Award No. 7370

Docket No. CL-7512

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

NORTHERN PACIFIC RAILWAY COMPANY

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

(1) That the Carrier violated the terms of the Clerks' Agreement when on or about July 18, 1951, it assigned two positions at the Butte, Montana, Freight House in a seven-day service.

(2) That Mr. Steve Sepcevich, Checker, and/or his successors, if there be any, be compensated at time and one-half times the rate of $14.036 per day for overtime worked on Saturdays and Sundays from July 18, 1951 to February 1, 1954, when the arrangement causing this grievance was discontinued.

(3) That Mr. Steve Sepcevich, Checker, and/or his successors, if there be any, be paid a minimum day at daily straight time rate of $14.036 for each Tuesday and Wednesday, effective as of July 18, 1951, on account of being assigned in such a manner as to require him to suspend work on such days to absorb overtime on Saturdays and Sundays, this payment to continue up to and including February 1, 1954 when the arrangement causing the grievance was discontinued.

(4) That Mr. Claude Leverton, Relief Foreman and Checker, and/or his successors, if there be any, be compensated at time and one-half times the rate of $14.036 per day for each Saturday when worked as a Checker and time and one-half times the $14.804 per day for each Sunday when worked as a Foreman, such payment to cover the period from July 18, 1951 to February 1, 1954 when the arrangement causing this grievance was discontinued.

(5) That Mr. Claude Leverton, Relief Foreman and Checker, and/or his successors, if there be any, be paid a minimum day at daily straight time rate of $14.036 for each Thursday and Friday, effective as of July 18, 1951, on account of being assigned in such a manner as to require him to suspend work on such days to absorb overtime on Saturdays and Sundays, this payment to continue up to and including February 1, 1954 when the arrangement causing this grievance was discontinued.

he was required to perform on rest days. Inasmuch as the assignment should have been on a 6-day basis rather than on a 7-day basis, the claim properly should be for one day held out of service at a pro rata basis and for the overtime rate on rest day. This Board has frequently ruled that penalties cannot be pyramided. We have also ruled that in the absence of exceptional circumstances requiring a contrary conclusion, where two or more violations carrying different penalties are established, the higher of the several penalties involved is the one to be imposed. See Award 5423. Accordingly, in the case the appropriate penalty is one day's pay on a pro rata basis for each week during the period in question."

In spite of the evidence in this docket, should this Division find that Sunday service is not essential to the successful operation of the Butte warehouse, any claim retroactive beyond ten days prior to June 30, 1952 cannot be considered in the application of Rule 55 of the current Clerks' Agreement.

As shown by Carrier's Exhibit "A", Superintendent C. W. Coil declined the claim presented in behalf of Relief Foreman-Checker Leverton and Checker Sepcevich to Division Chairman Tony Cocchiarella on November 12, 1951. On July 23, 1952, or some eight months later, an appeal was made to Assistant General Manager C. Corser. Rule 55, which applies to disputes growing out of the interpretation and application of the Clerks' Agreement (Award No. 595 of this Division), provides that appeals must be made within thirty days from the date of the decision appealed from. Therefore, any claim beyond ten days prior to July 23, 1952 is barred from consideration.

The Carrier has shown that work handled in Butte warehouse is necessary on Saturdays and Sundays and cannot be dispensed with. Consequently, this claim should be denied in its entirety.

All data in support of the Carrier's position in connection with this claim has been presented to the duly authorized representative of the Employes and is made a part of the particular question in dispute.

(Exhibits not reproduced.)

OPINION OF BOARD: Claimants are employes working in Carrier's freight house at Butte, Montana. Prior to the forty hour week, the freight house was a six day operation, with some overtime work being performed on Sundays. On July 18, 1951, Carrier instituted seven day service by assigning Claimants to work on Sundays. Effective February 1, 1954, Carrier returned to the same method of operation as existed prior to July 18, 1951, and thus terminated the claimed violation of the Agreement. The issue presented in this case is whether or not Carrier violated the Agreement in operating the freight house on a seven day basis from July 18, 1951 to February 1, 1954.

The Carrier contends that this claim is barred by the time limit provisions contained in Rule 55 (b), current Agreement. An examination of Rule 55 shows that its provisions deal with discipline and grievances. It has no application to claims involving the interpretation of the rules and losses of compensation growing out of rule violations. A party has a reasonable time in which to progress a claim to this Board in the absence of contractual provisions fixing time limits. The contention that this claim is barred by lapse of time is without merit.

The record in this case shows that prior to the five day work week agreement, the freight house was operated six days per week, Monday through Saturday. After September 1, 1949, all employes were assigned to a five day work week on six day positions, no employe being assigned to work on Sunday. On July 18, 1951, the two Claimants were assigned to work on Sundays. It is the position of the Organization that the Carrier was not permitted under its Agreement to institute seven day service and that Claimants were therefore improperly assigned when Sunday was included as one of their work days.

The freight house handles inbound freight shipments arriving by rail and highway trucks which are destined for reloading into outbound cars and trucks, or for reloading into local pickup and delivery trucks. Outbound freight includes freight received from local shippers. The record shows that it has been necessary to use some employes on Sundays on an overtime basis. To avoid this overtime pay, Claimants were regularly assigned to work on Sundays. The Carrier shows that there are trucks arriving at the freight house after closing hours on Saturdays and on Sundays which were held over for the early morning shift commencing work at 5:00 A. M. There are trucks leaving the freight house from 6:30 A. M. on. There is one truck that departs at 1:30 A. M. which is usually loaded on Saturday prior to its Monday morning departure. A joint check of the work performed by Claimants on a Sunday when they were occupying the Sunday assignments shows that they spent their time in loading out the trucks for departure early Monday morning. The record shows that there has been no change in rail or truck schedules for several years prior to July 18, 1951, and that the work has been performed the same as prior to July 18, 1951, since regularly assigned Sunday work was abandoned on February 1, 1954. It is clear from the record also that no operational problem arose which justified the institution of seven day positions at the freight house. It is true that there was some extra work performed on Sundays but it does not appear to have been any greater than it was when the forty hour work week became effective. Where there has been no additional need brought about by some change in circumstances that creates a need for seven day service, the rules of the forty-hour week Agreement do not permit the institution of seven day service where it did not exist before.

The language used in Rules 30-1 (d) and 33 (c) sustain this view. They provide:

> "On positions which have been filled seven days per week any two consecutive days may be the rest days with the presumption in favor of Saturday and Sunday." Rule 30-1 (d), current Agreement.

> "Previously existing provisions that punitive rates will be paid for Sunday as such are eliminated. The elimination of such provisions does not contemplate the reinstatement of work on Sunday which can be dispensed with. On the other hand, a rigid adherence to the precise pattern that may be in effect immediately prior to September 1, 1949, with regard to the amount of Sunday work that may be necessary is not required. Changes in amount or nature of traffic or business and seasonal fluctuations must be taken into account. This is not to be taken to mean, however, that types of work which have not been needed on Sundays will hereafter be assigned on Sunday. The intent is to recognize that the number of people on necessary Sunday work may change." Rule 33 (c), current Agreement.

It is not contemplated by these rules that Carrier's method of operation is frozen as of September 1, 1949, the effective date of the forty hour week Agreement. It is specifically provided in Rule 33 (c) that "a rigid adherence to the precise pattern that may be in effect immediately prior to September 1, 1949, with regard to the amount of Sunday work that may be necessary is not required". But this authority is limited by other language in the rule. It is stated therein that "the elimination of such provisions does not contemplate the reinstatement of work on Sunday which can be dispensed with". It further states that "changes in amount or nature of traffic or business and seasonal fluctuations must be taken into account". It is stated definitely that types of work which have not been needed on Sundays will not be thereafter assigned on Sunday. Construing the rules as a whole, they simply mean that Sunday assignments will remain as they were before the forty hour week except where there has been such a change in operating conditions due to a change in the nature or amount of business, or other changed condi-

tions which makes Sunday work necessary. The presumption is that work is not required to be performed on Sunday when it was not required to be so performed before the forty hour week Agreement. The Carrier is required to overcome this presumption by evidence that changed circumstances necessitated the institution of seven day service. There is no evidence in the present case of any changed conditions which warranted any seven day assignment. Before as well as after the seven day assignments here made the work was performed without any regularly assigned Sunday work. There would appear to be no better proof that Sunday work was not required than the fact that it was so performed before and after the Sunday assignments of which complaint is here made. We do not think these Sunday assignments were justified at the Butte freight house and that they were in violation of the Agreement. This result is sustained by the principles announced in Awards 1566, 1644, Second Division; 5247, 6232, 6502, 6695, 6856, Third Division.

The question as to the nature of the penalty for the violations has been raised. The Board has frequently decided that penalties cannot be pyramided. Where two or more violations carrying different penalties are established, the higher of such penalties is the one to be imposed. Awards 5423, 5549, 5638, 6750. Under the foregoing, Claimants are entitled to a day's pay on a pro rata basis for each day they were improperly held out of service, it being a higher penalty than time and one-half for rest day work. We hold that Claims (1), (3) and (5) should be sustained and Claims (2) and (4) denied under the foregoing Awards.

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 Claims (1), (3) and (5) should be sustained and Claims (2) and (4) denied.

AWARD

Claims (1), (3) and (5) sustained. Claims (2) and (4) denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: A. Ivan Tummon
Executive Secretary

Dated at Chicago; Illinois this 28th day of June, 1956.

DISSENT TO AWARD NO. 7370, DOCKET NO. CL-7512

This dissent is directed primarily to that paragraph of the Opinion holding:

> "The Carrier contends that this claim is barred by the time limit provisions contained in Rule 55 (b), current Agreement. An examination of **Rule 55** shows that its provisions deal with **discipline and grievances.** It has no application to claims involving the interpretation of the rules and losses of compensation growing out of rule violations. A party has a reasonable time in which to **progress a claim to this Board** in the absence of contractual provisions fixing time limits. The contention that this claim is barred by lapse of time is without merit." (Emphasis supplied.)

Rule 55 has nothing to do with the progression of claims or grievances to this Division of the National Railroad Adjustment Board. Rule 55 (b) stipulates the time limits in which to progress appeals on the property, in regular order of succession and in the manner prescribed up to and including the highest official designated by the Railway Company to whom appeals may be made. Rule 55 (f) deals with grievances and stipulates that the handling of grievances on appeal is subject to the provisions of Rule 55 (b).

Rule 55 is captioned, "Discipline and Grievances," and consists of eight paragraphs; paragraphs (a), (c), (d) and (e) deal with disciplinary matters; paragraph (b), with the time limits in which to make appeals, in regular order of succession up to the highest official designated by the Carrier to handle discipline and grievance claims covered by paragraphs (a), (c), (d), (e) and (f); paragraph (f) deals with grievances and grants to the employe or his duly accredited representative the right of appeal as stipulated in Rule 55 (b); paragraphs (g) and (h) apply alike to the other paragraphs.

The facts dealing with the progression of this dispute on the property are as follows:

September 6, 1951—The Division Chairman representing the Organization presented claim to the Division Superintendent.

September 10, 1951—The Division Superintendent declined the claim.

October 23, 1951—The Division Chairman requested the Division Superintendent to reconsider his decision.

November 12, 1951—The Division Superintendent confirmed to the Division Chairman his denial of the claim on **September 10, 1951.**

The next official in order of succession to handle an appeal under Rule 55 was the Assistant General Manager, the final official being the Chief of Personnel.

