Award No. 5247
Docket No. CL-5133

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Robert O. Boyd, Referee.

PARTIES TO DISPUTE:

MISSOURI PACIFIC RAILROAD COMPANY

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

STATEMENT OF CLAIM: (1) The Carrier claims it has the right to establish seven-day-per-week service at its freight warehouses to enable it to currently handle less carload merchandise, which is an operational necessity.

(2) The Carrier further claims that seven-day positions may be set up to protect the service outlined in Section (1) and employes coming within the scope of the Clerks' Agreement may be assigned five days of work and any two consecutive days, not necessarily including Saturday, Sunday or Monday, as rest days each week to perform such service.

(3) The Employes contend such arrangement would be a violation of Article II, Section 1 (d) of the 40-hour week agreement made at Chicago, Illinois, March 19, 1949, and have notified the Carrier that claims will be filed if it establishes the service.

CARRIER'S STATEMENT OF FACTS: 1—There are in effect between the parties, two agreements, referred to in Statement of Facts and hereinafter as "Clerks' Agreement", copies of which have been furnished your Board, and which, by reference, are made a part of this submission. For ready identification, these agreements are described as follows:

(a) Basic Agreement, effective July 1, 1943, covering hours of service and working conditions,

(b) Memorandum of Agreement, effective September 1, 1949, covering agreed-to changes in rules of the basic agreement to conform with the provisions of the 40-hour week agreement made at Chicago, Illinois, March 19, 1949.

2—On September 1, 1949, in accordance with provisions of the Chicago Agreement, the 40-hour work-week was established on this Carrier which resulted in the basic warehouse operation being reduced from six days per week to five days per week, with the warehouse employes assigned to work Monday through Friday and having Saturday and Sunday as assigned rest days each week.

3—Work requiring six days per week prior to September 1, 1949 could not thereafter be performed by the same force working only five days per week and some of the assigned Monday-Friday forces were worked at the

merely is a position taken by the Carrier argumentative in support of its positon but which we believe can be described as constituting a subterfuge. The Carrier's expressed opinion that because it has occasionally worked some freight warehouse platform forces on Sundays in the past and paid them at the punitive rate supports its position that such force was needed by the Carrier does not, the Employes hold, show that such force was needed by the Carrier seven days per week as contemplated in Article II, Section 1, Paragraph (d)—Rule 21, Section (1), paragraph (d), current Agreement. It can only show that some such positions were needed on those particular days and it well establishes the fact that they were not needed seven days per week, which showing the Carrier, we hold, must make and support factually before it can properly establish seven day assignments on freight warehouse platform positions, whether such positions be hourly or daily rated ones.

The Employes are in vigorous disagreement with the Carrier's position as reflected in the fifth paragraph of its letter to the General Chairman of February 15, 1950, in which it says:

> "There are numerous provisions that call for employes being relieved two days per week and we do not look upon the sixth or seventh day of work as something that involves benefits to the employes or the question of whether they should be 'permitted' to work more than five days. We believe that under the agreement we are not only obliged to relieve employes two days a week when this can be done, but the arrangements for such relief can be made at the pro rata rate in the manner in which it is proposed to be done by establishing the Sunday warehouse force at St. Louis.",

and we have supported our position in opposition to that taken by the Carrier upon the basis of rules of the Agreement as abundantly shownin this submission.

The Carrier has stressed that unless its proposed arrangement can be given effect there is possibility of loss to both the Carrier and the employes, that delays occurring to merchandise can result in the loss of substantial tonnage which would represent loss of revenue to the Carrier and abolishment of some of the present regularly assigned positions. The Employes submit that the Carrier's predictions in this regard are speculative, but notwithstanding, the Employes do not understand how such a position can operate to grant to the Carrier the right to do a thing which is so clearly and expressly prohibited in Agreement provisions.

