Award No. 8868
Docket No. TE-7998

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Norris C. Bakke, Referee

PARTIES TO DISPUTE:

THE ORDER OF RAILROAD TELEGRAPHERS

THE TEXAS AND PACIFIC RAILWAY COMPANY

STATEMENT OF CLAIM: Claim of the General Committee of The Order of Railroad Telegraphers on The Texas and Pacific Railroad, that

(1) The Carrier violated the Agreement between the parties when it changed the assigned rest days of P. E. Harris, Longview, Texas, and permitted him to work only four days in his work week beginning Thursday, October 14, 1954, and

(2) Carrier shall now compensate Claimant P. E. Harris for one additional day at the straight time rate because of being deprived of this work.

EMPLOYES' STATEMENT OF FACTS: The Agreements between the parties to this dispute are on file with this Division of the National Railroad Adjustment Board, and by reference thereto are made a part of this submission.

The claim arises out of Carrier's refusal to pay claimant P. E. Harris, regularly assigned relief employe Longview, Texas, a pro rata day's pay for Oct. 14, 1954, at the rate of said assignment, which claimant lost due to Carrier's change in the rest days of his position. The facts are not in dispute.

Prior to October 14, 1954, claimant Harris held a regularly assigned relief position at Longview, Texas. His assigned work week was Thursday through Wednesday with rest days of Tuesday and Wednesday. Effective October 13, 1954, Chief Dispatcher J. W. McCoy in his notice dated October 7, 1954, issued the following instructions relative to changing claimant's rest days. (Employes' Exhibit "A"):

"* * *

Effective same date (Wednesday, October 13) the rest days of third trick operator Longview will be Friday and Saturday instead of Thursday and Friday and relief Operator Longview will work

in those awards were not assigned to relief positions. They were assigned to first and second tricks, respectively. Your Board ruled even then that after the change in rest days, claimants were on new work weeks. Surely in the instant claim, where the rule says it is a new position when the assignment is changed, you could not reasonably rule otherwise. The same organization, petitioner here, was petitioner in Awards 6281 & 6282. It appears that they have little regard for your Board's awards, otherwise, this claim would not have been submitted to you.

The Carrier asserts that this claim is entirely without merit and requests your Board to so decide.

It is affirmed that all data submitted herein in support of the Carrier's position has heretofore been presented to the Organization and is hereby made a part of the question in dispute.

(Exhibits not reproduced.)

OPINION OF BOARD: As will be noted from the statement of claim, this is another case arising out of change in claimant's rest days.

There is no dispute about the facts. Harris was the occupant of a regular rest day relief assignment, established under the provisions of Article 6, Section 1 (e) of the Agreement. Accordingly, he was assigned to work in rest day relief service at Longview, Texas, on Thursdays, Fridays, Saturdays, Sundays and Mondays. He thus had a work week beginning on Thursday, with rest days of Tuesday and Wednesday.

On October 7, 1954, the Carrier issued a notice to Harris and others outlining a number of changes to be made. Among these changes was one affecting claimant Harris. He was directed to work a second trick on Tuesdays instead of a third trick on Thursdays; also that his rest days were to be Wednesday and Thursday instead of Tuesday and Wednesday. All of the changes covered by the notice were to be "Effective Wednesday, Oct. 13."

During Claimant's work week that began on Thursday, October 7, he worked the usual five days—through Monday, October 11—and observed his rest days of Tuesday, the 12th, and Wednesday, the 13th. But he was not permitted to work on Thursday, the 14th, because in the Carrier's view his new work week became effective on Wednesday, the 13th, and Thursday was one of the rest days of the new work week. This resulted in Harris being off duty three consecutive days.

It is not particularly important where we start to pick up the essence of the dispute involved here, and Award 5129 is as good a place to start as any.

As the Carrier points out, the claim in Award 5129 arose before the adoption of the 40 Hour Week Agreement but it is interesting to note that the language of the rules in that award is no different in principle than that involved in the agreement before us, and the language in "the fifth paragraph of Article 6, Section 1 (e) of the current agreement" which reads:

> "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."

which Carrier relies on as a defense (i. e., that the claimant exercised his option by electing the new position) is identical with that portion of the Rest Day rule in effect in Award 5129.

