Award No. 8145
Docket No. TE-7715

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Frank Elkouri, Referee

PARTIES TO DISPUTE:

THE ORDER OF RAILROAD TELEGRAPHERS

CHICAGO AND WESTERN INDIANA RAILROAD COMPANY

STATEMENT OF CLAIM: Claim of the General Committee of The Order of Railroad Telegraphers on the Chicago and Western Indiana Railroad that:

Case No. 1

1. Carrier violated the agreement between the parties when it failed and refused to compensate James A. Porter at the rate of time and one-half for work performed on Monday, October 19 and Tuesday, October 20, 1953, the sixth and seventh days of his work week after having completed forty hours in his work week of his relief assignment.

2. Carrier shall now compensate J. A. Porter for the difference between the straight time paid and the time and one-half rate due for services performed on October 19 and 20, 1953.

Case No. 2

1. Carrier violated the agreement between the parties when it failed and refused to compensate John Vaisvil at the rate of time and one-half for work performed on Tuesday, October 20, 1953, the sixth day of his work week after having completed forty hours in his work week of his relief assignment.

2. Carrier shall now compensate J. Vaisvil for the difference between the straight time paid and the time and one-half rate due for services performed on October 20, 1953.

Case No. 3

1. Carrier violated the terms of the agreement between the parties when it required or permitted Roy S. Owens and Richard J. O'Connor on Tuesday, October 20, 1953 to suspend work.

2. Carrier shall now compensate R. S. Owens and R. J. O'Connor at the straight time rate for 8 hours on October 20, 1953, because not used to perform service to which they were entitled.

Case No. 4

1. Carrier violated the terms of the agreement between the parties when it required or permitted A. B. Klimson, R. V. Janutis and C. D. Tullis on Friday, October 23, 1953 to suspend work.

2. Carrier shall now compensate A. B. Klimson, R. V. Janutis and C. D. Tullis at the straight time rate for 8 hours on October 23, 1953, because not used to perform the service to which they were entitled.

Case No. 5

1. Carrier violated the terms of the agreement between the parties when it failed and refused to compensate C. D. Harris, A. C. Hale and H. L. Jenkinson at the rate of time and one-half for work performed on Tuesday, October 20 and Wednesday, October 21, 1953, the sixth and seventh days of their work weeks of their relief assignments.

2. Carrier shall now compensate C. D. Harris, A. C. Hale and H. L. Jenkinson for the difference between the straight time paid and the time and one-half rate due for services performed on October 20 and 21, 1953.

EMPLOYES' STATEMENT OF FACTS: The following calendar month of October, 1953 is submitted for the convenience of your Board:

OCTOBER

SUN	MON	TUES	WED	THURS	FRI	SAT
				1	2	3
4	5	6	7	8	9	10
11	12	13	14	15	16	17
18	19	20	21	22	23	24
25	26	27	28	29	30	31

Case No. 1

On October 14, 1953 Carrier issued Bulletins No. 507 and 508 changing the rest days on regular and relief assignments here involved. Employes' Exhibits No. 1, 2, 3 are reproductions of the letter and bulletins informing the Employes and their Representatives of changes contemplated. These changes affected 29 regular and 17 relief assignments.

Claimant Porter was regularly assigned to a relief assignment with a work week beginning on Wednesday with Monday and Tuesday as rest days. In his work week beginning on Wednesday, Oct. 14, 1953, Mr. Porter worked Oct. 14, 15, 16, 17, 18, 19 and 20, or seven consecutive days. Claim was made for Oct. 19 and 20, the sixth and seventh days, when the Carrier failed and refused to compensate him at the time and one-half rate of pay to which he was entitled.

Case No. 2

Claimant Vaisvil was regularly assigned to a relief assignment with a work week beginning on Thursday, which had Tuesday and Wednesday as rest days. In his work week beginning on Thursday, October 15, 1953, Mr. Vaisvil worked October 15, 16, 17, 18, 19, and 20, or six consecutive days. Claim was made for October 20th, the sixth day, when the Carrier failed and refused to compensate him at the time and one-half rate of pay to which he was entitled.

Case No. 3

Claimants Owens and O'Connor were assigned to regular positions with work weeks beginning on Tuesday and had Sunday and Monday as rest days.

In their work weeks beginning on Tuesday, Oct. 13, 1953, they worked Oct. 13, 14, 15, 16 and 17. On Sunday, October 18 and Monday, Oct. 19, 1953, the Carrier permitted them to observe their rest days. However, on Tuesday, Oct. 20, 1953, the Carrier required or permitted them to suspend work. Claim was made for 8 hours at straight time rate because they were not used to perform service to which they were entitled on October 20, 1953.

Case No. 4

Claimants Klimson, Janutis and Tullis were assigned to regular positions with work weeks beginning on Monday, and had rest days of Saturday and Sunday. In their work weeks beginning on Monday, October 12, 1953 they worked October 12, 13, 14, 15 and 16. They were not required to work their rest days of Saturday, Oct. 17, and Sunday, Oct. 18. They then worked Oct. 19, 20, 21 and 22. On Friday, Oct. 23, 1953, they were permitted or required to suspend work, and the Carrier refused to pay the claim for 8 hours at the straight time rate.

