Award No. 5072
Docket No. CL-5117

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Jay S. Parker, Referee

PARTIES TO DISPUTE:

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

THE WESTERN PACIFIC RAILROAD COMPANY

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

(a) The Carrier violated the rules of the Clerks' Agreement on November 16, 1947, January 18, 1948 and subsequent Sundays by failing and refusing to call employes for Sunday work as provided in Rules 20 and 29.

(b) The following employes be compensated at time and one-half on the basis of the rate of their respective assignments, account failure of the Carrier to call them for the performance of over-time work on Sundays as follows:

Mrs. Maxine Naisbitt, Asst. T. & E. Timekeeper
8 hours, November 16, 1947
8 hours, January 18, 1948

Mrs. Elizabeth Helmick, General Clerk
4 hours, January 18, 1948

Mrs. Kathleen Norris, Stenographer-Clerk
8 hours, January 18, 1948

Mrs. Mildred Griesheimer, I. C. C. Clerk
8 hours, January 18, 1948

(c) All employes adversely affected by reason of failure of the Carrier to call them on Sundays for the performance of the class of work to which they are regularly assigned be compensated for all wage loss sustained subsequent to November 16, 1947.

EMPLOYES' STATEMENT OF FACTS: On Sunday, November 16, 1947, Mrs. Maxine Naisbitt was not called to perform work on T. & E. payrolls on an overtime basis, which class of work was part of the regular duties of her position of Assistant T. & E. Timekeeper, and another employe who was not regularly assigned to this class of work was used.

On Sunday, January 18, 1948, it was again necessary to work employes of the Superintendent's Office on T. & E. payrolls. Mr. R. R. Willard, Transportation Clerk, and Mr. M. Mooney, B. & B. Clerk were used to work on payrolls, although they were junior in seniority to Mrs. Elizabeth Helmick, who was regularly assigned to class of work for which overtime was necessary,

though it necessitates suspension of work on her regularly assigned position for an entire day to comply with requirements of California Laws.

In Award 2433, the Board, with Referee Carter, gave consideration to a dispute arising under similar rule and circumstances, and in denying claim of employes, stated in part under "Opinion of Board" as follows:

> "We have carefully examined this Division's Awards Nos. 707 and 2273, both of which arrive at a conclusion directly contrary to our present holding. Of course, the decision in Terminal Railroad Association v. Brotherhood of Railroad Trainmen, supra, had not been decided when Referee Spencer prepared Award No. 707, and it does not appear that Referee Swaim had the benefit of the reasoning and holding of that case when he prepared Award No. 2273. In any event, the decision in Terminal Railroad Association v. Brotherhood of Railroad Trainmen, supra, is directly in point and is such an authority that it cannot be ignored, irrespective of past holdings or future effects.
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> "The situation presented is a delicate one for several reasons; the necessity for passing upon a question of constitutional power, the necessity for overruling two previous awards of this Division which were prepared by two able and scholarly referees, and the necessity for departing from that consistency of decision which is ordinarily essential in avoiding economic confusion. A careful analysis, however, leads to but one conclusion—the result is controlled by the state law of Texas regulating the hours of labor of women and not by the literal wording of the collective agreement made pursuant to the provisions of the Railway Labor Act.
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> "We consequently are obliged to overrule Awards 707 and 2273 and adhere to the result herein announced as the correct interpretation of the legal point involved in view of the controlling decisions of the Supreme Court of the United States."

The intent of Labor Cord Section 1350 is clear, and it is to be noted that even under wartime conditions, the Industrial Welfare Commission only relaxed this section to the extent that women could work on the seventh day only one in a calendar month.

In Carrier's opinion, the agreement does not require or contemplate that a woman should suspend work on her regularly assigned position in order to be available for overtime work. In fact, the agreement states that applicable laws enacted for the government of employment of women must be observed.

Under existing California Laws, Rule 9 of current agreement, and Award 2433, Carrier contends there is no basis for the Organization's claim.

(Exhibits not reproduced.)

OPINION OF BOARD: The claimants are all women holding regularly assigned six-day positions not necessary to the continuous operation of the Carrier, Monday through Saturday, in the Division Superintendent's office in Sacramento, California. Their work is clerical in nature and none of them engages in or is connected with the movement of any train.

There is no dispute about the factual situation giving rise to the controversy and can be outlined very briefly.

On the dates set forth in the statement of claim, all Sundays, the Carrier caller men employes to work overtime in the Superintendent's office on its pay rolls. This was the class of work claimants had been performing during their assigned hours and they insist they were entitled to perform it. Specifically their claim is that in assigning the work to men employes not regularly assigned thereto the Carrier violated Rule 20 of the current Agreement relating to overtime and in particular that portion thereof which reads:

"In working overtime before or after assigned hours, employes regularly assigned to class of work for which overtime is necessary shall be given preference. In working overtime on Sundays and holidays, the same principle shall apply."

The Carrier does not deny that claimants are employes regularly assigned to the class of work for which overtime was necessary. Neither does it seriously dispute that under the provisions of Rule 20, standing alone, they would have been entitled to the work in question. Its position is that the involved women employes were not available for overtime work on Sunday, their rest day, on any of the dates in question, because of Rule 9 of the Agreement and applicable California State Laws governing working conditions of women.

Rule 9 of the Agreement relates to women and in part provides "Applicable laws enacted for the government of their employment must be observed."

The State Law to which the Carrier has reference is Section 1350 of the California State Labor Code, which reads:

"No female shall be employed in any manufacturing, mechanical, or mercantile establishment or industry, laundry, cleaning, dyeing, or cleaning and dyeing establishment, hotel, public lodging house, apartment house, hospital, beauty shop, barber shop, place of amusement, restaurant, cafeteria, telegraph or telephone establishment or office, in the operation of elevators in office buildings, or by any express or transporation company in this State, more than eight hours during any one day of 24 hours or more than 48 hours in one week."

There is also in evidence Industrial Welfare Commission Order No. 9 R, effective June 1, 1947, regulating, among other things, hours for women. Included in this Order, in apparent conformity with Statute, is a regulation stating that no woman shall be employed more than eight hours during any one day or more than forty-eight hours in any one week.

Summarized the Carrier's position is that to have permitted the claimants to have performed the work in question would have resulted in their working more than 48 hours during the particular week of which the Sundays referred to in the statement of claim were a part.

Much is to be found in the record with reference to possible conditions under which a woman might work more than six consecutive days and not violate the 48 hour maximum work week. To go into possibilities only confuses the issue. What we are concerned with here is the actual situation existing on the dates involved in the claim. It is clear from the record that these claimants held regularly assigned positions, the hours of which could not be changed or shifted. The established work week of each such position was Monday through Saturday, with Sundays as the regular rest day. Therefore, Sunday must be regarded as the seventh and last day of the week. The record makes it equally clear that had the claimants worked the overtime disclosed in the statement of claim on the Sundays in question, each and every one of them would have worked more than 48 hours during the week of which the particular Sunday involved was the last day. That, in our opinion, under the existing facts and circumstances, would have been in violation of the express terms of the Statute and Order to which we have heretofore referred. In such a situation our decisions (see Award 2433) are to the effect and we hold that Rule 9 is decisive and the State Law controls the result. It follows the Carrier did not violate the rules of the current Agreement by failing and refusing to call the claimants for the involved overtime work on the Sundays specified in their statement of claim.

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

That both parties to this dispute waived oral hearing thereon;

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 23rd day of October, 1950.