guarantee also automatically keeps the existing call and stand-by rules in effect. Similarly, in rejecting the penalty pay requests specifically for Saturdays and Sundays and any payments at double time, as well as the minimum guarantee, **the intention was plain that * * * existing call and stand-by rules should remain as they are * * *.**" (Emphasis added.)

Thus the Board which made the original recommendations, out of which the present contract grew, made a definitive and categorical ruling on the very question involved in this docket, namely, that of whether the employes should be entitled to a minimum payment of 8 hours for any work performed on a rest day. Its answer was in the negative.

The second time this question was answered was when it was submitted to arbitration pursuant to the March 19th National Agreement. There the various organizations (including the Clerks) made exactly the same argument as the Clerks make in the present case, namely, that the carriers might use the call rule for casual or irregular work but that they could not use it regularly or repeatedly, as was done in this case. The decision there was that the parties had the same rights with respect to these call rules as they had prior to the adoption of the 40-hour week in September, 1949. The language of the decision was as follows:

> "Such rights as existed before September 1, 1949 to make regularly recurring calls or part-time assignments on assigned days of rest with respect to any craft or class on any carrier have not been restricted, enlarged or changed, except that such rights are now applicable to two rest days where formerly they applied to only one." (Decision 5 of the 40-Hour Week Committee.)

It is clear from these decisions that the rights of these parties with respect to part-time service on rest days were not disturbed by the adoption of the 40-Hour Week amendments. On the contrary, the parties were deliberately left with exactly the same rights in this regard as they formerly had, with only the necessary exception that two rest days are now involved where only one existed before.

All of this was thoroughly and carefully explained to the referee and he has in fact conceded that the ruling of the 40-Hour Week Committee is "highly persuasive with respect to the proper application of Article VII, Sections 1(f) and 2" (the rest day and call rules). But instead of being guided by these controlling determinations of the question, the referee indulged in a false and improper speculation with respect to the effect of his decision on what he calls "the philosophy" of the 40-Hour Week and reached an opposite and entirely unsound conclusion. He says: "It seems inconceivable to us that an innovation admittedly calculated to shorten the work week,

provide longer rest periods and spread opportunities for employment should have the practical effect of defeating those objectives."

It is apparent from this statement that the referee has completely misunderstood not only the issue in the case but also the facts. The facts as they apply to the referee's theory of the case are that the claimant employe is asking to be worked (and be paid for) 48 hours per week. The Carrier seeks to work him only 44 hours per week (4 hours on overtime). The objectives of a shorter work week to which the referee refers would in fact be better served—not "defeated"—by sustaining the position of the Carrier and denying the claim. But this is not the real issue in the case, and neither party argued, or even suggested, that it was.

The real and only issue, on the pleadings and under the evidence, is that respecting the question of past practice in making recurring calls to members of this craft on this railroad. What were their prior rights? What did the facts of record show? Apparently the referee made no effort to find the facts; at least no reference is made thereto in his opinion. In any event, there is a complete failure to make such a finding as would support a proper conclusion in this dispute.

The undisputed facts of record are that this Carrier had the right to make recurring calls to members of the Clerks' craft, and that it exercised it generally and repeatedly prior to September, 1949. A proper opinion in this case would have found these facts and a responsive decision would conclude that a denial award was compelled in order to give effect to the expressed and determined intention of the parties.

Instead of doing that, however, the referee has chosen to be guided by an unfortunate and erroneous conclusion reached by this Division in Award 5797. In that award Referee Yeager, like the referee in the present docket, refused to be governed by the rulings of the Emergency Board and the 40-Hour Week Committee and rendered an entirely unsupportable award which, for reasons pointed out in the dissent of the Carrier Members thereto and in the record in the present case, is not worthy of faith and credit and does not constitute proper precedent.

The opinion and findings in the present docket disclose such fatal omission and palpable error as to impeach the award.

For reasons set forth above, we most vigorously dissent to this award.

/s/ C. P. Dugan

/s/ R. M. Butler

/s/ W. H. Castle

/s/ E. T. Horsley

/s/ J. E. Kemp