It will be noted also the Carrier in its "Position of Carrier" in Award 5129 relies on Award 1814 from which is quoted inter alia the following: "We hold only that the parties, having determined in advance that the carrier has the right for good cause to make this particular readjustment, have **impliedly** agreed to accept the consequences of it, one of which is that a train dispatcher may lose a day from his assignment while such change is being made effective." (Emphasis ours.)

What has happened since Award 5129 was adopted (November 30, 1950) indicates that the employes "impliedly" or otherwise have not agreed to "lose a day" from these changes of rest day assignments, and Award 5129 sustains the claim for the day allegedly lost.

No good purpose would be served by analysis of our awards since 5129 in an attempt at reconciliation, but as pointed out in Award 6519, our case is another one of getting "the cart before the horse", i. e., by imposing employe's rest days at the head of his work week, and if that results in the loss of a day's work to the employe because of his right to finish out his present work week, he has a claim for pay for that day.

In Award No. 5113, the referee apparently did not go along with Carrier's contention that "The position the General Chairman has taken in the past with respect to a change in rest days will indicate to the Board that our manner of handling the instant case was in entire accord with that position."

Our confusion is confounded by both parties embracing Awards 7319 and 7320 in support of their respective positions and being faced with that dilemma now seek escape from it by relying on recent System awards. The Carrier relies on Award No. 28 of Special Board of Adjustment No. 117 of July 26, 1956 while the Organization relies on Award No. 7 of Special Board of Adjustment No. 186 of August 30, 1957.

The meat of Award 28 is in the following language—

> "We are of the opinion that a week as contemplated by the rules covers a period of seven days, rather than five consecutive days, and, in light of this, it cannot be said that the claimant here suffered any loss since he had five days' work with two consecutive rest days during that period, notwithstanding the change in his assignment."

But note the concluding paragraph—

> "In finding and holding as it has above, the Board, however, wishes at this point to clearly state that it is not its intent that this award and opinion be interpreted in a way that it is prejudicial to the rights of employes and contrary to the general intent of the agreement (example: by changing rest days and creating new assignments in a manner as to continuously deprive employes of rest days) since the intent of any agreement of the type and nature here in question is two-fold—to protect the rights of employes covered thereby and to provide necessary operating flexibility for the Carrier."

The Carrier in the instant case seeks to defeat the claim on the theory that this is a new position, and that under it the claimant made an election in choosing to accept the new position and in doing so was bound by the characteristics of the new position, relying on rule "The fifth paragraph of Article 6, Section 1 (e) of the current agreement", supra.

But this rule must be read in relation to the other rules relied upon by the employes, particularly Section 1 (i) of Article 6 which requires that the work week being on the first day on which the assignment is bulletined to work, which in this case was Friday, October 15. This being so, claimant was entitled to complete his old assignment and allowed to work on Thursday, October 14. Award 7319.

Since we noted Award 28, supra, we shall also mention Award No. 7 of Special Board of Adjustment No. 186, supra, where the Board, after quoting the rules concludes by saying—

> "Therein they carefully set out an exception in the case of work performed by an employe due to moving from one assignment to another or to and from an extra or furloughed list or where days off were being accumulated, but did not make any exception in the case of change of rest days of an assignment."

If I understand the position of the Carrier as of now, the claim lacks merit, aside from non-support of rules, because if claimant worked long enough on his new position he would pick up the rest day he lost, and thus be made whole. If that is true, it is up to the Carrier to show when it actually does happen. The Board member representing the Organization says that he has made the calculation suggested and that it could not have happened at least not in the first year of claimant's work on the new position here.

Since Award No. 7 of the Special Board of Adjustment, we have had the following sustaining awards, Nos. 8103, 8144, 8145 (sustained four out of five claims). No such late awards are in favor of the Carrier's position.

We have re-read all of the dissents written by Carrier members on this issue since Award 5129 was adopted (November 30, 1950). As appears from the quotation in bold face in the dissent to Award 8103 the language that they tie to is a quotation from Case No. 14 Special Board of Adjustment as follows:

> "* * * 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. * * *"

We have never contended there was such a prohibition. All we have said and are saying is that when a Carrier does so, it must respect the other applicable rules of the agreement.

No good purpose would be served by further comment.

We have not overlooked Carrier's motion to dismiss the claim as not being filed in time. This referee is on record as being opposed to the contention.

