Award No. 5394
Docket No. CL-5338

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

J. Glenn Donaldson, Referee

PARTIES TO DISPUTE:

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

ST. LOUIS SOUTHWESTERN RAILWAY COMPANY

ST. LOUIS SOUTHWESTERN RAILWAY COMPANY OF TEXAS

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employes:

1. That Carrier's unilateral action, effective September 1, 1949, in denying employes in various offices and departments rest periods approximating fifteen (15) minutes each in the morning and afternoon during the work day was violative of the rules embodied in Agreement effective April 1, 1946 between the Brotherhood and Carrier that governs the hours of service and working conditions of the employes.

2. That all employes adversely affected on and after September 1, 1949 be paid for the time denied them as rest periods (approximating thirty (30) minutes per day) at the rate of time and one-half.

EMPLOYES' STATEMENT OF FACTS: A. For a considerable length of time, extending over a period of years, a condition of employment governing clerical workers in the General Superintendent's Office, Accounting Department Offices and Superintendent of Transportation Offices at Tyler, Texas, as also in various other Division and Departmental Offices, Freight Stations and Yard Offices, permitted of their absenting themselves under pay for periods of time approximating fifteen (15) minutes in the morning and fifteen (15) minutes in the afternoon (total thirty (30) minutes per day) within their normal service assignment and commonly referred to as "rest" periods.

In support of the foregoing there is attached hereto and made a part hereof copy of bulletins issued by the then Superintendent of Transportation, Mr. Matthews, dated September 29, 1943 and June 26, 1944. (Employes' Exhibits A and B.)

Also letters from individual employes in certain offices, namely:

J. M. Gugenheim, employed as T&E Timekeeper in the Office of Auditor of Disbursements, dated Tyler, Texas, October 26, 1949.

work eight hours exclusive of the meal period for a payment of eight hours, regardless of the provisions of the rule. They are requesting in effect that the rule hereafter be applied for these employes on the basis that eight hours, including two refreshment periods, shall constitute a day's work for which 8 hours pay will be allowed.

The facts pointed out show that while some employes in certain offices have been permitted to absent themselves for short periods to secure refreshments, the Carrier has been under no obligation to grant such permission, and in declining permission for such absence subsequent to September 1, 1949, it was not violating any rule, but to the contrary was merely exercising a right plainly set forth in the rules in effect prior to September 1, 1949.

The payment claimed is not provided by the rules, and in addition is not the claim as handled on the property.

Under these circumstances, the Carrier respectfully requests that the claim be denied.

(Exhibits not reproduced.)

OPINION OF BOARD: For a number of years prior to September 1, 1949, clerical employes working in certain offices at some points on the Carrier's lines indulged in recesses or rest periods and were permitted to leave the building in which they worked for varying times, usually ten to fifteen minutes, morning and afternoon in order to obtain coffee, coca cola or other refreshments. This dispute does not concern time consumed in taking refreshments at desk, or going to water coolers or rest rooms. Effective September 1, 1949, the practice, where existing, was discontinued by oral instructions of the managing force. Claim is made for all employes adversely affected for time denied them as rest periods (approximately thirty minutes per day) at the rate of time and one-half, the Organization contending that through such practice a seven and one-half hour work day had been established for these employes.

Carrier contends that the rules make no provision for such absences and eight hours, exclusive of meal period, may be required as a day's work. It further denies the alleged existence of a general practice, pointing out that there are a number of offices where employes have never been allowed to be absent for the purposes stated, and where permitted, it has been a matter of discretion, a gratuity which the Carrier regulated as it saw fit without prior objection.

The Organization points to a change in the Hours of Service Rule in the 1946 Agreement from that previously prevailing:

October 16, 1939 Agreement

"Rule 45. Except as otherwise provided in this article, eight (8) consecutive hours' work, exclusive of the meal period, shall constitute a day's work."

April 1, 1946 Agreement

"Rule 27-1. Except as otherwise provided in Rules 28 and 29, eight (8) consecutive hours work **or less,** exclusive of the meal period, shall constitute a day's work, **for which eight (8) hours pay will be allowed."** (Emphasis supplied.)

