

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Award Number 22242
Docket Number CL-21953

Joseph A. Sickles, Referee

PARTIES TO DISPUTE: (Brotherhood of Railway, Airline and
(Steamship Clerks, Freight Handlers,
(Express and Station Employees
(
(Elgin, Joliet and Eastern Railway Company

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood
a-8334, that:

"1. The Carrier violated the effective Clerks' Agreement when effective June 24, 1975 it established Position GT-597 (changed to Position GT 552 effective July 23, 1975) with rest days other than Saturday and Sunday when there existed no legitimate reason for so doing;

2. The Carrier shall now compensate Clerk J. Moran, and/or his successor or successors in interest, namely, any other employee or employee who has stood in the status of claimants as occupants of Position GT-597 (GT 552 after July 23, 1975) and as such were adversely affected for an additional four (4) hours' pay at the pro rata rate of Position GT-597 commencing with July 5, 1975 and for each and every Saturday thereafter that a like violation occurs; and for eight (8) hours' pay at the prorated rate of Position GT 597 commencing on July 7, 1975 and continuing for each and every Monday thereafter that a like violation exists."

OPINION OF BOARD: This dispute concerns the Carrier's action in mid-1975, when the Carrier, by bulletin, established a position (GT-552) with rest days of Sunday and Monday.

The rules which are pertinent to the assignment of rest days on this 7-day position (under the 40-hour work week) are Rule 36½(d) and 36½(e):

"(d). Seven-day positions

On positions which have been filled seven (7) days per week any two consecutive days may be the rest days with the presumption in favor of Saturday and Sunday."

"(e). Regular Relief Assignments

All possible regular relief assignments with five (5) days of work and two consecutive rest days will be established to do the work necessary on rest days of assignments in six (6) or seven (7) day service or combinations thereof, or to perform relief work on certain days and such types of other work on other days as may be assigned under this agreement."

The Employees assert that the Carrier is required to afford rest days of Saturday and Sunday when there is no valid basis for doing otherwise, pursuant to the rules of the agreement between the parties. The Carrier had three (3) Input-Output Technician assignments (around the clock - one per shift) and they were 7-day assignments. The position at issue in this dispute is an 11:00 p.m. to 7:00 a.m. assignment, with rest days of Sunday and Monday.

The Union asserted (while the matter was under consideration on the property) that because one relief assignment which Carrier had established was to protect the rest days of the various assignments, it was meaningless that the rest days for that assignment were Sunday and Monday, or Saturday and Sunday, because Monday was filled by a furloughed employee and it was practicable to designate Saturday and Sunday as rest days for the position and use a furloughed employee on Saturday. Thereby it would not disturb the one relief assignment which covered the three regularly assigned Input-Output Technicians.

Carrier argues that it has a unilateral right to establish rest days of other than Saturday and Sunday concerning 7-day positions, and that the Organization may not question that determination. However, we think that Award 6384 (which was cited by Carrier) is quite pertinent to this dispute:

"The essential question presented in this Claim is whether the Carrier violated the rules of the Clerks' Agreement by assigning Monday and Tuesday as rest days for this position instead of Saturday and Sunday.

"Article VI, Section 10-d is controlling. It provides that 'any two consecutive days may be the rest days with the presumption in **favor** of Saturday and Sunday.'

Clearly, this is not a requirement that the two consecutive rest days must be on Saturday and **Sunday**. If the parties had intended a mandatory provision they would not have used the all inclusive term 'any', nor the permissive expression '**may**.' The use of the word 'presumption' does, however, **show** that the Parties regarded Saturday and Sunday to be the proper rest **days** unless some other condition existed. The understanding as to what this condition could be is found in the December 17, 1948 Report to the Resident by the Emergency Board No. 66 in **National** Mediation Case A-2953, which reads in part:

'Consistent with their operational requirements, the Carriers should **allow** the **employees** two consecutive days off in seven and so far as practicable these days **should** be Saturdays and **Sundays**.' (Emphasis supplied).

Because of the 'presumption in favor of Saturday and Sunday' set forth in Article VI. Section 10-d, the Carrier has the burden of showing that it **was not 'practicable'** to have Saturday and Sunday as rest days for this position. **This Board** cannot find that the terms 'practicable' and 'possible' are synonymous. **There** are many situations where what is '**possible**' is not 'practicable.'" (Underscoring ours.)

The Organization concedes that the Carrier has the right to establish 7-day position with rest **days** other than Saturday and Sunday; however, it stresses that the Carrier **must** have **some** logical and legitimate reason for doing so. In this regard, **if** the Carrier is **challenged** pursuant to the dictates of Award 6384, **cited** above, it is the **Carrier's** burden to show "**...that** it was not practicable to have Saturday and Sunday **as** rest **days** for this position."

As we review the record, both on the property end as submitted to this Board, the Carrier has **simply** argued that the positions **serviced** a large **steelmaking** facility and that **it was** necessary to have qualified **employees** available for the **assignments**. However, as was **pointed** out by the **Organization**, the Carrier does not call **extra** or furloughed **employees** for the Input-Output **assignments** unless they have qualified - under a special **agreement** - to **perform** the duties of the **assignments**. Accordingly, we feel that the Carrier's **argument** has been met and rebutted by the **Organization**.

We are not **unmindful** of the presentation to the **Board** by the Carrier **Representative** which stressed that it was difficult, if not impossible, to **call** qualified **employees** on a Saturday evening, which **may** very well have been a prime consideration in the **assignment** of the rest days. That assertion **speaks** directly to the **practicability** of an assigned Saturday and Sunday rest days. However, we are unable to find that such an assertion was presented and argued while the matter **was** under consideration and review on the property, so that the **Organization** might have had an opportunity to present contrary assertions and contentions. Had it been so presented, then it would have been properly before us for consideration; however, based on **numerous** determinations of this **Board**, we may not **now** consider arguments which are raised for the first time before the Board.

Similarly, the issue of appropriate **damages** was also urged, for the first time, in the presentation of the **case** to this Board and for the **same** reasons, we **are** precluded from considering that issue.

The Carrier has failed to rebut the **prima facie** presentation **made** by the Organization on the property and, accordingly, we will sustain the claim in its entirety. However, we have noted that as a **matter** of record, the particular dispute presented here ceased to exist as of November 4, 1975 when the **Monday** rest day of Position GT-552 **was** made a part of another regular relief assignment. **Of** course, any controversy over that action would be the subject of another dispute and would not be properly before us.

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;

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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; end

That the Agreement was violated.

A W A R D

Claim sustained to the extent specified in the Opinion of **Board**.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST:


Executive Secretary

Dated at Chicago, **Illinois**, this **30th** day of **November 1978**.