Award No. 7319
Docket No. CL-7508

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

ERIE RAILROAD COMPANY

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood that the Carrier violated the rules of the Clerks' Agreement at East Buffalo, New York when it failed to compensate K. W. Hicks, Typist working 12:00 noon to 8:30 P. M., at the rate of time and one-half for services rendered on February 16 and 17, 1954, his sixth and seventh days, and

That Carrier shall now compensate K. W. Hicks the difference between the pro rata rate he was paid and the rate of time and one-half he should have been paid for services rendered on dates of claim. (Claim 1046)

EMPLOYES' STATEMENT OF FACTS: Claimant Hicks bid in and was assigned to position of typist at East Buffalo, New York, working 12:00 noon to 8:30 P. M. with a work week Thursday through Monday, with rest days Tuesday and Wednesday. On February 10, 1954, Carrier notified K. W. Hicks that effective February 15, 1954, the days of rest on his position would be changed from Tuesday and Wednesday to Thursday and Friday.

The change in rest days resulted in claimant's working over and above forty hours in the work week commencing Thursday, February 11, 1954 for which he was paid the straight-time rate of his position, for work performed on his sixth and seventh day. He worked seven consecutive days starting with Thursday — February 11th, 12th, 13th, 14th, 15th, 16th and 17th, 1954.

This claim was handled on the property in regular order of succession up to and including the highest officer designated for handling employe matters. This claim was filed with Mr. G. C. White, Assistant Vice President, on May 21, 1954, Employes' Exhibit "A". Conference was held, and under date of December 6, 1954, Employes' Exhibit "B", Carrier denied our claim.

POSITION OF EMPLOYES: This claim primarily involves the application of Rule 20-3 (Overtime) of current agreement, among other rules, revised July 1, 1945, amended July 20, 1949 and subsequent amendments, printed copies of which are on file with your Honorable Board, and said rule as well as those not specifically cited herein, contained in the agreement, are to be considered as if filed as a part of this submission.

The Carrier has shown that Rule 17 authorizes a change in rest days and it is crystal clear that when rest days are changed the work days of the assignment must change simultaneous. It is simply impossible to change rest days without changing the work days or work week of an assignment. Any argument to the contrary seems futile.

The Carrier submits that the Claimant was properly compensated for service performed on February 16 and 17, 1954, at the straight time rate of pay in accordance with the pay rules of the applicable Agreement. Further, the claim is neither supported by any agreement rule nor decision of this Board. Therefore, the claim is without merit and must be denied.

All information herein has been discussed with or is known to the Organization.

(Exhibits not reproduced).

OPINION OF BOARD: Claimant K. W. Hicks was regularly assigned as Typist in the Freight Station Office at East Buffalo, New York. He was assigned to work Thursday through Monday, with Tuesday and Wednesday as rest days. Effective February 15, 1954, his rest days were changed to Thursday and Friday. This had the effect of changing his work week to Saturday through Wednesday, with Thursday and Friday as rest days. Claimant worked Thursday, February 11th, Friday, the 12th, Saturday, the 13th, Sunday, the 14th, and Monday, the 15th. The 15th was the effective date changing his rest days to Thursday and Friday. Claimant worked Tuesday, the 16th, and Wednesday, the 17th. Thursday and Friday, the 18th and 19th, he did not work. He then worked Saturday through Wednesday and observed his assigned rest days of Thursday and Friday. Thereafter he continued to work in accordance with the new work week. It is here claimed that when claimant was required to work on Tuesday and Wednesday, the 16th and 17th, he was working the sixth and seventh days of his work week and that he should have been paid the rest day rate. The claim is for the difference between the pro rata rate which he was paid and the time and one-half rate for those two days.

The rules provide that regularly assigned rest days shall not be changed except upon 36 hours advance written notice to the employe affected. Rule 20-3(e) 3, Current Agreement. It is not questioned that this rule was complied with in the present case. The rules further provide that where the rest days of an assignment are changed, the employe affected may exercise his seniority rights to any position for which he is qualified that is held by a junior employe. Rule 17, Current Agreement. In the present case, claimant did not elect to exercise his seniority and remained on the position. The rules also provide that the term "work week" for regularly assigned employes shall mean a week beginning on the first day on which the assignment is bulletined to work. Rule 20-2(i), current Agreement. The rules further provide the work in excess of 40 straight time hours in any work week and employes worked on more than five days in a work week shall be paid at the one and one-half rate. There is an exception to the rule for work on the 6th and 7th days of the work week, the same being that time and one-half will not be paid for such work where it is due to moving from one assignment to another or to or from an extra or furloughed list. Rules 20-3(b) and 20-3(c), current Agreement. The rules further provide that nothing within the Agreement shall be construed to permit the reduction of days for regularly assigned employes below five per week, with exceptions not pertinent here. Rule 28, current Agreement.