July 23, 1952—On this date, some ten months after the Division Superintendent had declined the claim, the General Chairman of the Organization appealed to the Assistant General Manager. **(Rule 55 (b) stipulates that this appeal should have been made within thirty (30) days.)**

August 4, 1952—The Assistant General Manager, in a letter to the General Chairman, declined the claim.

August 11, 1952—The General Chairman appealed the claim to the Chief of Personnel.

August 18, 1952—The Chief of Personnel advised the General Chairman the claim was declined and, in so doing, stated:

"In any view of this case, however, there is no basis for a claim retroactive to July 18, 1951 in the application of Rule 55 of the current Clerks' Agreement. Superintendent C. W. Coil declined the claim in behalf of these employes to Division Chairman Tony Cocchiarella on **November 12, 1951**[1] and no appeal was taken from Mr. Coil's decision until **June 30, 1952**[2]." (Emphasis supplied.)

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[1] The record discloses that the Division Superintendent initially declined the claim on **September 10, 1951.**

[2] The correct date is **July 23, 1952.**

During the entire handling of this dispute on the property up to the Chief of Personnel, the entire Agreement was before the parties.

Nowhere in the docket is there any denial by the Organization of the application of Rule 55 (f) to the dispute. In presenting the claim to the Referee, no argument was advanced on behalf of the Organization to the effect that Rule 55 (f) had no bearing on or application to a dispute such as covered by this Award. The following was advanced to the Referee:

> "* * * We observe that this carrier raises no issue of so-called 'unconscionable delay' by the petitioner in appealing this dispute to the Board, relying solely upon the above stated application of Rule 55 (f) with respect thereto." (Reference is made to Chief of Personnel's statement, quoted above.)

Award 5330 by this Division was handed the Referee. That Award involved the same parties as are here involved. An analysis thereof indicates clearly it was not sustained on the grounds of non-applicability of Rule 55 (f) to the dispute. It should be noted that no reference to the citation of Award 5330 is made in Award 7370 covering the instant dispute, and to which Award this dissent is directed.

The unrefuted fact remains that the claim presented by the Division Chairman was declined on **September 10, 1951**, and that in answer to the Division Chairman's communication of **October 23, 1951**, the Division Superintendent, on **November 12, 1951**, reiterated his denial of **September 10, 1951**. The Assistant General Manager was the next official in the regular order of succession to handle appeals. The record discloses this claim was not handled with the Asssitant General Manager until **July 23, 1952**, or some ten months after the Division Superintendent had initially declined it. Nowhere in the docket is there any agreement between the parties extending the time limits, as provided for in Rule 55 (g). **The Employes failed to appeal this case within the time limits prescribed by Rule 55 (b).**

The attention of the Referee was directed to Award 595 of this Division, issued under date of March 24, 1938. That Award involved the same parties as in the present dispute; it also involved Rule 41, titled "Grievances," of the Agreement then in effect. Rule 41 is identical to Rule 55 (f) now before us. Referee Frank M. Swacker, in his Opinion in Award 595, stated:

> "As to the carrier's contention, however, that a part of the claim is barred by the operation of Rule 41, the Board is of the opinion that it is sound, and that the claim so far as it relates to Sundays more than 10 days before Sept. 16, 1936, is barred. There is a sharp conflict of authority on whether Rule 41 should be deemed to be a cut-off rule or should be limited to situations analogous to discipline. In Award 417 this Board held that it was a limitation on grievances of the sort here involved while in Award 444 it held to the contrary. It is considered that Award 417 represents the weight of authority on the subject and it is consequently followed. This, of course, does not bar complaint at any time concerning a continuing violation; it merely limits retroactive reparation to ten days before complaint."

and in his Findings held:

> "That A. V. Shaw, weighmaster at Auburn, is entitled to time and one-half for service performed on Sundays from 10 days previous to Sept. 16, 1936, to and including Nov. 2, 1936."

and in the Award stated:

> "Claim sustained to the extent indicated by the findings."

Ample support for the conclusions of Referee Swacker in Award 595 is in the testimony of Mr. George M. Harrison, President of the Brotherhood

of Railway and Steamship Clerks, Freight Handlers, Express and Station Employes, before the Hearing of the Committee of the House of Representatives on HR-7650 (pp. 80, 81) when urging the adoption of the bill which resulted in the enactment of the Railway Labor Act, Amended:

> "Now, as a brief explanation of the character of those disputes, they might very well concern a man's seniority, whether or no his date is the proper date; might very well concern whether or no he has been paid the proper amount of compensation for a particular class of work performed, as the contract provides shall be paid. It may very well concern the separation of an employe from the service, whether or no he has been unjustly dismissed. It very well may concern the promotion of a man, whether he should have been accorded promotion, in accordance with his ability and his seniority in keeping with the rules of the contract; whether or no he was laid off in his seniority order; if he had not been taken back in his seniority order."
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> "* * *
>
> "So, out of all of that experience and recognizing the character of the services given to the people of this country by our industry and how essential it is to the welfare of the country, these organizations have come to the conclusion that in respect to these minor grievance cases that grow out of the interpretation and/or application of the contracts already made that they can very well permit those disputes to be decided, if they desire to progress them, to be decided, by an adjustment board."

If a claim for reparaton is not a "grievance," then the long accepted and understood meaning of the word, as used in the railroad industry, and the testimony of this competent witness, Mr. Harrison, the chief executive of the proponents of the legislation, are worthless.

In this dispute, claim for reparation should have been limited from ten days prior to July 23, 1952, to February 1, 1954, therefore, we dissent.

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

CONCURRING OPINION TO AWARD NO. 7370, DOCKET NO. CL-7512

The Labor Members concur in the Opinion of Referee Carter in this Award wherein he stated: "We do not think these Sunday assignments were justified at the Butte Freight House and that they were in violation of the Agreement". What the referee has here said is in complete harmony with the views of the two Members of the President's Emergency Board, Messrs. Leiserson and Cole, who later, while serving as arbitrators through selection by Railroad Managements and the involved Unions Nationally, actually wrote the National 40-Hour Work Week Rules, particularly the principal rules upon which the dispute in Award 7370 turned; namely the Seven-Day Positions Rule, and the Sunday Work Rule. As evidence of the foregoing we refer to Award 6695 authored by Dr. Leiserson while serving as referee on the Third Division; also to the Opinion of the Majority, Board of Arbitration, NMB Case No. 212, authored by David L. Cole, Chairman. Award 6695 is on file in the Third Division, National Railroad Adjustment Board and by reference is made a part of this Concurring Opinion.

With respect to the Seven-Day Positions Rule, Dr. Leiserson in Award 6502 said:

"Since there were no seven-day positions prior to September 1, 1949, and the operational requirements could be met by six-day positions supplemented by Sunday calls, we think the rules require the Carrier to continue this method of handling the work, in the absence of changes in traffic or business that might make it necessary to work full days on Sundays the same as week days. (Award 5710 reaches the same result in a similar situation)."

Regarding the Sunday Work Rule, Dr. Leiserson in Award 6695 also stated:

"This rule begins by taking away the right to overtime pay for Sunday work which employes had for many years before the 40-Hour Work Week was agreed to. The first sentence stipulates: 'Previously existing provisions that punitive rates will be paid for Sunday work as such are eliminated.' This, however, was conditioned by the statement in the second sentence that 'The elimination of such provisions does not contemplate the reinstatement of work on Sunday which can be dispensed with.' Then, to guard against freezing of the pattern as it existed prior to September 1949, there follows the provision that a rigid adherence to that precise pattern is not required, but changes in traffic or business must be taken into account. Finally, after explaining that this does not mean that types of work not needed prior to September 1949 will thereafter be assigned on Sunday, the last sentence of the rule sums up that 'The intent is to recognize that the number of people on necessary Sunday work may change.'

This rule, so carefully balanced to safeguard the respective rights of both parties in the matter of Sunday work offers no basis for a general inauguration of Sunday work where previously this has not been necessary."

In connection with these two rules, in his Opinion of Majority, Mr. Cole, Chairman, in Board of Arbitration NMB Case No. 212 said in part:

"The position of the Organization, on the other hand, is summarized and supported by the following statement by Referee Leiserson in Award 6695:

'This claim can only be upheld if the contractural provisions of its 40-Hour Agreement with the Clerks permit it. Examining Rule 35 (d) which governs 7-day service, we find that the rule states that any two consecutive days may be the rest days on positions which **"have been filled 7 days per week."** (Emphasis added.) Admittedly, the positions at Utica have not been filled seven days a week either before or after September 1, 1949, except by special arrangements during World War II. Accordingly we cannot hold that this rule authorizes the proposed change from the present 5-day service to a 7-day operation.'

We subscribe basically to the interpretation of Referee Leiserson. We do so, in brief, because we find that the parties in agreeing upon Sections 1 (a), 1 (b), 1 (c), 1 (d) and 1 (j) made it clear that seven-day operations stand on different grounds from six-day and five-day operations, by using guarded and carefully drawn language distinguishing the three kinds of work weeks. We find that the seven-day operation, unlike the other two, is closely tied to the Sunday Work Rule, which rule did away with the long-established practice of premium pay for Sunday as such, but assured the employes that seven-day types of work previously dispensed with by the Carrier would not be reinstated now that it may be done at straight time and that types of work which have not been needed

on Sundays will not hereafter be assigned on Sunday. To avoid misunderstanding or misquotation, however, it must be pointed out that neither Section 1 (d) nor Section 1 (j) stipulates that the prior Sunday work must have been paid for either at the rate of time and one-half or straight time. Read with the test stipulated in Section 1 (d) that speaks of seven-day positions as those which have been filled seven days per week, this makes the intent of the parties quite plain.

The reference to staggered work weeks in accordance with operational requirements applies to six-day operations, as distinguished from five-day, and also to seven-day operations which may properly be carried on by one or more of the many classes or crafts of employes who are parties to the agreement, and in any event is definitely and explicitly qualified by the more specific sections which follow Section 1 (a). The provisions in Section 1 (j) which speak of non-rigid adherence to existing patterns, and taking into account changes in traffic and seasonal fluctuations, relate to changes in the **amount** of allowable Sunday work and to changes in the **number** of employes on necessary Sunday work. These provisions provide a framework within which the Carrier has latitude and flexibility, but they do not permit the inclusion of a new **type** of Sunday work which does not meet the essential contractual test.

This test set up in the agreement is a simple pragmatic test which leaves little possibility of disagreement or dispute over the meaning of the word 'necessary' or over the facts, unlike the tests applicable to five or six-day operations. The efforts of the parties in arriving at the language indicates that they meant to set up a simple and undebatable test. Enlisting the services of the former members of the Emergency Board as interpreters, mediators, and finally as arbitrators shows this."

Arbitration Board Award, Case No. 212 is a public document on file in the District Court of the United States for the Northern District of Ohio, Eastern Division. It is hereby made part of this Concurring Opinion to Award No. 7370 and reads:

"In Arbitration Between New York Central Railroad Company and Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employes	**NATIONAL MEDIATION BOARD** **NMB CASE NO. 212** **AWARD OF BOARD OF ARBITRATION**

Appearances:

For the Carrier

R. C. Bannister, Esq., of Chicago, Attorney
L. B. Fee, Director of Labor Relations

For the Labor Organization

Lester Schoene, Esq., of Washington, Counsel
Earl Kinley, Vice President
George Price, General Chairman
William Winston, General Chairman
G. G. Younger, General Chairman

Pursuant to an arbitration agreement entered into by the above-named parties on March 28, 1956, under the provisions of the Railway Labor Act, and in accordance with the extension of time within which to file its award agreed upon by the parties, the Board of Arbitration consisting of L. W. Horning, Carrier-named member, George M. Harrison, Labor Organization-named member, and David L. Cole, Chairman, having duly heard the parties and considered their evidence and arguments, does hereby make its award as follows:

It answers the specific question set forth in paragraph 'Fourth' of said arbitration agreement in the negative; that is to say that the party of the first part, the Carrier named above, did not have the right to establish a five (5) day staggered work-week, including Sunday as a regularly assigned work day, at the freight transfer stations in Utica, Syracuse, and Buffalo, New York, Cleveland, Ohio, Detroit, Michigan, and Gibson, Indiana under the so-called Forty-Hour Week Agreement which is in effect between the parties hereto.