The Employes have referred in the record of this dispute to Rule 25 (e). We submit that its provisions would be violated if the arrangement proposed by the Carrier were given effect, for the reason that employes would be required to suspend work on a week day which should constitute a regularly assigned work day in order to work on Sunday at pro rata rate, thus, in substance, absorbing overtime.

The Employes believe that on the face of the record that the Carrier's position cannot be supported by Agreement provisions, and that therefore, the Third Division of the National Railroad Adjustment Board should, by proper directive or order, indicate to this Carrier that it does not have the right to do the things that it contemplates doing as reflected in its Statement of Claim submitted by it, ex parte, to Your Honorable Board for decision. The Employes ask that the National Railroad Adjustment Board sustain the position here taken by the Employes.

(Exhibits not reproduced.)

OPINION OF BOARD: This matter is before the Board on claims presented by the Carrier. In substance, they constitute a request for the opinion of the Board as to whether the Carrier may, under the terms of the Agreement effective July 1, 1943, and the amendments thereto effective September 1, 1949 (40 Hour Week Agreement), establish seven-day-per-

week service at its warehouses to enable it to handle currently LCL merchandise; and establish seven-day positions for employes under the Clerks' Agreement with two consecutive days, not necessarily including Saturday, Sunday or Monday, as the assigned rest days, to perform such service. This proposal was handled on the property with the representatives of the Clerks' Organization, who dispute the Carrier's right to establish such service, and the matter is now properly here under the provisions of the Railway Labor Act, as amended. While the claims of the Carrier are stated in general language, the submissions of the parties have related the Carrier's request to two warehouses in St. Louis and our disposition of the matter here will have application only to such specific locations.

The position of the Carrier is that in accordance with the Agreement effective September 1, 1949, it reduced its warehouse operation from six days to five days per week, with employes assigned Monday through Friday. Because the work could not be accomplished in five days per week, some of the employes were worked at the time and one-half rate on Saturdays. It further asserts that, by reason of the application of the 40 Hour Week Agreement throughout the railroad industry, the work at warehouses in terminals, such as at St. Louis, has been substantially increased, and working the force on Saturday does not meet the operational necessity to handle the business, and that Sunday work is required. By reason thereof the Carrier contends it is not obligated to use its warehouse force at time and one-half rate for Sunday work, but may under the terms of the Agreement establish seven-day-per-week service. It relies on Rule 21, Section 2 (d) and Rule 26 (c). (As these Rules are set out in the submissions, they need not be repeated here.)

The Employes in opposing the right of the Carrier to establish the service proposed by the Carrier rely chiefly on two contentions: The first is that Rule 21, Section 2 (d) (Agreement of September 1, 1949) limits seven-day positions to those which have been filled in the past. Section 2 of Rule 21 deals with the application of the 40 Hour Week to the different kinds of work week assignments and regulates the rest days for such work weeks. Paragraph (d) must be read with relation to paragraph (a) of Section 2; and when so applied we cannot find that the parties intended the number of seven-day positions in existence on September 1, 1949, to be frozen. Had this been the intention of the parties, they could have so stated. The absence of expressed authority in the contract for the Carrier to establish a seven-day position does not prevent it from doing so if such position is established to meet the conditions expressed in the Agreement relating thereto.

The other principal contention of the Employes is that Rule 26 (c) of the Agreement effective September 1, 1949, does not authorize an assignment of work on Sundays as contemplated by the Carrier. Specifically, they conten that this Rule does not permit Carrier to reassign platform forces on Sunday to work where it has been found that such work can be dispensed with.

The amended Rule 26 has eliminated from the Sunday and Holiday Work Rule, as it existed prior to September 1, 1949, two provisions, mention of which is pertinent here. The punitive rate for Sunday work as such has been eliminated as well as the provision that employes necessary to the continuous operation of the Carrier could be regularly assigned at the pro rata rate with a rest day other than Sunday. In lieu of these former restrictions on Sunday work, the parties have now adopted the limitations expressed in Rule 26 (c).