It is the contention of the Organization that the days in question were rest days, and since there are no exceptions applying to situations where the Carrier, for its own convenience, changes the rest days, the rest day rate should have been paid. The Carrier contends that claimant worked five days in the old work week and the work performed on the two following days, February 16th and 17th, were in the new work week and, consequently,

claimant did not work more than five days in any work week in violation of the Agreement. The Organization cites Awards 5113, 5586, 5805, 5807, 5997. The Carrier relies on Awards 5854, 6281, 6282, Third Division, and Award 1804, Second Division.

The parties appear to be in agreement that a change in rest days necessarily changes the work week. It appears that they also agree that the beginning of the old work week was Thursday and that the beginning of the new work week was Saturday. This is where the points of Agreement appear to end. It seems to be the position of the Organization (1) that having worked five days, two rest days necessarily follow irrespective of the change in the assignment, and (2) that a new work week cannot begin until the first assigned work day thereof.

A change in rest days does not have the effect of terminating the old assignment and creating a new one where the occupant does not exercise his seniority. If such were the case the change of rest days would require that the new position be bulletined. This means, also, that the position remains the same irrespective of the change in rest days and consequently there is no moving from one assignment to another. Awards 5586, 5807. The fact that the occupant of the position may exercise his seniority rights after a change in rest days does not appear to affect the situation when the right has not been exercised. We must necessarily come to the conclusion that the Carrier has the right, after notice, the change the rest days of a position and thereby change the work week of the position, but it remains the same assigned position throughout. From this it is argued by the Organization that the guarantee rule applies which in substance states that nothing within this agreement shall be construed to permit the reduction of days for regularly assigned employes below five per week, to which there are exceptions not material here. Consequently, we find that the same assignment exists throughout with rest days properly changed and a guarantee that nothing in the Agreement, which necessarily includes a change in rest days, shall be construed to permit the reduction of days below five a week. It is plain also that if the work week is changed in such a way that there is no violation of the guarantee rule, then the rest day rule may become applicable.

It would appear, therefore, that claimant's work week commenced on Thursday before the rest days were changed and on Saturday threafter. Claimant worked five days commencing on Thursday, February 11th and ending February 15th, the latter date being the day the change in rest days became effective. Thereafter, no change in rest days could be made except by a further compliance with the rule authorizing such change.

It seems to us that our previous awards do not adequately decide the issue here raised. The effect of the overtime and guarantee rules as they bear upon the situation do not appear to have been adequately considered. We think it is necessary to give effect to all the rules bearing on the problem and to state the controlling principle with that objective in mind. We shall attempt to do so.

The effective date for the change in rest days was February 15, 1954. On that day, the change was made in accordance with Rule 20-3(e) 3. No further change in rest days could be made except in the manner provided by Rule 20-3(e) 3. But the change in work weeks could not take place until the new work week began, which was on Saturday, February 20, 1954. It seems logical to say that as the new work week began on February 20, 1954, the old work week assignment necessarily continues up to that date. If this were not so, we would have one of two contingencies, — an overlapping of work weeks or a void between the close of one work week and the beginning of the new work week resulting from the change in rest days. We are convinced that every day in a regular assignment is in a work week and consequently there can be no void between work weeks. We are also convinced that we should not inject any idea of overlapping work weeks into

the rest day rules and thereby further confuse that which is already fraught with uncertainly as to meaning. We conclude, therefore, that upon a change of rest days in accordance with agreement rules, when the occupant elects not to exercise seniority and to remain on the position, it is the first day of the new work week that controls the applicable rules.

In the present case, therefore, this old work week continued in existence until February 19, 1954, and the new work week began on February 20, 1954. Commencing with Thursday, February 11th, claimant properly worked the 11th, 12th, 13th, 14th and 15th. Tuesday and Wednesday, the 16th and 17th, were rest days. Thursday and Friday, the 18th and 19th were work days. The new work week began on Saturday, February 20th, and the transition in work weeks had then been completed. Claimant worked on Tuesday and Wednesday, February 16th and 17th, which were rest days. He should be paid the time and one-half rate for such rest days.

The Carrier contends that the rules do not contemplate any penalty pay when the rest days are changed in accordance with the Rules. The rules do not say that such changes can be made without penalty and it would have been easy to have said so if such a result was intended. It is clear, also, that the right to change rest days does not have the effect of limiting other rules of the agreement, including the overtime and guarantee rules, which could easily have been excepted as to Rule 20-3(e) 3, if such had been the intention of the parties.