/s/ **David L. Cole**
David L. Cole, Chairman

June 4, 1956

/s/ **Geo. M. Harrison**
George M. Harrison, Member"

The Opinion of Majority of the Board of Arbitration, NMB Case No. 212, David L. Cole, Chairman, is likewise made a part of this Concurring Opinion and reads:

"National Mediation Board
NMB Case No. 212

"In Arbitration

Between
New York Central Railroad Company

and

Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employes.

"Opinion of Majority of the Board of Arbitration

"Appearances:

"For the Carrier

R. C. Bannister, Esq., of Chicago, Attorney
L. B. Fee, Director of Labor Relations

"For the Labor Organization

Lester Schoene, Esq., of Washington, Counsel
Earl Kinley, Vice President
George Price, General Chairman
William Winston, General Chairman
G. G. Younger, General Chairman

— — —

"On March 28, 1956 the parties named above entered into an arbitration agreement naming L. W. Horning and George M. Harri-

son as their representative members of the Arbitration Board, and thereafter David L. Cole was duly designated as the third member and Chairman. The issue before the Board is stated in Paragraph Fourth of this agreement as follows:

> 'The specific question to be submitted to the Board for decision is: "Did the party of the first part have the right to establish a five (5) day staggered work-week, including Sunday as a regularly assigned work day, at the freight transfer stations in Utica, Syracuse, and Buffalo, New York, Cleveland, Ohio, Detroit, Michigan, and Gibson, Indiana under the so-called Forty-Hour Week Agreement which is in effect between the parties hereto".'

"Hearings were held in Washington, D. C. on seven days between May 3 and May 15, 1956 and the Board met in New York City on June 4, 1956 to consider the evidence and arguments and to arrive at its decision and make its award.

"The form of the question submitted was in effect a request for a ruling in the nature of a declaratory judgment. It calls for the construction of certain provisions of the national agreement of March 19, 1949 to which Class I railroads and sixteen cooperating railway labor organizations were parties, including the New York Central Railroad Company and the Brotherhood of Railway Clerks, the Carrier and the Organization parties in this arbitration proceeding.

"This agreement of March 19, 1949 is usually referred to as the Forty Hour Week Agreement, and its provisions have been incorporated as rules into the collective bargaining agreements on the several railroad properties. The provisions requiring interpretation are part of Article II, Section 1 of the national agreement, and, in identical words, of Rule 35 of the New York Central—Brotherhood of Railway Clerks agreement. We shall use the article and section designations of the national agreement in this opinion, in line with a similar course followed by the parties at the hearings.

"Among the six freight transfer stations named in the submitted question is that at Utica. This station has twice been the subject of rulings by the National Railroad Adustment Board, once in Award No. 314 on October 9, 1936, and again on June 25, 1954 in Award No. 6695. In the earlier award claims of employes at this freight transfer station were sustained, holding that Sunday operation was not necessary to, or a necessary part of, the continuous operation of the Carrier as defined in the Sunday Work Rule of the then prevailing agreement. This is interesting as background material and as a demonstration of the difficulties encountered in determining the meaning of the word 'necessary,' but since the old Sunday Work Rule has been abolished by the Forty Hour Week Agreement, and the type of necessity there described has been changed by the current agreement, it cannot be held that Award 314 constitutes a binding ruling either under the Railway Labor Act or under the doctrine of **res judicata**, as to the question before us insofar as it applies to the Utica transfer station.

"Award 6695, however, stands on a totally different footing. There the question submitted was essentially the same as that before this Arbitration Board, namely, 'the right of the Carrier to operate its Utica Freight Transfer House by means of staggered working assignments on seven days each week at straight time rates under the terms of the National Forty Hour Week Agreement.' Moreover, as the case was presented and ruled on, it was governed by the very contract provisions, the same arguments and substan-

tially the same evidence as have been offered and urged in our case, except that we have the benefit of later data. The Carrier urged that Award 6695, as part of an administrative as distinguished from a judicial proceeding is not entitled to the force of **res judicata.** This, however, by-passes the effect of Section 3 (m) of the Railway Labor Act, which states:

> 'The awards of the several divisions of the Adjustment Board shall be stated in writing. A copy of the awards shall be furnished to the respective parties to the controversy, and the awards shall be final and binding upon both parties to the dispute, except in so far as they shall contain a money award. In case a dispute arises involving an interpretation of the award, the division of the Board upon request of either party shall interpret the award in the light of the dispute.'

"It is true, as the Carrier pointed out, that a number of referees in Adjustment Board cases have overruled prior decisions on the grounds generally that such decisions were unsound in fact or not based on good reasoning. In none of the references to such cases, as submitted in evidence before us, was any mention made of Section 3 (m) of the Act, nor of the fact that Congress as a matter of policy while providing no appeal from Adjustment Board awards nevertheless made such awards final and binding on the parties. By what authority subsequent Adjustment Boards may ignore this clear legislative direction we can not understand, nor can we get any enlightenment from the quoted portions of the opinions accompanying the awards which overrule prior awards in disputes between the same parties on the identical question.

"On the other hand, we see that the United States Circuit Court for the Fifth Circuit in the recent case of **Coats** vs. **St. Louis-San Francisco Ry. Co. et al** (March 16, 1956, CCH Labor Cases, paragraph 69, 830) found the statutory directive to mean what it says. The Circuit Court sustained the dismissal of a cause brought by an employe who sought reinstatement and claimed to have been wrongfully discharged on the ground that his claim had been ruled on by the National Railroad Adjustment Board and that the Railway Labor Act makes such awards final and binding on the parties irrespective of whether the submission to the Adjustment Board was mandatory or voluntary. Other cases are cited and discussed in the **Coats** opinion.

"The Carrier in our case was the moving party in the case leading to Award 6695, so that there is no point to be made as to whether it was a voluntary or mandatory submission. Nor is there any question concerning the jurisdiction of the Adjustment Board in that case.

"The doctrine of **res judicata** technically applies only to judicial proceedings, and is designed to put an end to litigation between parties over a given issue. A similar doctrine may be made applicable to administrative proceedings, which serve as a substitute for court litigation, either by legislation or by voluntary agreement. No citation of authority is needed at this late date to support the proposition that agreements to arbitrate which stipulate that the award will be final and binding on the parties will sustain a defense in the nature of **res judicata** if an action is brought in court by the disappointed party after an arbitration award has been rendered. As the **Coats** case indicates, the same is true of proceedings processed before the Adjustment Board under the Railway Labor Act, because Congress has so directed.

"We have observed that the issue and arguments presented in the 1954 Utica case were essentially the same as in our case and that the evidence offered was very similar except that it was later brought up to date. The Carrier frankly requests this Arbitration Board to reverse the Adjustment Board. The statute, however, provides for no appeal from Adjustment Board awards, in fact confining disputes even over interpreattion to the division of the Board which rendered the award. The parties are free in the first instance, by mutual agreement, to substitute arbitration for submission to the Adjustment Board, but the disappointed party is not free to urge a subsequent arbitration tribunal sitting on the same dispute between the same parties to disregard the conclusive force of the prior award of the Adjustment Board.

"This is so, as indicated, because Congress has made it so. It is not within the proper authority of referees or of the Adjustment Board to set aside or to ignore this legislative mandate.

"A distinction must obviously be made between this type of **res judicata** doctrine and the weight to be given to prior awards on the same or similar issues as between different parties. There the question relates to the value to be ascribed to precedents. This constitutes an area of discretion, because the statute has no declaration or mandatory provision with respect to this. In this area, it would seem, subsequent Adjustment Boards may elect to give little or no weight to prior awards if they find fault with the findings, reasoning or conclusions. This they have done very freely. It has led to conflicting rulings on given subjects and to competitive advantages to the more fortunate parties. But other inconsistent rulings do not relieve the parties from the binding effect of the award in their own case. The situation is not unlke that when two Circuit Courts make conflicting constructions of the same statute or contract. Unless the Supreme Court acts, the parties to each Circuit Court action are bound by their respective judgments or decrees.

"Since there is no appeal in the customary sense from Adjustment Board awards, the parties are unqualifiedly bound by the award in their case. The remedy obviously for overcoming inconsistencies is to seek relief through negotiations instituted by a statutory Section 6 notice of desire to modify the rules set forth in the agreement. Such notices may be given at any time, and in 30 days negotiations will be under way. In a sense the Supreme Court in this situation is the bargaining table, and it is a forum readily available and one which when properly used can provide a great measure of flexibility and adjustability.

"For these reasons it could be held as to the Utica Transfer that there is in force a final and binding interpretation of the Forty-Hour Agreement which legally and authoritatively determines that at that station, under the Agreement, the Carrier did not have the right to establish the seven-day operation here in question. But it would still be necessary, for two reasons, to inquire into the meaning of the contract provisions because there are five other stations named in the submitted question: (1) Award 6695 is by Section 3 (m) of the Act final and binding only as to the dispute or controversy in that case; (2) the controlling facts and considerations may be different from those at Utica, just as the parties have conceded them to be at the Carrier's East St. Louis Transfer Station which has continually been in operatoin seven days per week. This being so, the award of this Board as to all six stations will be predicated on its interpretation of the Agreement, with the effect of Section 3 (m) as merely an additional reason or support for the Board's conclusion as to Utica.

"The Carrier maintains that it must have the right to operate these freight transfer stations seven days each week for the purposes of meeting competition of over-the-road transportation and of some other railroads which are now operating such facilities seven days per week, rendering efficient and satisfactory service to shippers, retaining or attracting new business, and achieving a more efficient use of cars and facilities. These, as stated, were essentially the same reasons asserted in the 1953-4 Utica case. The Carrier urges that Article II, Section 1 contains provisions which entitled them to do so because their experience reflects the type of need called for in these rules to support such seven-day operations, and, further, that a large number of awards of the Adjustment Board have so held.

"The contract provisions in question are the following parts of Section 1 of Article II:

'Section 1. Establishment of Shorter Work Week

Note

'The expressions "positions" and "work" used in this Article II refer to service, duties, or operations necessary to be performed the specified number of days per week, and not to the work week of individual employes.

'(a)—**General**—

'The carriers will establish, effective September 1, 1949, for all employes, subject to the exceptions contained in this Article II, a work week of 40 hours, consisting of five days of eight hours each, with two consecutive days off in each seven; the work weeks may be staggered in accordance with the carriers' operational requirements; so far as practicable the days off shall be Saturday and Sunday. The foregoing work week rule is subject to the provisions of this agreement which follow:

'(b)—**Five-day Positions**—

'On positions the duties of which can reasonably be met in five days, the days off will be Saturday and Sunday.

'(c)—**Six-day Positions**—

'Where the nature of the work is such that employes will be needed for six days each week, the rest days will be either Saturday and Sunday or Sunday and Monday.

'(d)—**Seven-day Positions**—

'On positions which have been filled seven days per week any two consecutive days may be the rest days with the presumption in favor of Saturday and Sunday.'