It is urged upon behalf of the Organization that the "or less" clause is uncommon to Clerks' Agreements and that it was negotiated into Rule 27-1 for a specific purpose, i. e., to establish by agreement what had heretofore been recognized as a gratuitous practice. The Carrier denies that the issue now before us came up during negotiations or that the rule change was intended to cover it. Such uncertainty in the evidence is not unusual where search is made for events and motives prompting an Agreement as a key to its understanding. Better that we apply a rule as it is written where, as here, no particular ambiguity in meaning is apparent.

Nowhere in this revised rule or in any other rule of the Agreement do we find basis to support a demand for a continued rest period as such. It is clear, however, from a reading of the revised Hours of Service Rule (Rule 27-1) that it fits the seven and one-half hour work day as readily as an eight hour work day. The addition of the phrase "or less" has changed the entire concept of the work day and leaves room for recognition of a shorter work day, which was not the case before the rule revision took place. It further provides for eight hours' pay irregardless of its length. This practice, acknowledged by Carrier's bulletins upon the subject, plus changes in the Hours of Service Rule in 1946, which removed any past conflict with the rules, have served to formalize a work day of less than eight hours.

At page 9 of Carrier's Ex Parte Submission, the Carrier placed its finger upon the decisive factor in this case when it stated:

> "Less than 8 hours work becomes a day's work only when the Carrier requires less than that amount."

As one example, it cites authorized absence for part of a day without deduction in pay. That is exactly what Carrier has done in the instant case. Over an extended period this Carrier, while continuing to pay for eight hours' work, has required less than eight hours' work by permitting employes at certain of its offices to take two recesses or rest periods, aggregating approximately thirty minutes in time per day. Thus for a continuous period and not occasionally, it has received seven and one-half hours' work for eight hours' pay, knowingly and intentionally as is evidenced by the bulletins introduced as Employes' Exhibits A, B and D. The Hours of Service Rule has been conformed to such practice. For the Carrier to lengthen the work day at these offices by abolishing the rest periods, without adjustment in pay, required the approval of the Organization which was not had. The same past practice recognized the right in management to regulate and police the rest periods to meet the convenience of the service and to prevent abuse, and nothing herein is intended to interfere with this right if the Carrier elects to reestablish the rest periods in lieu of increasing the compensation.

It would strain the plain meaning of Rule 30, entitled "Meal Period" to apply it to the case at hand, as Carrier urges. We cannot say that the taking of liquid refreshments during a mid-morning or mid-afternoon rest period constitutes a meal within the intended application of Rule 30. Such drinks are commonly considered as energy pick-ups **between** meals, meals being the breakfast, luncheon and dinner or breakfast, dinner and supper eating periods at which solid, sustaining foods are partaken.

We are confronted also with the question of what effect, if any, the application of the Forty Hour Day Rules have upon the instant dispute.

On the 5th day of August 1950, the parties hereto entered into a Memorandum of Agreement which provided, in part, as follows:

"Rule 27

> 27-3(a) **General**—The carrier will establish, effective September 1, 1949, for all employes, **subject to the exceptions contained in Article II of the Chicago Agreement of March 19, 1949,** a work week of 40 hours, consisting of five days of eight hours each, * * *. **The foregoing work week rule is subject to the provisions of the Chicago Agreement of March 19, 1949."** (Emphasis supplied.)

Article II, Section 3 (j) of the Chicago Agreement, reads:

> "Existing rules which provide for the number of hours constituting a basic day shall remain unchanged."

Decision No. 17 of the Forty Hour Week Committee (3-1-50) applied the last quoted paragraph to a rule which provided, in part: "For positions * * *, where it is the Company's policy to permit employes filling the same to work a less number of hours than eight (8), on any day of their assignment, without deduction of pay, * * *." The Committee decided that the March 19, 1949 Agreement did not require any change in the text by reason thereof, thus recognizing shorter work days.

