Award No. 7719
Docket No. CL-7651

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

H. Raymond Cluster, Referee

PARTIES TO DISPUTE:

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

ST. LOUIS-SAN FRANCISCO RAILWAY COMPANY

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

(1) The Carrier violated the terms of the currently effective Agreement between the parties when effective Friday, June 4, 1954, it changed the rest days of the third shift car clerk position, West Yards, Ft. Worth, Texas in such a manner that the occupant was required to work 8 straight days without a rest day and was allowed only pro rata rate of pay for the sixth and seventh days of his work week, instead of at time and one-half.

(2) That the occupant of the third shift car clerk position, P. E. Dial, now be paid the difference between what he was paid and 8 hours at time and one-half rate of his position on Sunday, June 6th and Monday, June 7th, the sixth and seventh days of his work week.

EMPLOYES' STATEMENT OF FACTS: The third shift car clerk position at West Yards, Ft. Worth, Texas, has always been a seven day position, relieved on the rest days since January 1, 1946 by a regularly assigned relief employe, an extra employe or worked by the regular incumbent of the position. Prior to the effective date of the Forty Hour Week Agreement, September 1, 1949 the bulletined rest day was Thursday (See Employes' Exhibit 1 (a)). With the effective date of the Forty Hour Week Agreement, which required the assignment of two rest days instead of one, the rest days were, apparently, designated as Monday and Tuesday (See Employes' Exhibits 1 (b) and 1 (c)), although we have no official notice of such designation and the position was not rebulletined. Apparently, although again the General Chairman received no notice of change, sometime in 1950 the rest days of the position were changed to Sunday and Monday but the incumbent remained on the position and it was not bulletined (See Employes' Exhibit 1 (d) and 1 (e). The rest days remained Sunday and Monday until changed as per Mr. R. C. Grayson's file 69-4-2 of June 2, 1954 (See Employes' Exhibit 1 (f)). By the latter change, the incumbent, Mr. Dial, was required to fulfill and perform the duties of his position for 8 straight days June 1 to June 8, 1954 inclusive without a day of rest for which he was paid at the pro rata rate of the position for each of the 8 days.

claimant's work week remained the same before and after the change. The applicable agreement rules, as they have been interpreted by this Division in awards above referred to, require a denial of this claim and this Division is requested to find that the Carrier did not violate the agreement.

All data in support of Carrier's position have been presented to the employes and made a part of the particular question in dispute.

(Exhibits not reproduced.)

OPINION OF BOARD: Claimant occupied the position of third shift car clerk at West Yard, Fort Worth, Texas. Prior to June 4, 1954 this position was assigned to work Tuesday through Saturday, with Sunday and Monday as rest days. By notice of June 1, 1954, Carrier changed the rest days of this position, effective Friday June 4, from Sunday and Monday to Wednesday and Thursday. As a result, Claimant worked Tuesday through Saturday, May 25-29; had Sunday and Monday, May 30-31 as rest days; and then worked Tuesday—June 1, Wednesday—June 2, Thursday—June 3, Friday—June 4, Saturday—June 5, Sunday—June 6, Monday—June 7, and Tuesday—June 8. He then had Wednesday—June 9 and Thursday—June 10 as rest days.

The claim is that Sunday, June 6 and Monday June 7 were the sixth and seventh days of his work week and that he should have been paid at time-and-one-half for these days instead of at the pro rata rate.

Although there is no rule in the Agreement between the parties specifically authorizing Carrier to change rest days, such right is conceded and no issue is raised by Claimant on this question.

The effect of a change in rest days upon the work week has been the subject of numerous disputes which have been considered by this Division, and a great many awards have been cited by the parties to support their contentions. An indication of the complexity of the issues involved in these disputes and the inconsistency of decisions concerning them is found in the fact that a number of awards are cited by both parties to support their oppoisite conclusions. The claims which have resulted from changes in rest days fall generally into two groups. One group is composed of claims under so-called guarantee rules where the change in rest days has resulted in reducing an employe's "work week" below five days. Examples of such claims are Awards Nos. 5854, 5998, 6211, 6519, and 7324. The other group of claims are those filed under so-called overtime rules in instances where the change in rest days has resulted in an employe's working more than five days in his "work week", such as the claim in the instant case. Examples of such claims are Awards Nos. 5113, 5464, 5807, 6281, 6282, 7319 and 7320.

