Award No. 4186
Docket No. CL-4268

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

LeRoy A. Rader, Referee

PARTIES TO DISPUTE:

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

SOUTHERN PACIFIC LINES IN TEXAS AND LOUISIANA

(Texas and New Orleans Railroad Company)

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood that:

(1) Work performed on Sundays and holidays is not overtime within the meaning Article VI, but is instead the work of a day, separate and apart from the work of any other day, within the meaning of Article V; and that

(2) W. S. Jester, Chief Clerk, Austin Freight Station, be paid (a) on the daily basis, as required by Rule 45, (b) for a day's work, as required by Article V, and (c) at time and one-half rate, as required by Article VII, for services performed on Sundays and holidays in the period June 17, 1945 to and including May 5, 1946.

EMPLOYES' STATEMENT OF FACTS: W. S. Jester, Chief Clerk, Austin Freight Station, was assigned to work 8:00 A. M. to 5:00 P. M., Monday to Saturday, and from 9:00 A. M. to 1:00 P. M. on Sundays and holidays from June 17, 1945 to May 5, 1946, both dates inclusive. He was erroneously paid for Sunday and holiday service in the period on an hourly basis as if called for overtime service. Rule 45 provides that Jester, as a Clerk, shall be paid on a daily basis; Rule 27 provides that 8 hours constitute a day's work; and Article VII provides that work performed on Sundays and holidays shall be paid for at the time and one-half rate. Jester's claim for payment in conformity with Rules 45 and 27 and Article VII has been declined. Hence the dispute at hand.

The dispute concerns the method of payment of W. S. Jester for services performed on Sundays and holidays in the period running from June 17, 1945 to May 5, 1946, both dates inclusive. It is the position of the Carrier that Sunday and holiday service is overtime within the meaning of Article VI, and that it should be paid for as such. It is the position of the Employes that time worked on Sundays and holidays is not "time in excess of eight (8) hours" "on any day" within the meaning of Article VI, but is instead the work of a day, wholly separate and apart from the work of any other day within the meaning of Article V, and should be paid for as such. The conflicting positions of the parties, as shown, constitute a dispute which is submitted to your Honorable Board herewith for decision.

The Carrier's position in this case is fully supported by your Board's interpretation of these rules in previous disputes of identical nature, Awards 1178, 3037, 3842 and 3843.

Wherefore, in consideration of the facts, applicable rules of the Agreement, decisions of your Honorable Board in similar disputes, and the equity in this particular case, the Carrier urges that the contentions and the claim in this case be, in all things, denied.

(Exhibits not Reproduced).

OPINION OF BOARD: A long and extended record has been made in this case. In support of the claim, the Organization contends that Awards 3842 and 3843 be overruled, primarily on the grounds that (1) these awards are in error, based upon the evidence presented therein, and (2) that new and different evidence, in addition to that previously presented (Awards 3842, 3843), is here presented.

The fact situation is as follows: W. S. Jester, Chief Clerk, Austin Freight Station, was assigned to work 8:00 A. M. to 5:00 P. M., Monday to Saturday, and from 9:00 A. M. to 1:00 P. M. on Sundays and holidays from June 17, 1945 to May 5, 1946, both dates inclusive. He was paid for Sunday and holiday service on an hourly basis.

The Organization contends that payment as made is not proper; that Jester was paid for Sunday and holiday service on an hourly basis in keeping with calls for overtime service. It contends that such was not the true situation and that under Rule 45 he should have been paid on a daily basis; that Rule 27 provides that eight hours constitute a day's work, and Article VII provides that work performed on Sundays and holidays shall be paid for at the time and one-half rate. It further contends that time worked on Sundays and holidays is not "time in excess of eight (8) hours," "on any day," within the meaning of Article VI, but is the work of a day, wholly separate and apart from the work of any other day within the meaning of Article V, and should be paid for as such. The contentions are made under the rules of the Agreement of November 1, 1939, as amended June 16, 1945.