* * * * *

'(j)—**Sunday Work**—

'Existing provisions that punitive rates will be paid for Sunday as such are eliminated. The elimination of such provisions does not contemplate the reinstatement of work on Sunday which can be dispensed with. On the

other hand, a rigid adherence to the precise pattern that may be in effect immediately prior to September 1, 1949, with regard to the amount of Sunday work that may be necessary is not required. Changes in amount or nature of traffic or business and seasonal fluctuations must be taken into account. This is not to be taken to mean, however, that types of work which have not been needed on Sundays will hereafter be assigned on Sunday. The intent is to recognize that the number of people on necessary Sunday work may change.'

"It is our function to interpret and apply these rules. We are not engaged in a contract-making proceeding, nor are we free to alter or add to the contract provisions, whether we believe them satisfactory or not.

"There are expressions used in the rules which on their face seem to justify conflicting awards which have been offered in evidence. It is submitted, however, that if the pertinent rules and the explanatory letter of the 1948 Emergency Board members are read as a whole, one thread will be found running throughout, which when noted will do much to reconcile the superficial inconsistencies which have led to much of the confusion. This thread is that the abolition of the long established punitive pay for Sunday work as such has been coupled with the safeguard, from the employes' viewpoint, that the types of Sunday work dispensed with by the Carrier prior to September 1, 1949 may not be reinstated. The operational requirements mentioned in 1 (a), the need referred to in 1 (c), and the necessary Sunday work spoken of in 1 (j) must all be related to the specific restrictions placed in Section 1 as a whole on Sunday work. Such work may be done at straight time if it is necessary, but the test of this necessity must be that set forth carefully in the agreement.

"Section 1 (a), the general Forty Hour Week Rule is explicitly made 'subject to the provisions of this agreement which follow.' In Section 1 (b) if the duties 'can reasonably be met in five days' the positions will have the conventional five-day week. In (c) six-day positions are determined by the proposition that 'the nature of the work is such that employes will be needed six days each week.' Arguments and disagreements over the facts may easily arise under Sections 1 (b) and 1 (c), because the parties may differ as to whether the duties can reasonably be met in five days or whether the nature of the work is such that employes will be needed six days each week.

"But when we examine Section 1 (d) we see no room for argument. A pragmatic, undeniable test is set forth, which is 'on positions which have been filled seven days per week.'

"The Carrier has urged that this merely identifies the days off, but this position cannot be squared with the fact that (b), (c) and (d) are explicit qualifications of the general work week provisions of Section 1 (a). Nor, significantly, can this contention explain away the two pointed sentences in Section 1 (j):

> 'The elimination of [punitive pay for Sunday as such] does not contemplate the **reinstatement** of work on Sunday which can be dispensed with.'
>
> 'This is not to be taken to mean, however, that **types of work which have not been needed on Sundays** will hereafter be assigned on Sunday.' (Emphasis added.)

"Some light as to what was intended on the subject of Sunday work may be gleaned also from the letter of interpretation of February 27, 1949 which was written, at the joint request of the carriers and the 16 non-operating labor organizations, by the three members of the 1948 Emergency Board. A good deal of the language of Section 1 (j) was taken verbatim from the paragraph of this letter dealing with Sunday work. In this paragraph it was stated that the Board expressly denied the Organizations' requests for a uniform Monday-Friday work week and punitive pay for Saturdays and Sundays as such. It goes on to say:

> 'It had in mind the continuous nature of some of the operations on railroads. Work which at one time had been performed seven days per week has been cut down to six days, and avoidable Sunday work has largely been eliminated by force of the penalty pay provisions included in the agreements. Certainly the Board did not contemplate the reinstatement of work on Sundays where it has been found it can be dispensed with. This would be a distortion of its reason for recommending the elimination of penalty pay on Sundays as such.'

"Then follow four sentences identical with the four concluding sentences of Section 1 (j).

"The Carrier, and several referees who have given controlling weight to them, properly inquire, then, as to the meaning and purpose of the expressions or provisions in Section 1 (a) and 1 (j):

> (1) 'in accordance with the Carrier's operational requirements'
>
> (2) 'a rigid adherence to the precise pattern that may be in effect immediately prior to September 1, 1949, with regard to the amount of Sunday work that may be necessary is not required. Changes in amount or nature of traffic or business and seasonal fluctuations must be taken into account'
>
> (3) 'The intent is to recognize that the number of people on necessary Sunday work may change'

"The operational requirements mentioned in 1 (a) have broad and general application in determining the type of work week and also the fluctuations referred to later in Section 1. It is also of consequence and applicability in sub-sections (e), (f), (g) and (h) which deal with relief assignments, deviations from the Monday-Friday week, non-consecutive rest days, and rest days of extra or furloughed employes. As a general reference, it must give way before more detailed provisions relating directly to specific matters.

"The second and third quotations are intended to provide flexibility with respect to the expansion or contraction of the amount of necessary Sunday work. Since the determination of what is necessary Sunday work, under the agreement, depends on the simple test of whether the Carrier has been filling the types of positions in question on Sunday, meaning obviously prior to the effective date of the Forty Hour Agreement, the words 'necessary Sunday work' refer to such work as is allowable by the provisions of the agreement. Such types of necessary work may be enlarged in terms of numbers of employes as well as of additional locations. These are the respects in which the Carrier is given latitude, that is to say, in the words of 1 (j), in 'the amount of Sunday work that may be necessary' and in 'the number of people on necessary Sunday work.'

"But, to repeat, the determination of this necessity and of the types of work that may be performed on Sundays as part of a staggered work week is governed by the prior practice of the Carrier.

"We must remember that, before September 1, 1949, carriers had in force six-day work weeks, and the old Sunday and Holiday Work Rule, adopted in revised form in 1923, called for time and one-half for Sunday work, except where such work was necessary to the continuous operation of the carrier, in which case employes regularly assigned to Sunday service were paid at straight time. In two interpretations of this rule, one in arbitration in 1931, and the other by the National Railroad Adjustment Board in 1936 (Award 314), it was held that typical transfer and freight stations of the New York Central were not necessary to the continuous operation of the Carrier, as defined in this rule, and hence that employes assigned to Sunday work were entitled to time and one-half. Award 314 interestingly dealt with the Utica Transfer Station and the earlier arbitration award with the Carrier's Granton Transfer Station. The factual substance is that even if seven-day operation at Utica Transfer was not necessary to the continuous operation of the railroad, as indeed its operation for years after the making of Award 314 demonstrated, it may still have had some other degree of necessity which would have warranted its operation seven days per week even though this required time and one-half for the Sunday work done by regularly assigned employes. For a period this was done, but, starting in 1947 the seven-day operation was discontinued in favor of six-day operations and this was still in effect on September 1, 1949, the effective date of the Forty Hour Agreement. It thus fell into the category of 'avoidable Sunday work [which] has largely been eliminated by force of the penalty pay provisions,' to borrow a phrase from the explanatory letter of the board members in February, 1949, and, in the contract language of Section 1 (j), of 'work which can be dispensed with' or 'types of work which have not been needed on Sunday.'

"This leads again to the appropriate measure of need or necessity to be applied.

"The differences in language as among Sections 1 (b), 1 (c), and 1 (d) must not be taken lightly. Normally, if similar considerations were intended to be taken into account then similar expressions would have been employed. The five-day, six-day, and seven-day operations could all have been made determinable simply by operational requirements, or by the provision 'where the nature of the work is such that employes will be needed.' That this was not done is significant, and the explanation is that seven-day positions call for Sunday work at straight time rates, and the withdrawal of punitive pay for Sunday work was coupled with the restrictions against the reinstatement of such work as can be dispensed with and the assignment of types of work on Sunday that **have not been needed on Sundays.** The five-day and six-day positions are independent of the Sunday work provisions of the contract, but not so with the seven-day positions. It should be added that the provision in Section 1 (a) that work weeks may be staggered in accordance with the Carrier's operational requirements has meaning with reference to six-day as well as seven-day operations, since both call for staggered work weeks, and it also has meaning with reference to numerous occupations, positions and crafts, whether in the Clerks' bargaining units or not, who prior to September 1, 1949 were on a seven-day basis and have continued on that basis since the Forty-Hour Agreement.

"It is respectfully suggested that in most of the awards favorable to the Carriers' viewpoint on this subject the majorities on the Adjustment Board neglected to observe or to give proper weight to these language differences and to recognize that the seven-day positions are regulated by both Section 1 (d) and 1 (j). The result has been not only conflicting awards but the introduction of a variety of definitions of need or necessity, together with rules concerning presumptions and burden of proof which do not appear in the agreement itself.

"To repeat, it is our view that the test as to whether a position may be regularly filled seven days per week is the simple one set forth in Section 1 (d) and in essence repeated in Section 1 (j), namely, has the Carrier been filling it seven days per week. This establishes the need, without room for argument, because the Carrier has demonstrated the need by its prevailing practice.

"But what is the nature of the reasoning in awards cited as favorable to the Carrier?

"Examining a substantial sample of them chronologically, we see in Award 5247 of March 9, 1951, that Sunday work may be done if it is 'essential for prompt performance,' but that 'merely to show greater efficiency, or that the work could be done more economically, will not alone establish a basis that Sunday work is needed.'

"In Award 5581, of December 14, 1951, one rule, that which in the agreement relates solely to six-day operations, is applied to both six-day and seven-day positions without distinction. The opinion states:

> 'It is apparent that the Carrier in the first instance should be the judge of its operational requirements. It necessarily follows under the Forty-Hour Week Agreement discretion with respect to staggering work weeks of forces engaged in work of a nature requiring six or seven days protection rests with the Carrier . . . the Carrier's desire in this respect is not absolute. It may not deprive employes of Saturday and Sunday as rest days on an arbitrary or capricious determination that the work is of such a nature that employes will be needed six or seven days per week.'

"The opinion also places the burden on the employes of overcoming the determination of the Carrier that operational requirements are better met by having staggered work weeks.

"On the same day Award 5589 was issued. In this award the right to establish six **and** seven-day positions is held to be 'founded upon the need for employes to protect services, duties or operations that number of days each week.' It was also asserted that, in itself, the establishment of six or seven-day operations is evidence of the Carrier's good faith because in doing so the Carrier incurs more payroll expense than in covering such positions only five days.

"In Award 1566 (August 1, 1952) the view was expressed that the operation of positions on a five, six or seven-day basis depends on whether the services are necessary but this rule of necessity must be distinguished from mere convenience.

"In December, 1952 a series of similar awards was issued, of which the basic one was Award 1599. There it was stated that Sunday work is permissible if 'found necessary in the light of the Carrier's operational requirements.' The performance or nonperformance of work on Sundays just before September 1, 1949

was held to raise a presumption of necessity or non-necessity, and where there is such an affirmative presumption the burden is on the employes who are claimants to show that the Carrier's operational requirements have changed since then so that Sunday operations are no longer necessary. It was also ruled that the employes have the burden of proving that Sunday work at pro rata rates is not necessary to the effective operation of the Carrier. The ruling was favorable to the Carrier in this case on the finding that the employes did not successfully refute the Carrier's evidence that its 'competitive position would [otherwise] be somewhat jeopardized and the well-being of shippers and, to some extent, of the country would be lessened.'

"In January, 1953, in Award 6075, a seven-day operation in a terminal accounting bureau was approved on the ground that it was necessary to the proper and efficient functioning of the railroad.