We will not attempt to discuss and distinguish or relate all of the previous awards. However, it can be said that more recent awards have held that a change in rest days of necessity brings about a change in the work week. Awards Nos. 6281, 6282, 7319 and 7320. In cases such as the one before us, where the claim is that more than five days have been worked in the work week, the essential question is to define the precise work week involved. Under the principles enunciated in the cases last above cited, it is clear that Claimant's new work week began on Friday, June 4. He worked five days—June 4, 5, 6, 7 and 8 and was then off for two days, June 9 and 10. Therefore in the work week beginning June 4, he did not work more than five days and is not entitled to any additional pay under Rule 43, the overtime rule of the applicable agreement. This was the holding in Award No. 7320, recently decided by this Division, which involved almost the precise factual situation which we have before us here.

The result of holding that Claimant's new work week began on June 4 is to foreshorten his work week which began on Tuesday, June 1 to three days—Tuesday, June 1, Wednesday, June 2, and Thursday, June 3. A similar

situation was present in Award 7320, where the week preceding the new work week was shortened to four days. In this case, Claimant argues that if it is held that his new work week began on June 4 and consequently that he is not entitled to time-and-one-half for the work performed on Sunday, June 6 and Monday, June 7, he should be granted an additional two days pay at pro rata rate for the two days which were cut off of his previous work week, thus bringing it below the five days to which he is entitled under Rule 51, the guarantee rule in the Agreement. This argument was also made in Award 7320 and the Board there refused to consider it on the ground that there was no claim before it for pay for days not worked, but only a claim for overtime payment for two days worked. The same situation confronts us here and we abide by the ruling in Award 7320.

It has been contended by Petitioner that some denial Awards in the claims brought under the guarantee rule have been based upon the assumption that Carriers are liable to claims for overtime payment in situations such as the one in this case. In view of the restatement of our opinion in this case that such a claim cannot be sustained, it may be that the way is now clear for a determination of the issue argued in this case under the guarantee rule but not raised by the claim, when a claim properly raising that issue is brought before the Board.

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

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

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

That the Agreement was not violated.

AWARD

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: A. Ivan Tummon
Executive Secretary

Dated at Chicago, Illinois, this 25th day of February, 1957.

SPECIAL CONCURRENCE TO AWARD NO. 7719, DOCKET NO. CL-7651

The Carrier Members concur in the Special Finding in this Award which stipulates:

"That the Agreement was not violated"

but dissent to that portion of the Opinion which premised the above Special Finding on **Awards Nos. 7319, 7320** and **7324.** Accordingly, the Dissents to Awards 7319 and 7324 and the Special Concurrence to Award 7320 are made a part hereof.

The Opinion herein holds, and correctly so, that a change in rest days of a position brings about a change in the **work week** of the position. Such a conclusion was sufficient to deny the claim in this Docket inasmuch as the dates for which claim was here made thereby became **work days** of the **new work week.** In relying on the erroneous theory advanced in the Opinion in Award No. 7319, a conclusion was reached that a change in rest days,

regardless of when Carrier's notification provided the change to be effective, could not be affected until the **first work day** of the **new work week.**

The facts in the present Docket disclose that the notification of the change in rest days, which thereby acted to cause a change in the work week, provided the change to be effective as of the **first work day** of the **new work week;** hence, **Award No. 7320** is held to be controlling in this case.

The error in relying on **Awards Nos. 7319** and **7320** is threefold:

There is no rule in the Agreement before us requiring advance notice to employes before a change in rest days be effected. In this respect, this Award holds:

> "Although there is no rule in the Agreement between the parties specifically authorizing Carrier to change rest days, such right is conceded and no issue is raised by Claimant on this question."

Following this same line of reasoning, there is no rule in the Agreement which in any way limits the Carrier as to when it can make a change in assigned rest days effective. The absence of such a provision or provisions is significant. It is the rule of contract construction that except in so far as it has limited itself by agreement, all rights remain with the Carrier (Award 7296, Carter). There being no limitations or restrictions in the Agreement as to when a change in rest days can be made effective, such determination was and is a prerogative of Carrier. Therefore, in relying on Award No. 7319, which holds that a change in rest days cannot be effective until the first work day of the new work week, the Opinion in this dispute disregards the statutory authority vested with this Board. Such a strained interpretation placed meaning on the Agreement not found therein, expressly or otherwise. If the parties had intended such a construction on their Agreement, it would have been a simple act for them to have provided appropriate language to cover (Award 6044, Whiting); however, as stated by Referee Carter in Award 7166:

> "No such result was intended by the rules and this Board is not authorized to write such an intent into them in the form of an interpretation of the agreement. If any change is to be made it must be by negotiation."