Case No. 5

Claimants Harris, Hale and Jenkinson were regularly assigned to relief assignments with work weeks beginning on Thursday with Tuesday and Wednesday as rest days. In their work weeks beginning on Thursday, October 15, 1953, they worked October 15, 16, 17, 18, 19, 20 and 21. October 20 and 21, 1953, were the sixth and seventh days of the work weeks of the Claimants and claim was made for 8 hours' pay at the time and one-half rate. The Carrier paid the claimants at the straight time rate and refused to accept the claim for time and one-half.

After extensive conferences and handling of these disputes on the property, the highest officer designated by the Carrier to settle grievances declined the claims on February 28, 1955.

The dispute is now properly before your Board for decision.

POSITION OF EMPLOYES: There is a collective agreement in effect between the parties with effective date of September 1, 1949, and by this reference is made a part of this submission. While the entire agreement supports the Employes' Position, we wish to call particular attention to the following articles.

"Rule 4—BASIC DAY—OVERTIME—CALLS:

(a) Eight (8) consecutive hours, exclusive of the meal period, shall constitute a day's work, except that where two or more shifts are worked, eight (8) consecutive hours with no allowance for meals shall constitute a day's work.

(b) Except as provided in Section (e) of Rule 4, time worked in excess of eight (8) hours, exclusive of meal period, on any day will be considered overtime and paid for on the minute basis at time and one-half rate.

Work in excess of 40 straight time hours in any work week shall be paid for at one and one-half times the basic straight time rate except where such work is performed by an employe due to moving from one assignment to another or to or from an extra or furloughed list, or where days off are being accumulated under Paragraph (g) of Rule 7.

Employes worked more than five days in a work week shall be paid one and one-half times the basic straight time rate for work on the sixth and seventh days of their work weeks, except where such work is performed by an employe due to moving from one assignment

notified by Bulletin 508 of the change in their rest days and assignment in accordance with Rule 7(L) cited above. Their work weeks changed Monday, October 19th and their old rest days and work weeks were no longer in effect. In the same manner as the employes who allegedly worked their sixth and seventh days the employes are contending that these claimants worked less than five days between the rest days of their former assignment and the rest days of their new assignments. It would seem that the employes are claiming in both instances that the Carrier could properly make the change provided in 7(L) of the current agreement so long as their rest days in the first week of their new assignment remained as they were in the old. That, of course, would not be a proper interpretation of the rule because it is clearly evident the rule would be meaningless. When the Carrier issued its Bulletins 507 and 508, under 7(L), to change the claimants rest days, it was necessary to make the change effective on a definite date. On October 19th, their previous work weeks and rest days were no longer in existence and the agreement does not provide that they should be worked and paid as they were prior to the expiration of the 72 hour notice. The rules do provide that on and after the expiration of the notice, they will have new assignments and be compensated on the basis of these new assignments.

The Board's attention is again directed to Carrier's exhibit "C" attached. It will be noted that on the left is shown the seven day period prior to the change and the seven day period subsequent to the change. On the right is the same period with no change in the claimants assignments. In each instance the claimants had five work days and two rest days in the seven day period prior to the change and five work days and two rest days following the change, which the Board will note is the same number of work days and rest days they would have had if no change had taken place. It therefore certainly cannot be argued the claimants worked less than or more than the number of days encompassed in their former assignment.

If the employes are contending that the Carrier cannot make a change under 7(L) without paying for it at additional straight time or penalty rates then, as we pointed out previously, the rule is without meaning. In Carrier's exhibit "E" there are circled, in the new work week, effective Monday, October 19th, the claim dates as presented to your Board by the organization. Each date circled on the left corresponds to rest days or work days in the old work week. It is apparent the organization is of the opinion that claimants old work week should continue to exist even though the abolished position required changes in rest days and work days so that all concerned would have a work week of five days with two rest days. Rest days attach to and are a condition of a **position**, not an individual.

The Carrier has shown that the claimants were not worked more than five days or less than five days in their assigned work weeks or on their assigned rest days but were properly paid for the period, October 12th through 25th, in accordance with Rules 7(a), 7(e), 7(i), 7(L) and 4(b) of the current agreement. Claims for payment at time and one-half or straight time on certain claim dates are without merit and should be denied. See Award 1804 of the Second Division and Awards 5854, 6281, 6561, and 6973 of the Third Division.

All data in support of Carrier's position have been submitted to Organization and made a part of this particular question in dispute. The right to answer any data not previously submitted to Carrier by Organization is reserved by Carrier.

(Exhibits not reproduced.)