It will be noted that said Decision No. 17 was rendered over five months before the Memorandum of Agreement containing Rule 27-3(a) was drafted. Presumably the Decision was before them and the Agreement was made with this interpretation in mind. These parties twice refer to the Chicago Agreement in Rule 27-3(a). First, they refer specifically to the exceptions contained in Article II. Then, after providing for a work week of forty hours, consisting of five days of eight hours each, the parties expressly made it subject to the Chicago Agreement, thus evidencing a clear intent to give full effect to any exceptions to the eight hour day present on this property. This is not a case factually similar to that subject to Award 5278. Here we must find that the parties intended to give continuing effect to the Hours of Service Rule as it appears in the 1946 Agreement.

As to the Tyler, Texas, offices, the record reflects that the two fifteen minute rest periods prevailed without change before and after the revised Agreement of 1946. Therefore, a seven and one-half hour work day shall be recognized at this point.

At Pine Bluff, Arkansas, the evidence submitted by the Organization in respect to the duration of the rest periods is somewhat indefinite. See Employes' Exhibits C-1, 2 and 7. On August 17, 1946, however, the Carrier established ten minute rest periods, twice daily, and no exception was taken by the Employes, even though the action was taken after the rule revision. Accordingly, a work day of seven hours and forty minutes should be recognized at this point.

Because the employes in these departments have not in fact worked more than eight hours, and that being the number of hours of work required before time and one-half must be paid (Rule 32-1), the claims should be adjusted upon a pro rata rather than overtime basis. Award 5005.

The Carrier may elect to continue to work these employes eight hours a day as it has since September 1, 1949. In this event, the compensation must be adjusted to meet the extended work day. The practice affects only the length of the work day and the compensation to be paid therefor. We are not hereby recognizing a right to a rest period as such. To do so would be an unauthorized interference with one of management's principal prerogatives, i. e., the right to plan its work program. If rest periods are to come as a matter of right, it must be after collective bargaining has produced an enabling rule.

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 violated the terms of the Agreement to the extent indicated in the Opinion when it extended the duration of the work days at Tyler, Texas, and Pine Bluff, Arkansas, without a commensurate increase in compensation.

AWARD

Claims sustained in part. All employes at Tyler, Texas, and Pine Bluff, Arkansas, adversely affected on and after September 1, 1949, by Carrier's action in extending the length of the work day by abolishing rest periods shall be paid for thirty minutes per day at Tyler and twenty minutes per day at Pine Bluff at pro rata rates applicable to the positions.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: A. I. Tummon
Acting Secretary

Dated at Chicago, Illinois, this 18th day of July, 1951.

DISSENT TO AWARD NO. 5394, DOCKET NO. CL-5338

This is the third award involving a particular phase of the action taken by the railroads in establishing the 5-day 40-hour week which the non-operating railroad employes secured effective September 1, 1949, through the report and recommendations of a Presidential Emergency Board, in lieu of the prior 6-day 48-hour week generally existing on the railroads. In this award, as in Awards 5005 and 5278, the Carrier involved, upon the reduction of the work week, sought to place in effect the work week of five 8-hour days demanded and secured by the Employes. Only in Award 5278 has the express agreement of the parties, acceding to the Employes' demands, been given its proper effect.

Our dissent in Award 5005 sets forth fully our reasoned grounds for objecting to the majority's action therein disregarding the agreement that "the work week shall be 40 hours, consisting of five days of eight hours each." The Carrier involved in that dispute had for 21 years prior to the 40-hour week permitted certain clerks to enjoy a work week of 6 days, including five 7½ hour days and one 3½ hour day. The applicable agreement, prior and subsequent to the 40-hour week, contained a "Day's Work" Rule reading as follows:

> "Except as otherwise provided herein, eight (8) consecutive hours' work, exclusive of meal period, shall constitute a day's work."

In view of this unambiguous rule the Carrier could at any time have changed from a 7½-hour day to an 8-hour day, under principles followed by this Board in many awards, without any violation of the agreement. Even so, the Employes sought a 40-hour week of five 8-hour days and having obtained an agreement establishing such a work week, thereafter repudiated the agreement and were sustained in their action by the majority of this Division.

