

Award No. 15530
Docket No. CL-16074

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Don Harr, Referee

PARTIES TO DISPUTE:

**BROTHERHOOD OF RAILWAY AND STEAMSHIP CLERKS,
FREIGHT HANDLERS, EXPRESS AND STATION EMPLOYES**
**CHICAGO, MILWAUKEE, ST. PAUL AND PACIFIC
RAILROAD COMPANY**

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood (GL-5926) that:

1. Carrier violated the Clerks' Rules Agreement at Aberdeen, S. Dakota, when it denied employee R. F. Leif the right to work on Saturday, April 10, 1965.

2. Employee R. F. Leif shall be allowed eight (8) hours at the pro rata rate of Assistant Time Revisor and Statistician Position No. 6505 for Saturday, April 10, 1965 account of the violation referred to in Item 1.

EMPLOYEES' STATEMENT OF FACTS: Prior to April 12, 1965, employee R. F. Leif was occupying regularly assigned Position No. 6505, Assistant Time Revisor and Statistician, at Aberdeen, South Dakota. Position 6505 was assigned work days Tuesday through Saturday with rest days of Sunday and Monday.

On April 1, 1965, Position 6505 was rebulletined in Bulletin No. 28 account "Change in days of rest to Saturday and Sunday." Copy of Bulletin No. 28 is submitted as Employees' Exhibit A.

As will be noted, Bulletin No. 28 advised that applications for Positions 6505 would be received up to and including Wednesday, April 7, 1965. Thus, the Monday through Friday, with Saturday and Sunday rest days, assignment of Position 6505 could not properly become effective until Monday, April 12, 1965.

Claimant Leif was the successful applicant and remained on Position 6505; however, he was permitted to work only four days, namely, Tuesday, Wednesday, Thursday and Friday, April 6, 7, 8 and 9 respectively, in his work week which began Tuesday, April 6th, and was required to observe the new rest days prior to the first day on which the new assignment was bulletined to work.

Claim for one day's pay, Saturday, April 10, 1965, at the rate of Position 6505 was filed with Superintendent F. J. Kuklinski by claimant Leif account

of his work week beginning April 6, 1965 being reduced to four days as result of Carrier changing his rest days and requiring him to observe the new rest days before the new work week began, thereby depriving him of the right and opportunity to perform service on Saturday, April 10th, the fifth day of his work week.

The claim was denied by Superintendent Kuklinski in his letter to claimant Leif on April 16, 1965, copy of which is submitted as Employees' Exhibit B.

Claim was appealed to Mr. S. W. Amour, Assistant to Vice President, under date of May 25, 1965 and was declined by him in his letter of June 15, 1965.

Discussion of the claim during conference on September 23, 1965 and on November 15, 1965 produced no settlement.

(Exhibits not reproduced.)

CARRIER'S STATEMENT OF FACTS: Prior to April 1, 1965, claimant R. F. Leif was the regularly assigned occupant of Assistant Time Revisor and Statistician Position No. 6505 at Aberdeen, South Dakota with regularly assigned rest days of Sunday and Monday.

On April 1, 1965, Superintendent F. J. Kuklinski, in accordance with Rule 14(b) which specifically provides that if either or both assigned rest days of a position are changed, the position will be considered a new one and will be bulletined in accordance with Rule 9, issued Bulletin No. 28 account changing the assigned rest days of Position 6505 from Sunday and Monday to Saturday and Sunday. Copy of Bulletin No. 28 is attached hereto as Carrier's Exhibit A.

As a result of being the senior qualified applicant for new Position No. 6505, claimant Leif was assigned thereto by Bulletin No. 29 dated April 8, 1965. Copy of Bulletin No. 29 is attached hereto as Carrier's Exhibit B.

Under schedule rules and a recognized past practice of long standing on this property, claimant Leif was not entitled to and did not work on the date of the instant claim, i.e., April 10, 1965, nor was he or is he entitled to payment for that date under schedule rules and said recognized past practice of long standing on this property.

(Exhibits not reproduced.)

OPINION OF BOARD: Prior to April 12, 1965, Claimant occupied regularly assigned Position Number 6505, Assistant Time Revisor and Statistician, at Aberdeen, South Dakota. The assigned rest days of this position were Sunday and Monday.

On April 1, 1965 the position in question was rebulletined account changing the assigned rest days of the position to Saturday and Sunday. The position was rebulletined under Rule 14 (b) of the agreement.

Claimant was the successful applicant and remained on Position 6505. The bulletin advised that applications for the position would be accepted through Wednesday, April 7, 1965.

We do not believe that the new hours of the position could become effective until the beginning of the new work week on Monday, April 12, 1965.

The Rules of the agreement involved in this dispute are:

"RULE 14.
CHANGING ASSIGNED STARTING TIME,
DAYS OF ASSIGNMENT OR
DAY OF REST

(b) The regular starting time shall not be changed without at least twenty-four (24) hours' notice to the employe affected. When the established starting time of a regular position is changed more than thirty (30) minutes for more than five (5) consecutive working days; or changed in the aggregate in excess of one (1) hour during a period of one (1) year; or if either or both assigned rest days are changed; or if the home terminal of a rest day relief position is changed, the position will be considered a new one and will be bulletined in accordance with Rule 9.

Where a position is rebulletined, by reason of changes prescribed in the above paragraph the employe permanently assigned to the position at the time it is rebulletined will have the same privileges as though his position were abolished, except that if he desires the rebulletined position, he must make application for such position at the time bulletined and failing to do so, will not be permitted to exercise seniority to that position on the basis of having lost his former assignment.