OPINION OF BOARD: The Claim herein involves five cases, all of which grew out of the abolishment of a position at State Line Interlocking Plant and the consequent changing by the Carrier of Claimants' rest days. The individual cases (some of which involve several employes) can be divided into two categories, as follows: (1) Cases 1, 2, and 5 involve employes holding regular relief positions; these employes contend that they worked more than

forty hours in a work week and for the excess over forty hours they request the difference between the straight time rate which the Carrier paid them and the time and one-half rate provided by the Agreement for overtime work. (2) Cases 3 and 4 involve employes holding regular assignments who contend that they were suspended from work in that they were not permitted to work five days in a work week, and they now request payment of the straight time rate for the time that they were so suspended.

The facts and rules involved in Cases 1, 2, and 5, all involving employes holding regular relief positions, are similar to those involved in Award 5586. Of particular significance is the fact that the fourth paragraph of Rule 7 (e) of the Parties' Agreement herein is virtually identical to the fifth paragraph of Rule 32, Sec. 1 (e), of the Agreement in Award 5586; it was pointed out in said Award that the "determination of the issue presented * * * devolves upon the effect to be given to" said provision. The reasoning of sustaining Award 5586 is logical and sufficiently persuasive to be given controlling weight in the determination of Cases 1, 2, and 5 herein.

The facts and rules involved in Cases 3 and 4 produce an issue which has been before this Division numerous times and, as pointed out in Award 8144, it is impossible to harmonize the conflicting awards thereon that have been rendered by the Division with the assistance of different Referees. The present Referee participated with the Division in the rendition of the latter Award and as stated therein the issue in question was correctly evaluated and ruled upon in Award 7324, which sustained the Organization's Claim. Also see Award 6519.

The above considered, it is concluded that the Carrier violated the Agreement in each of the five cases that are included in the Claim herein, except as to Claimant Tullis. The Record contains conflicting statements of fact regarding the status of Claimant Tullis prior to October 19, 1953. The Employes indicated that he had the same work week as Claimants Klimson and Janutis—see page 3 of Employes' Ex Parte Submission; but the Carrier indicated that his assigned days were Friday thru Tuesday, with Wednesday and Thursday rest days—see page 3 of Carrier's August 25, 1955 submission. This conflict makes it impossible to determine the merits of Claimant Tullis' Claim and it accordingly must be dismissed.

The Claim should be sustained as to all named Claimants except Claimant Tullis.

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

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

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

That the Carrier violated the Agreement to the extent indicated in Opinion.

AWARD

Claim of all Claimants except Claimant Tullis sustained. Claim of Claimant Tullis dismissed.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: A. Ivan Tummon
Executive Secretary

Dated at Chicago, Illinois, this 19th day of November, 1957.

DISSENT TO AWARD 8145, DOCKET TE-7715

The erroneous premises upon which a sustaining decision was entered in the present Award were fully developed in our **Dissents** to **Awards 8103, 8077 and 7324** which are applicable here. They are, therefore, expressly made a part of this Dissent.

Additionally, however, the Majority relies on **Award 5586,** which is erroneous in itself, and relies on an Award, **Award 5113,** which, if properly analyzed, offered no support whatsoever.

First of all, **Award 5586** dealt with the provisions of a rule identical with Rule 7 (e) in the Agreement before us which reads in part,—

> "* * * changes in the assignment of regular relief positions from those advertised will constitute a new position but the employe holding the regular relief position at time of change will have the option of retaining it or exercising displacement privileges. In the latter event, the relief position so vacated will be rebulletined. * * *"

With respect to such a provision, **Award 5586** said,—

> "* * * Although Paragraph 5 of Rule 32, Sec. 1(e), initially provides that a change in the assignment of regular relief positions will constitute a new position, the nature of that change is qualified with respect to the incumbent. The effect of the qualifying language is to permit the incumbent to elect to treat the position as a new one or as the old one as changed by the Carrier. That is evident from the language of the rule. The rule does not give the incumbent preference in bidding for the 'new' position but provides that she shall retain it. Thus, some vestige of the old position must remain when the incumbent elects to remain, otherwise there would have been nothing to retain. One cannot retain that which is no longer in existence nor retain something which is newly created. We conclude, therefore, that with respect to Claimant when she elected to remain on the old position, as changed, she has not moved to a 'new' assignment and hence the exception in Rule 29(b) and (c) does not apply. (See Award 5113.)"

Such reasoning is wholly illogical and diametrically opposed to the language of the rule. The parties there, as here, expressly agreed that changes in regular relief positions from those advertised would constitute **new positions.** Nothing this Board can say or do will change this fact. We cannot, by interpretation, change the language of a rule from that which the parties themselves have written. (**Awards 7166,** Carter, **and 7718,** Cluster.) **Award 5586** was in error on that account.

Award 5113, upon which **Award 5586** relied, involved a situation where a change in rest days became effective on a Thursday. Unnder the prior existing work week, Thursday was a work day of the work week, but under the new or changed work week, Thursday became one of the two consecutive days off, or rest days, assigned the position. In that case the claimant employe worked on the Thursday. Because of having worked on a rest day of the new work week or in excess of forty hours in the new work week, the claim made therein was sustained. It is obvious, therefore, that **Award 5113** offered no support to the claim in **Award 5586** nor would it offer any support to the claims in the present Award.

For the reasons stated, we dissent.

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