Award No. 4138
Docket No. CL-4062

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

H. Nathan Swaim, Referee

PARTIES TO DISPUTE:

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

THE DENVER AND RIO GRANDE WESTERN RAILROAD COMPANY

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood that the employes occupying the positions of Cashier, Assistant Cashier, Chief Bill Clerk, Chief Revising Clerk, Accountant, Assistant Accountant, Stenographer, Record Stenographer-Clerk, Utility Clerk, Collection Clerk, Inspector, Expense Bill Clerk, Notification Clerk, Diverson Clerk, Chief Claim Clerk, Tracer Clerk, OS&D Clerk and Messengers at Salt Lake City Freight Station shall be compensated additionally at rate of time and one-half for four hours each Saturday October 26, November 2, 9, 16 and 23, 1946 when they were required to work beyond the established Saturday quitting time of 1:00 P. M. and until 5:00 P. M., in violation of Rule 45 and the regular practice in effect for a period of twenty-five or more years under this rule.

EMPLOYES' STATEMENT OF FACTS: For a period of twenty-five or more years 1:00 P. M. has been regular Saturday quitting time at Salt Lake City Freight Station for all employes occupying positions where the work or duties were not necessary to be handled on Saturday afternoon in order to perform the business of the carrier. The regular and established working time prior to October 26, 1946 and subsequent to November 23, 1946 has been 8:30 A. M. to 1:00 P. M. on Saturdays. On October 26, 1946 the force was divided into two groups and each Saturday October 26, November 2, 9, 16 and 23, 1946, the employes were required to work from 8:30 A. M. to 5:00 P. M. with a thirty minute lunch period, each group alternating on Saturday during this period with 1:00 P. M. as the quitting time.

CARRIER'S STATEMENT OF FACTS: Due to man power shortage and by reason of volume of work having increased beyond the capacity of the clerical force to handle currently, Mr. B. H. Decker, Superintendent, Salt Lake Division, issued the following instructions, under date of October 22, 1946, to Mr. R. W. Flandro, Local Freight Agent, Salt Lake City:

> "In order to expedite the handling of merchandise through the Salt Lake house which is badly behind, you may, effective at once, work your entire warehouse force one hour per day overtime, assigning hours best suited to the operation.
>
> Also understand practically every desk in the Local Freight Office is behind on their work. Effective Saturday, October 26, arrange to work one half of your force on Saturday afternoon and the following Saturday the other half, continuing this arrangement until the work is reasonably well in hand."

Award 2040:

The Carrier fully concurs in the Dissenting Opinion in Award 2040. Furthermore, the award was rendered in connection with a rule reading:

> "Where in a given office it has been the practice to let employes off a part of the eight-hour day on certain days of the week, such practice shall not be rescinded and shall not be departed from except in case of emergency."

which rule is entirely different from Rule 45 on which the Organization bases its claim in this case.

Award 2073:

Again the Carrier concurs in the Dissent to this Award. Also Award 2073 was rendered in connection with a rule reading:

> "Only such employes whose work cannot be reasonably deferred, shall be required to work Saturday afternoons, and no deduction shall be made from the pay of the employe thus relieved."

This rule is not the same as D&RGW rule. It is interesting to note the above rule is identical to the rule the Organization proposed that this Carrier adopt in 1939, but which rule was declined by the Carrier.

Award 2268:

This is another award on another railroad involving a rule not similar or comparable to the rule in effect on this property. Carrier also directs attention to the Dissent to Award 2268, in which it fully concurs.

Award 2345:

Even a casual examination of this award is convincing that it is distinguished from the instant case as to claim, circumstance and rule, and in no manner could it have any bearing or application in this dispute.

Award 2349:

This is another award involving the Mo. Pac. Railroad Company and this Carrier's position with respect to Award 2349 is the same as stated above concerning Award 2268.

Award 2460:

This award involves the Great Northern Ry. and this Carrier's position with respect to Award 2460 is the same as above stated concerning Award 2040.

The Carrier contends it has not violated the provisions of Rule 45, or any other rule in the schedule, and holds that clearly Rule 45 does not contemplate the payment of time and one half time for Saturday afternoon.

(Exhibits not reproduced.)

OPINION OF BOARD: The parties to this dispute have in their Current Agreement Rule 45 which provides that:

> "Only such employes as are, in the judgment of the Management, necessary to perform the business of the Carrier shall be required to work on Saturday afternoons, and no deduction shall be made from the pay of the employes relieved."

This same Rule was in the Agreement of February 1, 1926, and has been retained through all subsequent changes in the Agreement.