By this Award we hold that claimant worked on two rest days for which the time and one-half rate should be paid. We are asked to go further and determine whether or not changes in rest days can be made by the Carrier under Rule 20-3(e) 3, current Agreement, without incurring penalty pay by virtue of the guarantee or overtime rules. This question seems to have been touched upon in Award 6519, although it does not appear to have been directly in issue. The matter is of such importance that we decline to decide it until it is directly raised and the parties have full opportunity to state their positions with respect to it.

We necessarily conclude that claimant was entitled to be paid at the time and one-half rate for working February 16th and 17th, his rest days.

FINDINGS: The Third Division of the Adjustment Board, upon the whole record and all the evidence, finds and holds:

That the parties waived hearing on this dispute; and

That the Carrier and the Employe involved in this dispute are respectively carrier and employe 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 sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: A. Ivan Tummon
Executive Secretary

Dated at Chicago, Illinois, this 4th day of May, 1956.

DISSENT TO AWARD NO. 7319, DOCKET NO. CL-7508

The majority holds that "A change in rest days does not have the effect of terminating the old assignment and creating a new one where the occupant does not exercise his seniority." Consequently, the conclusion is reached that an assignment with work days from Thursday through Monday, and rest days of Tuesday and Wednesday, remains exactly the same assignment after it has been changed to one with work days from Saturday through Wednesday, with Thursday and Friday as rest days. This startling conclusion is assumed by the majority in order to avoid the application of a clear provision of the 40-Hour Week Agreement which compels a denial Award in this case. That provision states that the requirements of the Agreement for the payment of time and one-half when an employe works beyond 5 days or 40 hours in a work week do not apply if such work is performed by reason of moving from one assignment to another.

The parties to the Agreement obviously knew that in changing from one assignment to another, an employe might work more than 5 days in a work week because of the different work and rest days of the two assignments. It was clearly intended that the Carrier was not to be penalized in such a case. That is exactly what the Agreement says in unequivocal terms.

The majority, unable to completely ignore that clear provision of the Agreement, ignores its intended application by arbitrarily finding that two assignments with entirely different work days and different rest days are, nevertheless, the same assignment.

In this case, the Claimant was assigned to work as a typist from Thursday through Monday, with rest days of Tuesday and Wednesday. The Carrier, as it admittedly had a right to do, changed the work days to Saturday through Wednesday, and his rest days to Thursday and Friday. The majority admits that the work days, the rest days and the entire "work week" were changed, but it concludes that an employe who works from Thursday through Monday, and has Tuesday and Wednesday off, has exactly the same "assignment" as one who works from Saturday through Wednesday, and has Thursday and Friday off. Presumably, the majority would hold that an employe who works Wednesday through Sunday has the same assignment as one who works Monday through Friday, and has his week-end off. If such is the case, why does the Agreement make any distinction at all between 5-, 6- and 7-day positions? Obviously, the Claimant in this case occupied a different assignment after the change than he did before.

The majority says the assignments were the same because if this were not true, the change in rest days would require that the new one be bulletined. This does not follow. The Agreement does not provide that all new assignments be bulletined. It sets forth the changes which require re-bulletining. It does not follow that because a particular change does not require bulletining, that there has been no change. The Claimant in this case could have exercised his seniority to another job and displaced a junior employe because of this change in his prior assignment. If there had been no change in his assignment, why would the parties have permitted him to displace another employe? The fact that he chose not to displace another employe but, instead, exercised his choice to take the new assignment, does not support the conclusion that there has been no change in assignments.

The situation involved in this docket is one of the exact situations that the rule referred to above was designed to cover, and the failure of the majority to apply it constitutes error.

The majority opinion expresses concern over the possibility that, if the case were differently decided, confusion would result over two contingencies. When rest days are changed, it says, there would be either an "overlapping" of work weeks or "a void between the close of one work week and the beginning of the new work week * * *." Then the majority proceeds to decide

that the old work week in this case began on Thursday, February 11, and extended through Wednesday, February 17, and that the new work week began on Saturday, February 20th. This leaves the 18th and 19th in "limbo." Has this avoided the overlapping of work weeks or a void between work weeks, which the majority feared and thought it had solved? This decision certainly cannot be justified on the basis that it avoids "confusion."

The simple answer to the whole problem which so perplexes the majority is that the Claimant changed from one assignment to another when his work days, rest days and work week were changed and, in so doing, the Agreement (Rule 20-3) clearly provides that he is not entitled to time and one-half for any work in excess of 5 days or 40 hours. This rule compels a denial of the claim in this case. For the reasons set forth above, we dissent.

/s/ **C. P. Dugan**
/s/ **R. M. Butler**
/s/ **W. H. Castle**
/s/ **J. E. Kemp**
/s/ **J. F. Mullen**