In Award 5278 the Carrier involved had also, for 21 years prior to the establishment of the 40-hour week, permitted certain clerks to work less than an 8-hour day. Here the day was 7¼ hours, the week either 43½ hours, or 40 hours if the individual did not work Saturday afternoon. A "Day's Work" Rule effective before and after the 40-hour week read as follows:

> "Except as otherwise provided in this agreement eight (8) consecutive hours or less, exclusive of the meal period, shall be considered a day's work for which a day's pay shall be allowed."

Again the parties, effective September 1, 1949, agreed to "a work week of forty (40) hours consisting of five (5) days of eight (8) hours each." Here, however, the majority, in Award 5278, denied the claim that after

September 1, 1949 the Carrier could not have 8 hours' work from its clerks for 8 hours' pay. It was held that the "Day's Work" Rule did not establish the number of daily hours of work at 8 or at any other particular number; that the 21 year practice did not establish a 7¼-hour day; and that under the rule the Carrier could at any time have required 8 hours of work, instead of 7¼ hours, for 8 hours' pay. This is the obvious conclusion from this rule, and the same conclusion should have been reached with regard to the "Day's Work" Rule involved in Award 5005.

Moreover, in Award 5278 the majority held that when the parties agreed to a 40-hour work week of five 8-hour days, as the result of "an Emergency Board Report and Recommendation that was focused entirely upon hours of work", any prior work day of less than 8 hours which might have existed by practice or agreement was specifically changed to an 8-hour day, since the new agreement was entirely contrary to and incompatible with a work day of less than 8 hours.

In this present award the record indicates that "for a number of years prior to September 1, 1949" certain clerks were permitted rest periods, "usually 10 to 15 minutes" in the morning and afternoon. Effective September 1, 1949 the rest periods were discontinued by order of the Carrier. Prior to and after September 1, 1949 the following rule was in effect on this Carrier:

> "Except as otherwise provided in Rules 28 and 29, eight (8) consecutive hours' work or less, exclusive of meal period, shall constitute a day's work, for which eight (8) hours' pay will be allowed."

Effective September 1, 1949, this Carrier also agreed with its employes to establish "a work week of 40 hours, consisting of five days of eight hours each". In addition it agreed to pay, after September 1, 1949, the same pay for 40 hours' work which it had previously paid for 48.

The majority in this award has chosen to ignore the principle of Award 5278 and the clear language of the 40 Hour Week Agreement and to sustain the claim that the Carrier could not, after September 1, 1949, require the employes to work 8 hours for 8 hours' pay. The majority has in effect held that the granting of rest periods of indefinite duration for an indefinite period prior to September 1, 1949 established a fixed minimum day of less than 8 hours (7½ hours at Tyler, Texas and 7⅔ hours at Pine Bluff, Arkansas) which could not be changed except by agreement. The majority has further held that no change was made by the express agreement that a work week of five 8-hour days would become effective September 1, 1949. It has chosen to ignore the fact that the Carrier—on and after September 1, 1949—agreed to pay 48 hours' pay (at previous rates of pay) for 40 hours' work and has held, in effect, that this Carrier must pay that same 48 hours' pay for 37½ hours at Tyler and for 38⅓ hours at Pine Bluff.

As has been pointed out, in Award 5278, under an identical "Day's Work" Rule, this Division held that a definite practice of 21 years' standing failed to establish a work day of less than 8 hours, and that the Carrier there involved could have required 8 hours' work for 8 hours' pay at any time. There is no warrant for the majority's holding that the indefinite practice of granting rest periods here involved created a fixed work day of less than 8 hours. And even if this particular holding were correct, it is obvious that the agreement on a 40-hour week with five 8-hour days, effective September 1, 1949, was an express repudiation of the prior inconsistent practice, as this Division held in Award 5278. It is difficult to conceive how the parties in writing their 40-hour week agreement could have more clearly stated their intention to permit the Carrier, which had agreed to reduce weekly hours to 40 and days of work per week to 5, to require the employes in turn to give 8 hours' work for 8 hours' pay on each and every day of the 5-day work week.