"RULE 15.
BASIS OF PAY

(e) Nothing herein shall be construed to permit reduction of days for regularly assigned employes covered by this agreement below five (5) days per week, except if within the five (5) days constituting a work week, one of the seven (7) holidays specified in Rule 35 (b) occurs, the work week may be reduced to the extent of such holiday."

"RULE 27. 40 HOUR WEEK

NOTE: The expressions 'positions' and 'work' used in this rule 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.

There is hereby established for all employes, except those occupying positions listed in Rule 1 (b), a work week of forty (40) hours, consisting of five days of eight (8) hours each, with two consecutive days off in each seven; the work weeks may be staggered in accordance with the Carrier's operational requirements; so far as prac-

ticable the days off shall be Saturday and Sunday. This rule is subject to the following provisions:

(i) Beginning of Work Week.

The term 'work week' for regularly assigned employees shall mean a week beginning on the first day on which the assignment is bulletined to work, and for unassigned employees shall mean a period of seven consecutive days starting with Monday."

The rules are clear and unambiguous. Claimant had the right to work a full 40 hour week under the old assignment. The new assignment began on Monday, April 12, 1965. The change could not take place until the new work week began.

See Awards 6519, 7319, 7324, 12455.

We will sustain the Claim.

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

That the parties waived oral hearing;

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

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

That the Agreement was violated.

AWARD

Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of **THIRD DIVISION**

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 28th day of April 1967.

**CARRIER MEMBERS' DISSENT TO AWARD 15530,
DOCKET CL-16074 (Referee Harr)**

The claim is sustained on the basis of a conclusion that "the new assignment began Monday, April 12, 1965." This conclusion is contrary to the admitted facts and is not supported by any reason or authority.

This new position was advertised by bulletin dated April 1, 1965, the bulletin ended on April 7, and Claimant was assigned to the position as a successful bidder by bulletin dated April 8, 1965. From the time the position was bulletined, Claimant had "the same privileges as though his position were abolished," and the position to which he was thus assigned was a "new one." In the absence of restrictions appearing in the agreement, it was Carrier's prerogative to establish the effective date of the new position and to fill the new position beginning on any day of the work week thereof that Carrier might elect. Award 7918 (Shugrue.)

AWARD 12419 (Coburn)

"At this late stage in railroad 'case law,' there should be no question that Carrier management is to determine the way in which the work and operations are to be performed and conducted in the interests of economy and efficiency except insofar as that freedom may be limited by law or agreements . . ."

As stated by this Board in Award 10994 (Hall):

"This Board has no authority to supply rules where none exist . . . Consequently, there being no rule there can be no violation of same."

Obviously, this rule of law applies to cases involving changes in rest days as well as to other cases — see Awards 6211 (Shake), 7918 (Shugrue), 10755 (McGrath), 10865 (Kramer), 13621 (Mesigh), among others.

In this case we not only have the absence of a rule, but we have clear evidence of prior recognition by the Board and this petitioning Organization that an employe cannot fictitiously extend his old work week beyond the termination of his old position and the creation of a new position in lieu thereof.

The crux of the sustaining Awards cited in this Award as support therefore is a finding that the change in rest days did not terminate the old assignment and create a new one in its place, but rather that the old assignment continued and hence the old work week thereof continued in existence until commencement of a new work week on that same position. Such Awards are totally irrelevant to this claim, for here the controlling agreement provides that upon change of rest days "the position will be considered a new one and will be bulletined in accordance with Rule 9." This new position was bulletined and the Employes frankly concede in their rebuttal that the bulletin was in accordance with Rule 9.

In Award 10865 the Referee held that the old position was terminated and a new position created with the effective date of the change in rest days, and hence, the employe who had held the old position "moved from one assignment to another" when the change was effective. The rule there involved merely gave the occupant of the position a right to displace, a right which he did not exercise. The Employes did not deny that the theory of the Award was entirely correct. They challenged the decision on the basis that under the particular rule there was no new position and the Claimant did not have the same privileges as an employe whose position had been abolished. Their Dissent includes this:

DISSENT TO AWARD 10865 (Kramer)

"The decision that Carrier's changing of Claimant's rest days resulted in Claimant's having 'moved from one assignment to another,' constitutes a stubborn resistance to all reason and compensatory remedy for the Carrier's violative action in its improper application of an unambiguous rule.

Grasping at the only straw available in his vain attempt to support the decision, the Referee refers to Award 7918; one look at that Award is all that it takes to see that the principle in that claim is completely foreign to the principle involved in this docket, and the rules as dissimilar as day is from night.

. . . It is inconceivable that he completely ignored Award 7319, involving the exact same dispute, same parties, in which Referee Edward F. Carter stated emphatically:

'A change in rest days does not have the effect of terminating the old assignment and creating a new one where the occupant does not exercise his seniority. If such were the case the change of rest days would require that the new position be bulletined. This means, also, that the position remains the same irrespective of the change in rest days and consequently there is no moving from one assignment to another . . .' (Emphasis ours.)

In order to avoid the clear provisions of Rule 14 (b) establishing the new position, the Award purports to announce a new and heretofore unheard of rule that a new position cannot be made effective under Rule 14 (b) except on the first work day of the work week thereof. The Employees have cited no authority whatever for such a position. As we have noted, their key award (7319 — Carter) contravenes that proposition.

G. L. Naylor
R. E. Black
T. F. Strunck
P. C. Carter
G. C. White