Under this Agreement as amended, there arose the claims considered in Awards 3842 and 3843. That considered in Award 3842 was the claim of E. R. Manger, Clerk, Cashier's Office, San Antonio, Freight Station, a position not necessary to the continuous operation of the Carrier, assigned Monday to Saturday, inclusive, for eight (8) hours at time and one-half rate when called to perform service from 3:00 P. M. to 4:40 P. M., July 7, 1946. In the claim considered in Award 3843, the request was for payment on a daily basis on behalf of employe H. Leuning, Fruit and Produce Clerk, New Orleans, and stated:

> "(1) Work performed on Sundays and holidays is not overtime within the meaning of Article VI, but is instead the work of a day, separate and apart from the work of any other day, within the meaning of Article V; and that
>
> (2) H. Leuning, fruit and produce clerk, New Orleans, be paid (a) on the daily basis, as required by Rule 45, (b) for a day's work, as required by Article V, and (c) at time and one-half rate, as required by Article VII for services performed on Sundays, August 19th and 26th, 1945."

These claims were both denied by this Board.

It is contended that these awards are in error in that the Board changed Rule 37 to apply to Sundays and holidays, whereas the parties to the Agreement had limited this rule to apply only to calls "to perform work not continuous with, before, or after the regular work period." It is further contended that by the terms of all collective Agreements between the parties prior thereto (a period of about 25 years), at least three in number, this rule had never been applied to calls for Sunday or holiday work; that work

on those days was provided for in Rule 43, which was eliminated from the Agreement on June 16, 1945; and that this Board does not have the authority to so change rules, citing Section 3, First (i) of the provisions of the Railway Labor Act, and awards starting with Award No. 42.

Rule 43 was eliminated by an arbitration award effective as of June 16, 1945. This dispute considered in this arbitration award arose on a proposal of May 20, 1944. In the discussion prior to submission of the question in arbitration, it is contended by the Organization that the purposes and effects of the elimination of Rule 43 were discussed at great length and that a representative of the Carrier, Mr. Montgomery, made the statement that the elimination of Rule 43 would necessitate payment of all services performed on Sundays and holidays on the basis of a minimum day as required by Rule 27. The Organization's representative, Mr. Harper, answered that this, in his opinion, would be the result, and that on this basis Mr. Montgomery refused at first to arbitrate, but that later, agreement was reached and the matter submitted in arbitration. The proposal to so eliminate Rule 43 was made by the Employes, and Rule 43 was subsequently eliminated by the award which became effective on June 16, 1945.

The Arbitration Board set up under the provisions of the Railway Labor Act was composed of six members, of which Judge Yeager of Nebraska served as chairman. Later, Judge Yeager served as the Referee in Awards 3842 and 3843.

It is contended that Rule 43 dealt with calls or part time work on Sundays and holidays and that the same was eliminated, as stated. It is further contended by the Organization that the elimination of Rule 43 left no provision in the Agreement for calls or less than full day payments for work performed on Sundays and holidays and that, thereafter, employes would receive a full day's pay therefor under Rules 27 and 45. The Organization contends that the Arbitration Board, of which Judge Yeager served as chairman, had no authority to change Rule 37 to include Sundays and holidays, and that when serving later as Referee with this Board, his attempt to do so was in error; that in attempting to justify this position, Referee Yeager in Award 3842 stated that Rule 43, eliminated by the previous arbitration award, was "less favorable to employes than the rate under Rule 37." In this, the Organization does not agree on the basis that: Rule 43 called for a minimum allowance for two (2) hours at time and one-half, with time and one-half thereafter for Sunday and holiday work; that Rule 37 calls for a minimum of three (3) hours at straight time rates for two (2) hours or less and time and one-half thereafter; that payment under the two rules would be the same, but that there is a vast difference as to work or situations in which they are designed to apply; that Rule 43 applied only to Sundays and holidays and for any hours on those days; that Rule 37 applies only to "work not continuous with, before, or after the regular work period." It contends that Sunday was not a regular work day or period for the employe covered by Award No. 3842, nor is it a regular work period for claimant herein; that claimant's position, effective November 1, 1939, was placed in the Agreement as being given a daily rate and assigned to work week days only, less holidays.