Our conclusion is that the Carrier violated the Agreement and the claim should be sustained.

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 Employe involved in this dispute are respectively carrier and employe within the meaning of the Railway Labor Act, as approved June 21, 1934;

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

That the Carrier violated the Agreement.

AWARD

Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: A. Ivan Tummon
Executive Secretary

Dated at Chicago, Illinois, this 1st day of July, 1959.

DISSENT TO AWARD NO. 8868, DOCKET NO. TE-7998

In this Award the Referee finds that the Carrier violated the Agreement as alleged, but, significantly, he does not cite any rule from the Agreement which would sustain the payment claimed. This is error in itself, but the error is further confused by the purported discussion of prior Awards which are either distinguishable or otherwise erroneous.

The Referee begins with **Award 5129** because it was "as good a place to start as any." While the Referee purports to analyze this Award, he avoids the Opinion thereto. **Award 5129,** as the Referee did note, involved a claim which arose prior to the 40-Hour Week, and in view thereof the Referee in **Award 5129** expressly stated that, "(we pass no opinion on present rules)", meaning 40-Hour Week rules; hence, the Award distinguishes itself.

The Referee further cites **Award 6519.** The Referee in that Award not only confused himself with the facts in that case, but went beyond the main issue. There, the finding that the Carrier failed to give the required advance notice was all that was essential for disposition of the claim any anything beyond that was obiter dictum. It is interesting to note, however, that Award No. 28 of Special Board of Adjustment No. 117, to which the Referee refers, involved the same Carrier as was involved in **Award 6519** and the reasoning in this Special Board Award was used to deny eight other change-in-rest day claims.

Award 5113, to which the Referee also refers, is factually distinguishable, but even then he avoided any reference to the Opinion. There, if the Referee had properly considered the Award, he would have found that the employe worked on a rest day of the new work week or in excess of forty hours, or five days, in the new work week; hence, the claim was sustained.

The Referee further finds that both parties embrace **Awards 7319 and 7320,** but in this he is confused. Our Dissent to **Award 7319** and Special

Concurrence to **Award 7320,** as well as our Dissents and/or Special Concurrence to Awards which relied upon them, demonstrate that we do not embrace those Awards. If there is anything we embrace in those Awards, it is Carrier's right to change rest days.

In quoting from Award No. 28 of Special Board of Adjustment No. 117, the Referee also notes the concluding paragraph thereof, but for what purpose the Referee has not explained. There is no evidence whatever in the present Docket that the Carrier made the change in rest days to otherwise defeat the general intent of the Agreement. The change in rest days was brought about by the discontinuance of certain positions which necessitated the rearrangement of relief positions, and nothing to the contrary is shown.

Regardless of what the Referee may think of the "fifth paragraph of Article 6, Section 1 (e)," he cannot change the language of the rule by interpretation or otherwise. The rule, in no uncertain terms, provides that **"Changes in the assignment of regular relief positions from those advertised will constitute a new position"** and it is elementary that the Claimant, by accepting the new position (he having not elected to exercise displacement rights, as the rule permits), was governed by the characteristics of the new position. When the change in rest days was made effective by the Carrier, thereby constituting the relief position as a new position, the prior existing relief position and work week ceased to exist (**Award 6281**—Wenke), and any conclusion thereafter reached by the Referee is inconsistent.

The Referee notes Carrier's statement that the Claimant would eventually pick up the allegedly lost day, but that it was up to Carrier to show when it would happen. He then accepts the Labor Member's statement that, according to his calculation, it would not have happened in the first year. Such is not determinable of the dispute, but if the calculation was properly made, between October 13, 1954, and October 12, 1955, the Claimant would have worked 260 days and rested on 105 had there been no change in rest days. Conversely, even with the change in rest days, if, during that period, he worked all the work days of the new position, he would have worked and rested the same number of days; hence, there was no loss.

The Referee further states that he has read all of the Dissents written by the Carrier Members to Awards involving changes in rest days, but it is obvious from this Award that he failed to grasp and comprehend the full import of those Dissents.

This Award is erroneous and for the reasons stated, we dissent.

/s/ C. P. Dugan

/s/ R. M. Butler

/s/ W. H. Castle

/s/ J. E. Kemp

/s/ J. F. Mullen