"Shortly thereafter, in March, 1953, approximately a dozen related awards were issued involving the work weeks of carmen. The first was Award 1644. Sunday work had not been regularly assigned before September 1, 1949 but it had been performed on employes' rest days on a time and one-half basis. It was held that:

> 'The agreement does not prohibit the assignment of a type of work on Sunday after September 1, 1949, even though it was not so assigned prior to that date, if such work is necessary to be performed on Sundays. The proof required must, however, be sufficient to overcome the presumption that it is not necessary to be performed on Sunday because of the fact that it was not so performed prior to the advent of the Forty-Hour Work Week Agreement. But in the case before us, it is clear that the work was necessary to be performed on Sundays prior to September 1, 1949 and that it was necessary to be performed thereafter. The claimants have failed to establish that Sunday work was not required . . ."

"In Award 1712, of September 23, 1953, the rule is interpreted as follows:

> 'The record discloses that it has always been necessary to have these services, duties and operations performed on all seven days of the week. Consequently, carrier could assign any two consecutive rest days to employes assigned thereto subject, however, to a presumption in favor of Saturday and Sunday.'

"Award 6856, released on January 28, 1956, is, except for Award 6695, most closely in point with the case before us. The principal difference is that it arose under money claims filed by employes, whereas in both the present case and that leading to Award 6695 the matter was presented as a question of the right of the carrier to put certain positions at freight transfers on a staggered seven-day basis. In Award 6856 the employes' claims were denied, the Referee being critical of the findings and conclusions of Award 6695. He expressed the view that the Forty-Hour Agreement does not preclude the creation of seven-day positions even if the work was not so assigned prior to September 1, 1949. The test, he found, was necessity, and the non-performance of the work prior to September 1, 1949 constitutes 'strong evidence' that it was not required thereafter, but proof may be offered to overcome this 'presumption.' He also held that the differing language used in Section 1 (b), 1 (c), and 1 (d), the provisions relating respectively to five-day, six-day, and seven-day positions, showed no intent

that one was to be construed any differently from the others. Finally, in referring to Section 1 (j) he made no distinction between the references to **types** of work and **amount** of Sunday work or **number** of people that may be necessary.

"Reverting briefly to the earliest award offered in evidence, Award 314 of October 9, 1936, we see again the degrees of difference possible when the test revolves around the word 'necessary.' That case arose under the old Sunday work rule, and 'necessary to the continuous operation of the Carrier' was the important phrase requiring interpretation. The Referee said:

> '. . . the carrier concedes that the word "necessary" is susceptible of various definitions, and it cites court decisions to the effect that it need not be construed as meaning indispensable or absolutely necessary.'

"He spoke then of Decision 1621 of the U. S. Railroad Labor Board and pointed out that

> 'The Board in that and other decisions treated the word "necessary" as indispensable, absolutely essential, and absolutely necessary.'

"We have seen, in our discussion of most of the awards to which we have been referred by the Carrier, that some referees seem to have had difficulty and to have had to do a certain amount of groping to define the meaning of 'necessary.' Some have also interpolated a presumption with respect to positions which were or were not filled seven days prior to September 1, 1949, although no such presumption is created by the rule. The rule limits the only presumption it mentions to Saturday and Sunday as the favored rest days.

"This suggests that the parties were wise in working out their own simple test of the necessity which would support the Carrier's right to fill positions on a staggered seven-day basis. Having done so, as our analysis indicates they have, this feature of their agreement like all others must be construed and applied as written, intended and understood by the parties.

"The type of disagreement possible over the facts bearing on whether seven-day operations are necessary or essential may be illustrated by a few of the factual contentions advanced in this case. The Carrier insists that the denial of the right to have seven-day operations has been responsible for its great loss of LCL tonnage. During the war and post-war period and up to 1947 these transfer stations were manned seven days per week to meet the heavy LCL freight load. The unrefuted evidence is that the seven-day operations were discontinued in favor of six-day operations because of the decline in volume of LCL traffic. Thus, the decline in such volume was the cause, not the result, of the discontinuance of seven-day operations. Moreover, the tendency to transfer relatively more of the LCL business to trucks has been going on since 1940, according to expert traffic witnesses called by the Carrier. That 1946 was the peak year does not contradict this, for there were special reasons in the 1941-1947 period for enlarged volume as a whole.

"The Carrier contends that six-day operations are less satisfactory than five-day operations. It operated on a six-day basis after the Forty-Hour Agreement, starting late in 1949, for a period of some two years, and then reverted to five-day operations. Employe witnesses, however, testified that supervision informed them that

this reversion to five-day operations was due again to lack of volume of business and that it was planned later to go back to six-day operations, and this testimony was not directly contradicted.

"It has not been proven that the drop in LCL volume has been caused solely or primarily by the five-day week. Carrier's traffic expert witnesses testified that the drift to trucks has been going on since 1940 as truck service has been improving and as customer demands for speedy delivery have been growing, that even while the Carrier was on the seven-day week they found it necessary to use trucks, that shipments from New England to Albany and from Troy to Pittsburgh have often required 8 to 12 days as compared with 2 to 3 days by truck. Surely all this delay is not chargeable to the five-day or six-day operation of the transfer stations. It was also testified that traffic managers now very heavily use parcel post for a major part of certain shipments and that car-loading services have been growing both by companies performing this service and cooperative shipping associations, as a result of which much freight formerly classified as LCL is now moving as carloads. While this Carrier's LCL tonnage declined sharply from 1948 to 1955, its volume of such carloading traffic increased over 22%.

"The fact unquestionably is that the recent seven-day operations have been more efficient at these transfer stations than the prior five-day operations. After March, 1956, when the seven-day schedule was inaugurated, work progressed more expeditiously and there were considerably less cars left over. This may be ascribed partly to the use of more total man hours than in the five-day operation, because production per man hour in fact declined by about 6%. But no one could reasonably argue that operations on an every day basis will not tend to diminish delays caused by the weekend accumulation of arriving cars, provided a reasonably adequate work force is employed.

"The question before us, we must remember, however, is not whether seven-day operations may not be faster and more economical, but whether they may be instituted under the agreement.

"The problems described by the Carrier are not peculiar to Utica alone, nor to the other five transfer stations involved in this case, as distinguished from Utica. So far as the evidence reveals, the problems at all six are identical, with differences only in small degree.

"The Carrier raised the complaint that it is being discriminated against competitively. The denial of the right to work these stations seven days, it asserts, leaves it at a disadvantage with the trucking industry and with a few other railroads which at certain transfer stations are able to work on Sundays. Whether the trucking industry operates comparable transfer operations on Sunday at straight time was not made clear. Of the railroads which have this privilege, there are only three, the Erie, D.L.&W., and Pennsylvania, which are competitive with the New York Central. The half-dozen others which have this right at a restricted number of stations, have it because they conducted such operations on a seven day basis prior to September 1, 1949, and the Organization concedes that, under the Forty-Hour Agreement, this permits them to continue to do so at the stations in question, just as the New York Central is doing, for the same reason, at its East St. Louis Transfer Station. The Erie was accorded this right at Hornell by Award 6856. The D.L.&W. got it for its Scranton Station by an agreement with the Clerks' general chairman. The Pennsylvania started such operations at several of its stations in the belief that the rules of the Forty-Hour agreement permit it to do so. In all three cases the Organization

has taken action seeking to terminate the practice, in the first two instances by a Section 6 notice to modify the agreement, and in the Pennsylvania case by filing money claims to be prosecuted before the Adjustment Board.

"It is worthy of note that in the Erie case the Organization recognizes that it is bound by Award 6856 and that its remedy lies not in an attempt to have this unfavorable award set aside but by undertaking to make out a case to overcome its effect at the bargaining table.

"When the Forty-Hour Agreement was concluded on March 19, 1949, the provisions under discussion had been thoroughly aired and were known to all the parties. This agreement was not confined to the crafts or classes within the Clerks' bargaining units, by any means. All the Organizations representing the so-called non-operating employes were parties.

"When mention was made in Section 1 (a) of staggering work weeks in accordance with operational requirements, this applied not only to six-day operations but also to seven-day operations where they were and had to continue in force, in a variety of occupations. By no means was this written with the possibility in mind that some five-day or six-day freight transfer stations might subsequently be placed on a seven-day week. In fact, the restrictions in Section 1 (d) and 1 (j) indicate precisely the contrary. There is support for this construction in the fact that overwhelmingly the railroads of the country do not operate such transfer stations on a seven-day basis since the Forty-Hour Week Agreement.

"By way of conclusion, it would be well to summarize the controlling considerations in this case. Contract rules incorporated into the agreement may not be altered through interpretation on the ground that conditions have changed and some new provision is needed. Only through negotiations between the parties can this be accomplished.

"The congressional intent is clearly expressed in Section 3 (m) of the Railway Labor Act that an award is final and binding as to a given dispute upon both parties. If our interpretation of the Agreement differed from that in Award 6695, we would have a serious problem of how to give different answers to the submitted question with reference to Utica as distinguished from the other five stations, since we see no essential difference in the facts or circumstances governing each of these six stations. Our interpretation of the Agreement, however, is essentially in accord with that in Award 6695, and this problem does not arise.

"Referee Carter who wrote the Adjustment Board's opinion in Award 6856 (the Erie case) also participated in several other awards on this general subject of Sunday work. One of these was Award 1644 in which he summed up the view for which the Carrier is now contending in these words:

> 'The agreement does not prohibit the assignment of a type of work on Sunday after September 1, 1949, even though it was not so assigned prior to that date, if such work is necessary to be performed on Sunday.'

"In Award 6856 he cited a number of awards as supporting this view, although the facts in several indicated that the type of work in question had been performed on Sundays prior to September 1, 1949. This fact he called merely 'strong evidence' or a "presumption' that it continued to be necessary.

"The position of the Organization, on the other hand, is summarized and supported by the following statement by Referee Leiserson in Award 6695:

> 'This claim can only be upheld if the contractual provisions of its 40-Hour Agreement with the Clerks permit it. Examining Rule 35 (d) which governs 7-day service, we find that the rule states that any two consecutive days may be the rest days on positions which "**have been filled 7 days per week.**" (Emphasis added). Admittedly, the positions at Utica have not been filled seven days a week either before or after September 1, 1949, except by special arrangements during World War II. Accordingly we cannot hold that this rule authorizes the proposed change from the present 5-day service to a 7-day operation.'

"We subscribe basically to the interpretation of Referee Leiserson. We do so, in brief, because we find that the parties in agreeing upon Sections 1 (a), 1 (b), 1 (c), 1 (d) and 1 (j) made it clear that seven-day operations stand on different grounds from six-day and five-day operations, by using guarded and carefully drawn language distinguishing the three kinds of work weeks. We find that the seven-day operation, unlike the other two, is closely tied to the Sunday Work Rule, which rule did away with the long-established practice of premium pay for Sunday as such, but assured the employes that seven-day types of work previously dispensed with by the Carrier would not be reinstated now that it may be done at straight time and that types of work which have not been needed on Sundays will not hereafter be assigned on Sunday. To avoid misunderstanding or misquotation, however, it must be pointed out that neither Section 1 (d) nor Section 1 (j) stipulates that the prior Sunday work must have been paid for either at the rate of time and one-half or straight time. Read with the test stipulated in Section 1 (d) that speaks of seven-day positions as those which have been filled seven days per week, this makes the intent of the parties quite plain.

"The reference to staggered work weeks in accordance with operational requirements applies to six-day operations, as distinguished from five-day, and also to seven-day operations which may properly be carried on by one or more of the many classes or crafts of employes who are parties to the agreement, and in any event is definitely and explicitly qualified by the more specific sections which follow Section 1 (a). The provisions of Section 1 (j) which speak of non-rigid adherence to existing patterns, and taking into account changes in traffic and seasonal fluctuations, relate to changes in the **amount** of allowable Sunday work and to changes in the **number** of employes on necessary Sunday work. These provisions provide a framework within which the Carrier has latitude and flexibility, but they do not permit the inclusion of a new **type** of Sunday work which does not meet the essential contractual test.