Having eliminated restrictions hereinabove mentioned, the parties have now adopted other restrictions on Sunday work as such. This last mentioned Rule starts with the provision that it is not contemplated that work previously dispensed with can now be reinstated; but this is modified by the next following sentence in the Rule which removes the necessity for adherence to the pattern of work in existence on September 1, 1949. Thus if work previously dispensed with is now found to meet the other limitations in the

Rule, it may be assigned on Sunday. The Rule recognizes that changes in the volume of work created by business or seasonal fluctuations must be taken into consideration for the purpose of determining whether Sunday work may be reinstated. But this, in turn, is modified by the restriction that "types of work which have not been needed" on Sundays may now be assigned on Sundays. But this limitation is not related to what may be necessary for the continuous operation of the Carrier. The last sentence of the Rule recognizes that as necessary work on Sundays fluctuates, the number of employes so engaged will change.

It is apparent from this Rule that an essential conditon precedent to assigning work to include Sunday is that the work must be necessary. To support their contention of what is meant by this concept of "necessary" or "needed", the Organization has cited Awards 314 and 1614 of this Division. However, these Awards, and the Arbitration Awards GC-308, GC-309 and GC-700, referred to in Award 1614, were dealing with the provisions of the Rule as it existed prior to September 1, 1949, when the word "necessary" was used with reference to the employes "necessary to the continuous operation of the Carrier." But the parties have by their amended Rule 21 receded from the concept of work being necessary to the continuous operation of the Carrier. Having dropped from the Rule this latter phrase, the concept of "necessary" no longer imports such limitations. Sunday work as such without punitive payment is no longer tied to what is necessary to continuous operation of the railroad.

When we consider all of the references to Sunday work contained in the Agreement of September 1, 1949, it is apparent that the parties did not intend to authorize work on Sunday beyond that which was essential for prompt performance. On the other hand, it is apparent that the parties recognized the nature of the railroad transportation business as a continuously functioning enterprise. Thus, if work could be postponed without significantly harmful results, it could be "dispensed with." Likewise, types of work which have not been needed should not be performed on Sunday, but this limitation does not apply solely to work previously "assigned", but to work which the Carrier found necessary to perform on Sunday. The performance on Sunday of a type of work at the punitive rate would be indicative of the fact that it was "needed."

The work described in the submission is platform warehouse work on LCL freight. Under normal conditions the handling of such work could be postponed over Sunday. But significant increases in volume might make the handling of this on Sunday imperative, and the provision of the Rule, reading: "Changes in amount or nature of traffic or business and seasonal fluctuations must be taken into account," would be applicable.

The Carrier has set forth a plan of seven-day service to demonstrate that it would operate more efficiently. But merely to show greater efficiency, or that the work could be done more economically, will not alone establish a basis that Sunday work is needed.

The record here shows that in 1940 to 1944 the Carrier maintained considerable forces for Sunday work. Since 1944, the Carrier has performed work on Sundays at the warehouses named, but in a decreasing amount. The Carrier asserts that the business at these warehouses requires a plan for seven-day-per-week assignments, but it does not offer any proof that the volume of work has in fact substantially increased from that in 1949 when gangs were worked on two Sundays. The Carrier has shown that it would be efficient to have Sunday assignments but it has not demonstrated that such are necessary, and we must conclude that the Carrier has not shown a necessity for Sunday assignments as contemplated by Rule 26 (c). The burden of establishing facts sufficient to permit the allowance of a claim is upon him who seeks it. Limited, therefore, to the specific showing here, we must conclude that the Carrier has not established its claims.

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 facts of record do not support the claims.

AWARD

Claims 1 and 2 denied in accordance with the Opinion and Findings. Claim 3 dismissed.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: A. I. Tummon
Acting Secretary

Dated at Chicago, Illinois, this 9th day of March, 1951.