During all of the time this Rule has been in effect, and even prior thereto, it has been the practice of the Carrier to allow Saturday afternoons off to employes occupying certain positions, including the positions of the Claimants herein.

On October 22, 1946, the Superintendent of the Salt Lake Division issued the following instructions to the Local Freight Agent at Salt Lake City:

"In order to expedite the handling of merchandise through the Salt Lake house which is badly behind, you may, effective at once, work your entire warehouse force one hour per day overtime, assigning hours best suited to the operation.

Also understand practically every desk in the Local Freight Office is behind on their work. Effective Saturday, October 26, arrange to work one half of your force on Saturday afternoon and the following Saturday the other half, continuing this arrangement until the work is reasonably well in hand."

On November 25, 1946, these instructions were rescinded as follows:

GB-139 about working the office forces Saturday afternoon and Sunday.

Inasmuch as the situation again appears to be under control you may discontinue this practice and return to the regular Saturday afternoon arrangement formerly in effect."

The Claimants are the clerical employes who were worked pursuant to the above instructions. It is the contention of the Organization that so working the Claimants constituted a violation of the above quoted Saturday Afternoon Rule and entitles Claimants to pay at time and one-half rate.

The Organization contends that "the Carrier's judgment under the Rule is restricted to that of determining only what work is necessary to be performed specifically on Saturday afternoon in order to handle the business of the Carrier at that particular time".

In Award 3720 this Division interpreted an almost identical Rule. There also this same Organization contended that the work done by Claimants could actually have been done at a later date; that it was, therefore, not necessary to do it on Saturday afternoon and the fact that "in the judgment of the management it was necessary", did not avoid its being a violation of the Rule to require the work to be done.

In answer to that contention we there said:

"If this latter contention were correct the words 'in the judgment of the management' would be mere surplusage. In construing a contract we must attempt to give some meaning to all the words used. * * *

To prove a violation of this Rule it would be necessary to show that the 'judgment of the management' had not been considered judgment of the responsible officer or representative of management but had been an arbitrary or capricious decision. It is the ordinary rule that when we appeal from a judgment or a decision of a fact finding body or board which has been given the power to make a decision, we must show that the decision is fraudulent, abitrary, or without a reasonable basis. The appellate tribunal does not disturb a decision where to do so would only be to substitute its judgment for the judgment of the fact finding board.

We see no reason why that same principle should not apply here."

In the instant case also the record does not contain sufficient evidence to show that the judgment of the Carrier in finding this Saturday work necessary was arbitrary, unreasonable or capricious.

The Carrier insists that the necessity of doing this work on Saturday afternoons was "due to man power shortage and by reason of volume of work having increased beyond the capacity of the clerical force to handle currently" and shows that during the same period much overtime and Sunday work was done by the entire Warehouse forces.

The Awards cited by the Organization in support of its contention as to the interpretation of this Saturday Rule all had to do with different rules—none of which contained the qualifying phrase "in the judgment of the Management".

Award 3794, relied on by the Organization, also involved an entirely different factual situation. There the necessity of the Saturday afternoon work was caused by a reduction in the clerical forces. Of course, management could not deliberately do something to bring about the necessity for Saturday afternoon work and then take advantage of the Rule.

Nor can we agree with the contention of the Organization that long practice of the parties through several amendments of the Agreement has changed the purport and meaning of the Rule here in question even though there has been no change in the wording of the Rule.

If the facts were as contended by the Organization, i. e., that Saturday afternoon work during all of the years had never been required that would at most serve only as negative evidence. During all of that time such service may not have been necessary in the judgment of the Management.

The fact that the Organization did not consider this Rule modified is rather clearly shown by the attempts of the Organization in 1939 and again in 1941 to secure an amended rule.

In June 1939 the Organization proposed a Saturday afternoon rule reading:

> "Only such employes whose work cannot be reasonably deferred shall be required to work Saturday afternoon, and no deduction shall be made from the pay of the employe thus relieved."

Again on April 14, 1941, the Organization proposed the following rule:

> "Only such employes as are necessary to perform the business of the Carrier shall be required to work on Saturday afternoons, and no deduction shall be made from the pay of the employes relieved."

In the first proposal the Organization was trying to limit Saturday afternoon work to only that work which could not be deferred. In both proposals the Organization was trying to eliminate the question being left to the judgment of Management. Neither proposal was accepted by the Carrier.

This record does not establish a change in the written rule by the practice of the parties.

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

The Carrier did not violate the Agreement.

AWARD

The Claim is denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: A. I. Tummon
Acting Secretary

Dated at Chicago, Illinois, this 18th day of October, 1948.