"This test set up in the agreement is a simple pragmatic test which leaves little possibility of disagreement or dispute over the meaning of the word 'necessary' or over the facts, unlike the tests applicable to five or six-day operations. The efforts of the parties in arriving at the language indicates that they meant to set up a simple and undebatable test. Enlisting the services of the former members of the Emergency Board as interpreters, mediators, and finally as arbitrators shows this.

"What may the Carrier do to meet its problem? We suggest a careful exploration of the other sub-sections of Section 1 as one possibility. If no solution is found there, recourse to the bargaining

table remains. We agree that the solution does not lie in working regular employes on the sixth or seventh day at overtime, for Section 1 (g) (7) shows that the parties agreed this should not be done if if could possibly be avoided.

"It is our conclusion that the specific question submitted to this Board of arbitration must be answered in the negative, which is to say that the Carrier did not have the right to establish a five-day staggered work week, including Sunday as a regularly assigned work day, at the freight transfer stations in Utica, Syracuse, Buffalo, Cleveland, Detroit and Gibson.

"Dated: June 4, 1956

"/s/ **David L. Cole**
David L. Cole, Chairman

"/s/ **Geo. M. Harrison**
George M. Harrison, Member"

From the foregoing, we find it difficult, if not impossible, to concur in the following from the Opinion in Award 7370, that: "This **result** is sustained by the **principles announced** in Awards 1566, 1644, Second Division; 5247, 6232, 6502, 6695, 6856, Third Division. (emphasized)" We say this for the reason that the carriers of the nation generally, interpret at least one of those awards, Award 6856, as giving them the right under the two principal rules discussed in Award 7370, to establish a five (5) day staggered workweek, including Sunday as a regularly assigned workday, where seven day operations at freight transfer stations had not been in effect prior to September 1, 1949. As evidence of this, we direct attention to the Opinion of Majority in New York Central Arbitration Board Award, NMB Case No. 212, and also the reference therein to the action of the Pennsylvania Railroad, following Award 6856.

However, since the author of Award 6856 says that the **principles announced** in that award are of the same **result** as Awards 6502 and 6695, both authored by Dr. Leiserson, we must accept such statement at its face value. That necessarily would also carry with it the principles announced by the Opinion of Majority, Cole Arbitration Board Award NMB Case No. 212, for Chairman Cole of that Board there said: "We subscribe basically to the interpretation of Referee Leiserson (Award 6695)." Also that: "Our interpretation of the Agreement, however, is essentially in accord with that in Award 6695, * * *"

We cannot though, reconcile the last clause of the following sentence from the sixth paragraph of the Opinion of Board in Award 7370 reading:

"Construing the rules as a whole, they simply mean that Sunday assignments will remain as they were before the forty hour week except where there has been such a change in operating conditions due to a change in the nature or amount of business, or other changed conditions which makes Sunday work necessary."

with either Awards 6502 or 6695, authored by Referee Leiserson, or the ruling of Arbitrator Cole in NMB Case No. 212. We refer to that part of the quoted sentence which states: "* * *, or other changed conditions which makes Sunday work necessary." We submit that such would be contrary to the restrictions in the Sunday Work Rule, and that this question would have to be handled through negotiations and agreement by the parties to the Rules' Agreement.

We conclude by making as a part of our concurring opinion in Award 7370, Docket CL-7512, the following from our Memorandum to Referee Carter in that docket, argued to him on May 21, 1956, reading:

"On the merits of the claim, we submit that this dispute is controlled by our rulings in Award 5548, 5549, 5710, 6502 and 6695 with respect to the application of paragraphs (c) and (d), Rule 30-1. As the record shows, no position in this Freight House was assigned to work or 'filled seven days per week' prior to September 1, 1949, although some Sunday work probably was performed on a call basis prior thereto. The language of this rule is not ambiguous and the rule must be applied in accordance with its plain provisions. That the authors of this Rule 30-1 (d), intended that it should have a different application than paragraph (c), covering 6-day positions, we rely on Awards 6502 and 6695. For the purpose of comparison in the wording of these two rules, they will be quoted, reading:

> '(c) Six-day Positions: Where the nature of the work is such that employes will be needed six days each week, the rest days will be either Saturday and Sunday or Sunday and Monday.
>
> (d) Seven-day Positions: On positions which have been filled seven days per week any two consecutive days may be the rest days with the presumption in favor of Saturday and Sunday.'

The members of the Presidential Board that wrote these two rules were not novices in the work of writing rules of collective agreements, and from the language used, it is clear that Rule 30-1 (d) was intended to apply in the past tense, to the weekly assignment of positions as they existed prior to September 1, 1949. This should be clear in the face of the 7-day rule covering Sunday and Holiday Work that appeared in practically all collective agreements of the crafts and classes involved, prior to September 1, 1949. Rule 30-1 (c) speaks of the present and future, and treats with positions **where the nature of the work is such that employes will be needed six days** each week; whereas paragraph (d) speaks of the past and treats with **positions which have been filled seven days per week,** mean positions which had so **been filled** prior to September 1, 1949.

Under the former 7-day rule, referred to as continuous operation, where positions **had been filled seven days per week,** all Sunday work was at straight time rates. It is clear from the language of Rule 30-1 (d), complimented by Rule 33 (c), that such was to continue. It also is clear though as stated, that such privilege was to apply only to the period prior to September 1, 1949. As authority for these statements, we call as our witness the following from Award 6502, written by one of the authors of the 40-Hour Work Week Agreement, Dr. Leiserson who not only was Chairman of the Presidential Board, but also one of the two arbitrators that **wrote these very rules, upon request of the Carrier and Union Committees,** who could not agree thereon. Dr. Leiserson said:

> 'Since there were no seven-day positions prior to September 1, 1949, and the operational requirements could be met by six-day positions supplemented by Sunday calls, we think the rules require the Carrier to continue this method of handling the work, in the absence of changes in traffic or business that might make it necessary to work full days on Sundays the same as week days. (Award 5710 reaches the same result in a similar situation).'

In this regard we do not agree with the following from Award 6856:

> 'The Organization urges that Award 6695 should be followed because the referee in that dispute, and the author

of the award, participated in the drafting of the 40-Hour Week Agreement and was used as an arbitrator to determine the meaning of certain rules incorporated therein. We do not think that this is a matter to be considered here. It is presumed that all of the contentions and arguments of the parties are merged in the written agreement. A party is not permitted to go behind his written agreement and offer special knowledge on the intent of plain provisions. It is conclusively presumed that all such matters were considered and incorporated in or left out of the agreement to the extent that the written contract shows. The integrity of written agreements requires that they be so construed. The meaning of a written agreement must be gathered from the language used in it where it is possible to do so. The meanings of written contracts are not ambulatory and subject to undisclosed or rejected intentions of either of the parties. Effect should be given to the entire language of the agreement and the different provisions contained in it should be reconciled so that they are consistent, harmonious and sensible. We cannot subscribe to the view that the meaning of the 40-Hour Week Agreement can anywise be affected by the private knowledge of the party construing it as to its intended meaning. The terms of the written agreement must prevail.'

While the immediately above principle may apply in courts of law in interpreting contracts or agreements, here we have an entirely different question which falls under the principles embodied in the Railway Labor Act, a federal law. In the promulgation of the rules here before us, as shown by the Blue Book, Dr. Leiserson and David Cole served in the role of arbitrators, while perhaps not covered by the cold letter, nevertheless, they were covered by the warm spirit of Section 7 of the Railway Labor Act, by agreement between the parties to the 40-Hour Work Week Agreement, who selected Leiserson and Cole as arbitrators. Under Section 7 (m) of the Act, the men or Board that makes an arbitration award, also interpret their own awards or rulings.

This same spirit is provided for in Section 3 First (m). Under principles established by the Adjustment Board, **the persons** (referees) who write the awards are always called upon to interpret them, although not so specifically provided for in the cold letter of the Railway Labor Act. The same principle is followed when requests come from one of the parties to a National Railroad Adjustment Board award for reconsideration or reargument thereof; the latter at the suggestion or recommendation of the United States Attorney General, and also the National Mediation Board. Surely, people who promulgate rules of collective agreements have a better knowledge or understanding of their meaning than persons who must rely on the cold letter or wording of such rules, no matter how intelligent and capable the latter may be.

Now as to Rule 33 (c), dealing with Sunday work reading:

'SUNDAY AND HOLIDAY WORK

Rule 33. (c) Previously existing provision that punitive rates will be paid for Sunday as such are eliminated. The elimination of such provisions does not contemplate the reinstatement of work on Sunday which can be dispensed with. On the other hand, a rigid adherence to the precise pattern that may be in effect immediately prior to September 1, 1949, with regard to the amount of Sun-

> day work that may be necessary is not required. Changes in amount or nature of traffic or business and seasonal fluctuations must be taken into account. This is not to be taken to mean, however, that types of work which have not been needed on Sundays will hereafter be assigned on Sunday. The intent is to recognize that the number of people on necessary Sunday work may change.'

Surely no intelligent person will say that the language of this rule is entirely clear and unambiguous. As evidence of this, it is public knowledge that capable men with trained minds, who have been called upon as referees to interpret and apply this rule, have found it necessary to consult with one another; to bone-up or gang up, so to speak, to get the opinions of one another, before reaching their conclusions as to the meaning of the rule. This being true, and surely it will not be disputed, then another principle or rule of contract construction comes into play; namely, the consideration of the legislative history or the intent of the person or persons who promulgated the rule or wrote the contract. In this regard we call again as a witness, one of the authors of the rule, the man selected by the parties who could not agree among themselves on the wording of a rule to cover the subject matter, to compose and write the rule—namely, Dr. Leiserson. See Awards 6502 and 6695.

In his Opinion in Award 6695, Dr. Leiserson said in part:

> 'The rule begins by taking away the right to overtime pay for Sunday work which employes had for many years before the 40-Hour Work Week was agreed to. The first sentence stipulates: "Previously existing provisions that punitive rates will be paid for Sunday work as such are eliminated." This, however, was conditioned by the statement in the second sentence that "The elimination of such provisions does not contemplate the reinstatement of work on Sunday which can be dispensed with." Then, to guard against freezing of the pattern as it existed prior to September 1949, there follows the provision that a rigid adherence to that precise pattern is not required, but changes in traffic or business must be taken into account. Finally, after explaining that this does not mean that types of work not needed prior to September 1949 will thereafter be assigned on Sunday, the last sentence of the rule sums up that "The intent is to recognize that the number of people on necessary Sunday work may change."
>
> This rule, so carefully balanced to safeguard the respective rights of both parties in the matter of Sunday work offers no basis for a general inauguration of Sunday work where previously this has not been necessary.'

In his Award 6502, in referring to the Sunday Work Rule 33 (c), here Dr. Leiserson also said:

> 'Rule 21 of the Agreement between the parties provides that "a rigid adherence to the precise pattern that may be in effect prior to September 1, 1949, with regard to the amount of Sunday work that may be necessary is not required. Changes in amount or nature of traffic or business and seasonal fluctuations must be taken into account." The Carrier in this case, however, does not claim that any such changes have occurred to increase the amount of Sunday work. The evidence shows that on the last nine Sundays before the 40-Hour Agreement became effective, it called only three employes, whereas before that

four were most commonly called, and sometimes five. It relies entirely on the fact that on the average about four hours' work per employe was necessary every Sunday.'