There is cited by the Organization, in support of the claim, the origin of the Sunday and Holiday Rule, as promulgated by the U.S.R.R. Labor Board, Art. VII, in 1923, and, it is contended, made applicable to the present situation, herein, effective on June 16, 1945; that therein, as here, calls for Sunday and holiday work are not paid for under the general Call Rule (Rule 37 herein); that, thereafter, there remained no provision for paying less than a full day of eight (8) hours for such work; that the old U.S.R.R. Labor Board had authority to change existing rules or promulgate and issue new ones, which authority this Board does not have; that Award 3842 was an attempt on the part of this Board to usurp such authority, which is under the jurisdiction of the National Mediation Board by Section 6 of the Railway Labor Act.

The Carrier's defense is based upon the fact situation relative to the pay of claimant as to reduction in wages and that in order that claimant

might continue to receive the same monthly earnings (to make the same up to approximately $200 per month which it had been), the Superintendent permitted claimant to work sufficient time on Sunday mornings on a call basis to accomplish this; that no change was made in his duties and that except for the reason stated, the work could have been performed during his regularly assigned week day tour of duty.

The Carrier contends that the same wording is used in the instant claim as was used in the claim which is the basis of Award 3843; and that no new and different evidence is presented in support of this claim; that the award in 3843 is a denial of claimant's request for payment; that Carrier has paid the claimant on the basis, and in accordance with, the Notified and Called Rule, which is supported by the rulings in Awards 3842, 3843, and interpretation No. 1, Serial 73, involving the same parties.

The record of evidence, arguments of the parties, and previous rulings have been set out in this Opinion at considerable length by reason of the request made in this claim that certain previous awards of this Board be overruled.

It is noted that the Referee, who served in Awards 3842 and 3843, Judge Yeager, also served as chairman of the Arbitration Board which eliminated Rule 43. Such service placed Judge Yeager in a position where he could at first hand hear the evidence presented in the arbitration hearing, and therefore, it can be assumed that no one was in a better position to pass on the evidence presented in Awards 3842 and 3843. In order to properly base a finding that the ruling in the above awards was in error, there should be clear and convincing proof that such a situation exists that will permit such a ruling.

The Organization lays great stress on statements made by Carrier's representative, Mr. Montgomery, in negotiations prior to the submission of the proposal by the Organization to arbitration. This cannot be considered controlling as such statements present opinions only of a person as to what the result might be if certain events happen. The award itself is the only basis which can be considered herein. Someone's opinion as to what the result would be, under certain conditions, is not conclusive. Likewise, the evidence given by Mr. Ralph Speer as a witness in the arbitration hearing at Houston is also opinion and falls within the category of the opinion statements of Mr. Montgomery and the Organization representative in the negotiations leading up to the submission of the case in arbitration.

The question here presented is the application of Rule 37 in the instant case. Does it apply, and if so, does it defeat the right of claimant to a favorable ruling on his claim?

At the outset of determination of the question, it would seem that consideration should be given to the statement made in Award 3842, to-wit:

> "It will be observed that the call rate of pay under Rule 43 was less favorable to the employes than the rate under Rule 37."

This statement is considered to be dictum and has no bearing on the question there or here presented. It likewise falls within the category of the expressing of an opinion and adds nothing to the finding made and is not taken to be, or considered, as bearing directly on the question under consideration.

The entire question resolves itself to the application to be given to Rule 37 to the presented statement of facts herein. As to what the rule and practice may have been under Rule 43 is not a matter for consideration and decision in this case. It has been eliminated and, except as an evidential point, has no direct bearing on this question. At best, it can only be said as having an indirect bearing on the question here presented.

Can it be said that the provisions of Rule 37 are general in their scope? It would seem to be, and is not considered to be limited or restricted by any

other provision having relation to the general situation in the Agreement. Can the provisions of Rule 37 (the Call Rule) apply to calls on Sunday and holidays under the statement of facts as are here presented. The answer is in the affirmative. It being general in its scope, it can be applied to Sunday and holiday calls.

The finding herein is not considered to be a usurpation of the jurisdictional power to make, change, amend or alter a rule. It is based upon the interpretation of the application of Rule 37. As stated, it is general in its scope and can be invoked in a situation as herein presented.

The question of this being "a stale claim" is argued herein. In view of this ruling, as above stated, it is not deemed necessary to go into this question.

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 did not violate the Agreement.

AWARD

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: A. I. Tummon
Acting Secretary

Dated at Chicago, Illinois, this 29th day of November, 1948.