With respect to the rule relating to the **work week** of a regularly assigned employe, the unanimous opinion of the Members of Special Board of Adjustment No. 136, in Case No. 14, was:

> "There is no prohibition in the rules against assigning an employe **to commence work on some day other than the first day of the work week."** (Emphasis supplied.)

See Dissent to Award No. 7324.

The framers of the Forty-Hour Work Week Agreement, with a full realization that changed operating conditions would bring about a necessity for a change in regularly assigned rest days (which, of course, would automatically bring about a change in the assigned work week), granted the Carriers the right, under such conditions, to change rest days—the only requirement being the number of days' advance notice to be extended to employes who would be affected by such change. In granting such right to the Carriers, it was not the intent that Carriers would be penalized for exercising such right by the exaction of a penalty either under the Overtime or Guarantee Rule in agreements. Since the adoption of the 40-hour work week, we are dealing with an entirely new term, i.e., "WORK WEEK."

In their Ex parte Submission in this dispute, the Employes state:

> "While there is no specific rule authorizing a change in rest days, the employes have permitted it to be done without protest

and a letter of understanding providing that when rest days are changed, the employe may, on 36 hours advance notice, exercise seniority."

This letter of understanding is attached to and made a part of the basic Agreement effective January 1, 1946; it reads, in part:

"In accordance with the letter agreement of June 18, 1948, it is understood that when the assigned rest days of a regular position or a regular rest day relief position are changed, the regular incumbent has the option of retaining the position or, within ten days thereafter and upon 36 hours' advance notice, exercising seniority rights to any position held by a junior employe, and that other employes affected may exercise their seniority rights in the same manner."

Here we find the employe affected by the change in rest days is allowed two options:

(a) Remaining on the position under the changed conditions, or

(b) Exercising his seniority and displacing on a position occupied by a junior employe.

If the employe elects to exercise the latter option, he serves the required advance notice and displaces on a position occupied by a junior employe, and in so doing moves from one assignment to another; the vacancy thus created is bulletined for bids and the successful bidder is accordingly assigned to the vacancy. There can be no question but that such a move constitutes a change in assignment, as provided in Overtime Rule 43 (c) and (d).

If the employe elects to exercise his first option and remain on the job under the changed conditions, he likewise is moving from one assignment to another; the only part of the old work week remaining is the job content, and, therefore, Rule 43 (c) and (d) would apply. To hold otherwise is drawing a distinction without a difference. The employe's work week, work days, rest days and starting time in the new work week are not the same as in the prior work week.

Award 7319, as well as the Award under discussion here, recognizes that a change in rest days changes the work week of a position. This being so, the employe's assignment is not the same but, rather, is different from his prior assignment. The days of work and rest days of an assignment are as important as the rate of pay and daily assigned hours. The quoted provision from the letter agreement recognizes that a change in rest days on a position is so substantial that it changes the assignment from that which the employe applied for and was awarded. It is not to be regarded lightly that, when a change in rest days occurs, the employe affected is given full displacement rights to any position held by a junior employe. That such an employe may not elect to exercise displacement rights does not negate the fact there was a change in the assignment. The parties have agreed that when a change in rest days occurs, instead of bulletining the position in the first instance, they would permit the employe to remain on the assignment, if he so desires. Should the employe elect to exercise his seniority, the position then would be bulletined.

The weight of authority for a denial Award in this dispute on a basis other than that laid down in Award 7320 is with the Carrier, viz., Third Division Awards 5854, 5998, 6211, 6281, 6282; Cases 14 and 15 of Special Board of Adjustment No. 136, and Awards Nos. 28, 29, 30, 31, 32, 33, 34, 35 and 37 of Special Board of Adjustment No. 117.

Special Boards of Adjustment are set up under the auspices of the National Mediation Board in order to relieve the backlog of cases on this

Division. A Carrier and an Organization with a number of cases before the Board agree to a Special Board of Adjustment. The parties, by joint request, withdraw from the Division those cases desired withdrawn, and they are certified to the National Mediation Board for appointment of a Neutral Member. This Neutral Member sits with a representative of the Carrier and a representative selected by the Organization, and disposes of each dispute with an Award. In other words, the same method is followed as that of the Adjustment Board itself. The National Mediation Board pays the salary and expenses of the Neutral Member of such Special Boards.

A like method is being followed on another Division of the Adjustment Board in order to relieve the backlog of disputes before it.

Awards of the Special Boards of Adjustment are a matter of record.

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