We submit that the rulings by Dr. Leiserson in Awards 6502 and 6695 are authority for sustaining awards in the instant case. Such rulings with respect to Rule 30-1(d) are also supported by Awards 5548, 5549 and 5710. Award 5247 also supports the contentions of the Brotherhood here with respect to the application of Sunday Work Rule 33(c)."

Labor Members

J. H. Sylvester
R. C. Coutts
G. Orndorff
C. R. Barnes
J. W. Whitehouse

DISSENT TO CONCURRING OPINION FILED BY LABOR MEMBERS IN AWARD NO. 7370, DOCKET NO. CL-7512

The *Concurring Opinion of the Labor Members* deals primarily with the Award of the Board of Arbitration in National Mediation Board Case No. 212, involving the same parties as were involved in Award No. 6695 of this Division.

The Opinion of the *Majority of the Board of Arbitration* in NMB Case No. 212 was not presented to nor argued before the Referee in Docket No. CL-7512, Award No. 7370; therefore, since the Labor Members have made their Concurring Opinion a part of Award 7370, in order to complete the record, the Opinion of the third (minority) Member of that Arbitration Board is set forth below in its entirety:

"NATIONAL MEDIATION BOARD

"In Arbitration—

between

NEW YORK CENTRAL RAILROAD COMPANY

and

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

"NMB Case No. 212

"MINORITY OPINION OF THE BOARD OF ARBITRATION

"The majority opinion in this case is so grossly unjust, and erroneous and is so unsupported by the evidence presented to this arbitration board that I feel compelled to dissent therefrom and to point out its defects.

"At the very outset of their opinion the majority have committed gross error in applying the law to this case and it is obvious that this error was instrumental in their conclusion to rule adversely to the Carrier. The majority members have held that the effect of an award of the Adjustment Board rendered in 1954 in a dispute involving the transfer station at Utica is **res judicata** as to that station in the present proceeding. The error consists of a misapplication of the doctrine of **res judicata** plus a misinterpretation of a provision of the Railway Labor Act.

"The nature of the doctrine of **res judicata** and the applicability of the doctrine to proceedings before the National Railroad Adjustment Board was fully explained and documented for the Board in Carrier's Exhibit 24, which was the only evidence of record on this subject. It was pointed out in this exhibit first that the doctrine does not generally apply in administrative proceedings in the same manner as it applies to court proceedings and that in any event the doctrine may not be applied where the result would be inequitable or unjust. A number of cases were cited for these propositions, including the case of **United States v. Stone & Downer Co.**, 274 U. S. 225, in which the Supreme Court held that a prior decision of an administrative agency in a case involving the same parties and the same issues, where the decisions of the agency were not subject to review, was not **res judicata** where, in the interim, the agency had rendered a different decision in the case of a competitor.

"The majority undertakes to defend their refusal to recognize this undisputed authority by reference to the language of the Railway Labor Act, contained in Section 3 (m) (Title 45, Section 153, First (m), U.S.C.A.), which provides that awards of the Adjustment Board 'shall be final and binding upon both parties to the dispute, except insofar as they contain a money award'. The majority have erroneously concluded that this language has the effect of making inoperative the function and duty of the Adjustment Board, under Section 3 (i) of the Railway Labor Act to hear and determine disputes involving the interpretation and application of collective bargaining agreements in the railway industry in every case where the Board has previously ruled on the same question. They have reached this conclusion in the face of extensive and uncontroverted evidence in this proceeding (1) that the Adjustment Board has exercised a power of review over its previous decisions extensively and without restriction over the entire period of its existence, and (2) that the railroad labor organizations themselves, including the very organization party to the present proceedings, have repeatedly urged that the Board has and should exercise this power. The majority members apparently perceive it to be significant that in none of its great many awards in which the Board has reviewed and set aside prior unsound decisions 'was any mention made of Section 3 (m) of the Act, nor of the fact that Congress as a matter of policy of providing no appeal from Adjustment Board awards nevertheless made such awards final and binding upon the parties.' To begin with, I do not know what they mean by the term 'as a matter of policy' because I assume they have no more knowledge than I do of whether the many referees who rendered these decisions had information on the intention of the Congress when it enacted this legislation. Certainly there is nothing in the statute nor, so far as I have been able to determine, in the submission of the parties in these cases, identifying the language of 3 (m) as a statement of congressional policy, as distinguished from a mere provision indicating that there was to be no appeal to the courts or to other agencies from the decisions of the Board in cases other than those involving a money award. But be that as it may, there is nothing at all mysterious about the absence of any reference in these decisions to Section 3 (m). The reason is that apparently no one, and certainly not the Adjustment Board or the courts, nor even this labor organization in this case, has ever suggested the final and binding language in 3 (m) had anything whatsoever to do with the right and jurisdiction of the Adjustment Board to re-hear its own cases and to correct its own prior errors. Carrier's Exhibit 25 consisted of excerpts from numerous typical cases in which this and other non-operating unions have urged the Adjustment Board **not** to be bound by prior

decisions in cases between the same parties involving the same facts and the same issues.

"Instead of being governed by this evidence, the majority rejected it and by way of further attempting to justify the view of the law which they have taken charged the Adjustment Board and each of the many referees who have rendered these decisions with having acted improperly and in violation of law. The majority opinion states: 'By what authority subsequent Adjustment Boards may ignore this clear legislative direction we cannot understand, * * *', and further that 'It is not within the proper authority of referees or of the Adjustment Board to set aside or ignore this legislative mandate.'

"Does it not strike the majority as being even more curious or significant that if the Adjustment Board and its referees have in fact been acting unlawfully during the whole of its twenty-two years of existence no one has ever questioned or challenged this conduct? I cannot believe that they intended these remarks to be taken seriously or in good faith in the light of the admission by counsel for the Organization in this case that the Adjustment Board can and should hear and decide subsequent similar disputes between the same parties. In his final argument Mr. Schoene said:

> 'The employes, if they had time claims, could take the same issues back because that is the only remedy for them to collect on their time claims, and conceivably a different referee might arrive at a different conclusion.'

"Do the majority accede to the view that only the employes can take repeater cases back to the Board and that the carriers have no such right? Even if they believe that, which I seriously doubt, the present case was not brought by the Carrier. It is of record that time claims were filed by the employes in these transfer stations resulting from the Carrier's decision to inaugurate seven-day service. Under the process prescribed by the Railway Labor Act these claims would have ultimately progressed to the Adjustment Board in the form of an application by the Clerk's Organization. It was shown to the Board, and the majority opinion admits, that this Arbitration Board was sitting in lieu of and in substitution for the Adjustment Board in deciding the question presented to it. How, when the Organization itself has admitted that the Adjustment Board has jurisdiction and the right to reach a different result, can the majority conclude otherwise?

"I should like, however, before leaving this subject to call attention to a further error of law which the majority committed in discussing this matter. I refer to their reference, by way of attempting to support their conclusion, to the case of **Coats v. St. Louis—San Francisco Railway Co., et al.**, rendered by the Court of Appeals for the Fifth Circuit under date of March 16, 1956, and reported at 230 F. (2d) 798. This decision, not cited by either party, is completely irrelevant to any question in the present proceeding and is in no way germane to the proposition for which the majority have cited it as authority. The only issue in that case was whether an employe who claimed he was wrongfully discharged by a railroad and who had taken his case to the Adjustment Board and there received an adverse award could later sue the railroad on the same charge in federal court. This case is one of a long line of decisions, which counsel for neither party deemed relevant*, to the

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(*) Footnote shown at conclusion of "Minority Opinion of the Board of Arbitration."

effect that the 'final and binding' language of Section 3 (m) means that once a case is adjudicated by the Adjustment Board it may not thereafter be reviewed or again adjudicated by the courts. There was no issue in the **Coats** case, and the Court made no ruling upon, the effect of the language to prohibit the Board itself from reviewing its own prior decision and its citation by the majority is inaccurate and misleading.

"The majority opinion on the merits of the dispute is equally implausible. An analysis of the reasons cited in attempted support of their conclusion to rule favorably to the Organization discloses that they have variously committed each of the following abuses of discretion and authority:

(1) Refusal to recognize or take cognizance of undisputed evidence.

(2) Selection of evidence favorable to the Organization and rejection of evidence favorable to Carrier.

(3) Distortion and interpolation of Carrier's evidence.

(4) Selection of particular contract language favorable to the Organization and rejection or ignoring of contract language favorable to Carrier.

(5) Misconstruction of contract language.

(6) Refusal to be guided by precedent of prior decisions on the same issue.

(7) Misdescription of precedent favorable to Carrier.

(8) Failure to adhere to recognized rules of contract construction.

"While indicating that their wrongful conclusion on the subject of **res judicata** was a controlling consideration in their finding in favor of the Organization, the majority have attempted to additionally support their award by an analysis of the contract and the many prior decisions which have been rendered upon it. This portion of the majority opinion commences on page 6 by claiming that many previous awards of the Adjustment Board interpreting the rules of the contract here involved resulted in confliction, inconsistency and confusion. The awards referred to in the majority opinion total forty-three in number and, of these, forty-two were shown by the evidence to be completely uniform and consistent in holding that a carrier has the right to stagger its forces to perform operations in seven-day service under this agreement where it is necessary in the operation of the railroad that it do so. One award, that by Referee Leiserson in **6695**, stands solely opposed. It strikes me as significant that the majority predicate their discussion of the issues by describing the situation as confusing, contradictory and inconsistent where the acknowledged facts of record are those I have just stated.

"They then proceed to identify a 'thread' which they found running through the contract and which they identify as a pronouncement that the railroad industry, from the standpoint of scheduling and assigning its employes to perform service on Sunday, was immobilized and frozen in the particular condition which happened to exist on August 31, 1949. They interpret the contract, by methods hereinafter described, to mean that the management

of the New York Central and of all the other major railroads throughout the country agreed, when they entered into the National Forty-Hour Week Contract in 1949, that they would never have need or occasion in the future to do any work or perform any service on Sunday that they were not then doing. They find in effect that the industry foreclosed itself from change and agreed that no matter what the requirements of the shipping and travelling public might be the railroads were not to be able to adapt their service to meet these demands. They find, in reality, not a thread, but a rope by which they say the railroads agreed to strangle themselves.

"An early contradiction in the opinion appears on page 6 where it is stated that Sunday 'work may be done at straight time if it is necessary'. This should be compared with later statements in the opinion to the effect that necessity has nothing to do with it, and that only such work may be performed on Sunday as was performed on Sunday in 1949, without any regard to necessity.

"An example of disregard and misstatement of evidence on behalf of the Carrier appears on page 6 when the majority undertake to discuss Section 1 (d) of the contract. This section provides that 'on positions which have been filled seven days per week any two consecutive days may be the rest days with the presumption in favor of Saturday and Sunday'. The majority relied heavily on this provision, to the exclusion of others in the agreement, in support of their conclusion. The Carrier pointed out in its evidence **three** reasons why this rule should not be applied the way the majority have applied it, but in describing the Carrier's contention they mention only one. They say 'The Carrier has urged that this merely identifies the days off'. The Carrier made this contention, but it also cited two other reasons in support of its position. These were: first, that the rule is qualified by the 'Note' appearing at the head of the rule which requires that it be applied consistently with the proviso that 'The expressions "position" and "work" used in Article II refer to service, duties, or operations **necessary** to be performed a specified number of days per week * * *', and, second and most important, that if this rule has the effect which the majority say it has, namely, to freeze working assignments as of August, 1949, then there would have been no need whatsoever to have written paragraph (j) into the contract, which defines the circumstances under which Sunday work may be performed. The majority do not indicate that they paid any attention at all to the Note, and do not attempt to explain why all of paragraph (j), except possibly the first sentence, is not mere surplusage if 1 (d) means what they say. If 1 (d) freezes our operations, as the majority say it does, why did the parties provide in 1 (j) the circumstances under which Sunday work could henceforth be assigned? On their view, the two are utterly inconsistent.

"An example of the manner in which the majority opinion has misstated and misconstrued the language of the contract appears at the top of page 7 of the opinion when they quote, and rely upon, the provision of paragraph (j) which states that 'The elimination of punitive pay for Sunday as such does not contemplate the reinstatement of work on Sunday which can be dispensed with.' They have underlined the word 'reinstatement' and then cite the sentence as authority for the proposition that the parties intended to prohibit the performance of any work on Sunday which had **previously** been dispensed with. They would read the rule as if it said: 'which **has** been dispensed with' whereas the language is perfectly clear and merely insures against the reinstatement of work which in the future can be dispensed with. The unjustness of this conclusion is magnified by the reference of the majority to a letter written by

the Chairman of this Board and Mr. Leiserson under date of February 27, 1949, explaining the meaning of the report of the Emergency Board of which these two gentlemen were members. It is said that this letter throws 'some light' on what was intended, and they attempt to draw a parallel between the language of the letter and the language of the contract. They significantly omit, however, to point out one most important deviation. The letter said that 'The Board did not contemplate the reinstatement of work on Sundays where it has been found it can be dispensed with.' But this is not what the contract says. When this provision was written into the contract the words 'where it has been found' were **deleted** by the parties and the language made to read as quoted above. The difference in meaning is readily apparent. As originally written by the members of the Emergency Board the language would have frozen railroad operations, but as written into the contract by the parties it clearly permits the test of whether work **can henceforth** be dispensed with.

"In listing the provisions of the contract relied upon by the Carrier and by the Referees who have rendered the many decisions favorable to the Carrier the majority, on page 7, omit any reference to three important rules. They omit (1) any reference to the Note to Section 1, (2) to the provision of Section 1 (a) which provides that **'so far as practicable** the days off shall be Saturday and Sunday' and (3) to the provision of paragraph (j) mentioned above in regard to work which can henceforth be dispensed with.

"One of the provisions which they do mention is that contained in Section 1 (a) which provides that work weeks may be staggered 'in accordance with the Carrier's operational requirements' but the majority then proceed to dismiss the pertinence of this provision by saying that this provision has 'general application in determining the type of work week and also the fluctuations (whatever that means) referred to later in Section 1'. Although admitting at two later places in the opinion that the term 'operating requirements' in fact applies to seven-day operations, and although the February 27 letter contains the statement that the term ' "consistent with their operational requirements" **qualifies the entire forty hour program'**, they nevertheless failed and refused to attach such significance to this vital provision of the contract in reaching their conclusion that operating requirements have no bearing at all on the assignment of Sunday work.

"A most shocking instance of refusal to be governed by uncontroverted evidence in the case occurs in that part of the opinion (page 8) in which the majority discuss another particular provision of the contract which they deem to be significant. This is the provision in paragraph (j) that 'types of work which have not been needed on Sunday will not hereafter be assigned on Sunday'. The Carrier argued and introduced unchallenged evidence that even if this provision be given the restricted construction that the majority have applied to it the fact nevertheless was that the operation of freight transfer houses **was** a type of work which was performed, not only on the New York Central Railroad but on other railroads throughout the country, immediately prior to September 1, 1949. In its Exhibit 21-A Carrier listed first of all a major freight transfer station on its own property, namely, that at East St. Louis, Illinois, which was operated seven days a week on and for a long time prior to August 31, 1949. The Carrier witnesses also testified extensively about this. In addition to that, the Carrier listed twenty-one other transfer stations on twelve other railroads of which it had knowledge where Sunday transfer operations were likewise

conducted. Notwithstanding these facts, and notwithstanding that the majority state in their opinion that 'Such types of necessary work may be enlarged in terms of number of employes **as well as of additional locations**', they refuse to recognize that the six transfer stations involved in this dispute were, on their own analysis of the agreement, in fact 'additional locations'.

"The majority have misdescribed the many awards of the Adjustment Board which were presented in evidence as overwhelmingly favorable to the contention of the Carrier. While listing and correcting quoting from many of these awards in their opinion, they made no attempt to distinguish them and their only comment by way of criticism it that the referees in rendering these awards 'neglected to observe or to give proper weight' to the provisions of Section 1 (b), (c) and (d) of the contract or 'to recognize that the seven-day provisions are regulated by both Section 1 (d) and 1 (j).' The fact is that in each one of the forty-two awards favorable to the Carrier the Referees dealt specifically with some or all of these provisions of the contract and reached a conclusion exactly contrary to that which the majority have reached in this instance. To attempt to depreciate the significance of these rulings by the mere assertion that all of these referees were guilty of neglect is unbelievable.

"That majority undertake on page 12 of their opinion to justify their conclusion on the basis that the interpretation which they have placed on the contract freezing railroad operations as of September 1, 1949, was adopted and agreed to by the parties because it was a 'simple test'. It is said that the parties were 'wise' in agreeing to it. Being a lawyer, the Chairman of this Board must know that in interpreting a contract the question of whether the parties made a wise or unwise bargain can have no part. The proper function of the interpreters is confined entirely to determining what the parties meant. The fact that the test of current necessity, which is what the parties in fact agreed to, may involve somewhat greater difficulty of proof, affords no license to say that that is not what the parties intended and the inclusion of these statements in the majority opinion must be characterized as nothing more than rationalization.

"On this same subject, there is another universally known and accepted rule of contract construction which is that where a contract may be given two meanings, one to produce a reasonable result and the other to produce an unreasonable or absurd result, the contract will be interpreted in a way which will permit the former to be achieved. Here we have a contract which can clearly be interpreted to mean that the parties intended, from the standpoint of the employes, to limit Sunday work to that which was actually necessary to the operations of the railroads but which permitted sufficient flexibility to insure that the railroads would be able to perform a useful and satisfactory transportation service. That is the reasonable result. The unreasonable and absurd result which the majority find the contract produced is that operations were frozen in 1949 and could not be thereafter changed, no matter what the need and without regard for the result.

"An example of selection of evidence favorable to the Organization and rejection of evidence favorable to Carrier, and of gross disregard for the rules of evidence, occurs when the majority indicate on page 12 of their opinion that they chose to rely on a hearsay statement made on behalf of the Organization as against direct and documentary evidence offered on behalf of the Carrier. It will be recalled that the Carrier offered extensive exhibits and much testimony as to why the experimental six-day operation of these

transfers in 1950 and 1951 was unsatisfactory and that as a result the Carrier reverted to the less unsatisfactory five-day operation. The majority chose to reject this evidence and to believe instead the unverified statement which they accurately describe as follows: 'Employes' witnesses, however, testified that supervision informed them that this reversion to five-day operations was due again to lack of volume of business * * *'.

"Again, the majority opinion distorts and interpolates the Carrier's evidence in the matter of loss of LCL traffic. Carrier's Exhibit 11 showed a loss of 71% of the Carrier's total LCL traffic between the date immediately prior to the Forty-Hour Week Agreement (1948) and the end of the year 1955, and a loss of 29% from the date of Adjustment Board **Award 6695** to the present time. The majority opinion says of this that 'It has not been proven that the drop in LCL volume has been caused solely or primarily by the five-day week'. This is a grossly unfair statement because the record shows the Carrier never made any such contention. The Carrier's position was merely that the closing of its transfer houses one or two days a week, with resulting delays of up to four or five days in the further dispatchment of this freight, produced a non-competitive and undesirable service from the standpoints of time and reliability.

"Further, on this subject, the evidence showed that these transfer stations had been operated seven days a week since March 1, 1956, and the Carrier's exhibits showed a very significant and spectacular improvement in reduction of delays and time in transit of LCL freight. In terms of number of cars left over and unworked at these transfers, improvement in relation to total cars transferred was from 139% in February to 31% in April. The evidence shows that about 8% more man hours were used in the seven-day operation, but that this was substantially offset by a 6% reduction in output per man hour. On this evidence the majority elected to believe that the improved performance under the seven-day week 'may be ascribed partly to the use of more total man hours than in the five-day operation, because production per man hour in fact declined by about 6%'. I do not understand this statement and can only suggest that the statement which follows it to the effect that 'No one could reasonably argue that operations on an every day basis will not tend to diminish delays caused by week-end accumulation of arriving cars * * *' shows that the majority of the Board understood, but refused to be governed by, the fact that the seven-day operations constituted a necessary and desirable improvement in the Carrier's service.

"On page 14 of their opinion the majority members undertake 'by way of conclusion, * * * to summarize the controlling considerations in this case.' The first consideration listed is the **res judicata** effect of **Award 6695**, heretofore dealt with. They then go on to recite that they subscribe 'basically to the interpretation of Referee Leiserson' in that Award; ignoring and again failing to distinguish the forty-two contrary awards rendered by seven other different and experienced referees.

"The result of the award of the majority in this case is to produce a situation with respect to the right of a carrier to perform work on Sunday which is infinitely worse and more restrictive than the one which it had even under the old so-called 'continuous operation rule'. While the majority have found, properly, that that rule was abolished with the adoption of the five-day week, the effect of his award is to preserve that rule and to carry it forward and to hold that it is still applicable. This is so because on their interpretation of the agreement the Carrier can do now only what

it could do and did do under that rule prior to September, 1949. The result is to write the continuous operation rule back into these contracts, but without even the right to now seek to qualify additional operations even under the restrictive provisions of that rule as it previously existed. According to the majority, we are now and forevermore, so long as this contract remains in effect, stuck with what was 'necessary to continuous operation' in 1949. Certainly there was nothing by way of evidence of record in this proceeding or in the report of the 1948 Emergency Board nor in the events leading up to the adoption of the agreement of March 19, 1949, which lends one iota of credibility or support to such a conclusion. All of the evidence was exactly to the contrary.

"The hostile treatment of the Carrier's evidence, the favorable and unwarranted inferences on the employes' evidence, the selection of certain words from the agreement to the exclusion of other language of the contract, the wrongful use of the doctrine of **res judicata**, and the decision to follow the award of one referee (who happended to be a member, with the Chairman, of the Emergency Board which recommended the five-day week in the railroad industry) instead of the well-reasoned opinions of seven referees who have held to the contrary, all to reach the unreasonable and unrealistic result which this award would produce, indicate that the majority have committed the grossest kind of error in reaching their conclusion in this case.

"L. W. HORNING

"STATE OF ILLINOIS }
COUNTY OF COOK } SS.

"On this 14th day of June, 1956, before me personally appeared L. W. HORNING, to me known and known to me to be the person described in and who executed the foregoing opinion of minority of the Board of Arbitration, and acknowledged to me that he executed the same.

"LOLITA E. BUONAGINDI
Notary Public

"My Commission expires September 7, 1959

"(*) This case or cases like it, of which there are many, was undoubtedly what counsel for the Organization had in mind when, in answer to a question by the Chairman at page 885 of the Record as to whether there have 'been any court rulings as to the meaning of "final and binding" ' he said 'I do not know of any that would be applicable here'."

This Minority Opinion points out the numerous errors, unsound reasoning and the fallacious foundation on which a sustaining Award was rendered by the Board of Arbitration in NMB Case No. 212, therefore, we dissent to this Concurring Opinion.

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