The majority has distinguished Award 5278 on the ground that it is not factually similar to this award. It is true that in Award 5278 the clerks enjoyed a period of time off from the 8-hour day which came either at the beginning or end of the day's work, while here the period of time off came partly in the middle of the morning and partly in the middle of the afternoon. However, this factual distinction, the only one apparent from the record, is not even referred to as a distinction in the majority's opinion and obviously presents no basis for disregarding Award 5278. The majority opinion also holds that the parties here intended to give continuing effect to any exceptions to the 8-hour day present on the property. No evidence of such an intent can be discovered in this record. Nor is this conclusion supported by the reference in Rule 27-3(a) to the Chicago Agreement or by the majority's citation of Decision 17 of the Forty Hour Week Committee.

Nothing in the Chicago Agreement preserves mere practices inconsistent with the establishment of the 40-hour week. It is pertinent to point out that the Chicago Agreement significantly omits the provision, common to national agreements of this kind, permitting the employes to retain on individual railroads rules and practices more favorable to them than the terms secured in the National Agreement.

Decision 17 of the Forty Hour Week Committee involved the application of the Chicago Agreement to a Carrier which had in effect an agreement rule and a written understanding specifically establishing a basic day of less than 8 hours for certain positions in certain offices and containing special overtime provisions for such positions. The situation there was in no way similar to that involved in this dispute. Furthermore, Decision 17 involved a dispute between the Bessemer and Lake Erie Railroad Company and its clerks—that Decision has no application to the parties to this present dispute. It is absurd to hold that in negotiating Rule 27-3(a) this Carrier and its employes had in mind the interpretation made in Decision 17 of the application of the Chicago Agreement to the special (and unusual) agreement on the Bessemer and Lake Erie.

For the major reason that this award, like Award 5005, totally disregards and sets aside the effect of the rules agreed to in establishing the 40-hour week, and for the specific reasons stated above, we dissent to the Opinion, Findings and Award of the majority of the Division.

(s) A. H. Jones
(s) R. H. Allison
(s) R. M. Butler
(s) C. P. Dugan
(s) J. E. Kemp

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

INTERPRETATION NO. 1 TO AWARD NO. 5394

DOCKET NO. CL-5338

NAME OF ORGANIZATION: Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employes.

NAME OF CARRIER: St. Louis Southwestern Railway Company, St. Louis Southwestern Railway Company of Texas.

Upon application of the representatives of the employes involved in the above Award, that this Division interpret the same in the light of the dispute between the parties as to its meaning and application, as provided for in Section 3, First (m) of the Railway Labor Act, approved June 21, 1934, the following interpretation is made:

The subject Award was not intended to have the general application subsequently sought by the Organization. Our intent seems clear from a reading of the entire Opinion despite any contrary impressions given by particular words or phrases.

The Award is premised upon the unusual wording of Rule 27-1, which came into the Agreement on April 1, 1946, and the practice which followed. Under Rule 45 of the 1939 Agreement, which spelled out a definite eight-hour work day, release-time was a mere gratuity which could have been extended or abolished with immunity at the discretion of the Carrier. In short, practice or custom could not set aside rights under a clear, unambiguous rule.

After April 1, 1946, the specificity of the Hours of Service Rule no longer prevailed and evidence of practice became material in aid of construing the rule.

We were satisfied from the evidence submitted that at two points, namely, Tyler and Pine Bluffs, recognition of the shorter work day had been given by the Carrier. The burden of proof, assumed by the party asserting the practice, was not discharged at other points on the system. Accordingly our Award was restricted to the named localities. That our intent was to consider the question upon a point by point basis and upon the evidence peculiar to each of said points is reflected by our recognition of thirty minutes of compensable time at Tyler but only twenty minutes at Pine Bluff. Variance in practice was influenced perhaps by local physical conditions and different supervisory personnel. Presumably these factors plus needs of the service would reflect themselves in practice prevailing at other points upon the system, thus making unwarranted an Award of general application.

Application of subject Award was intended to be made to departments and employes shown on Employes' Exhibits A, B & D (Carrier's Exhibits

15, 16, and 17). It would appear from the Brotherhood's ex parte request for an Interpretation of Award that this obligation has been discharged.

Referee J. Glenn Donaldson who sat with the Division, as a member when Award No. 5394 was adopted, also participated with the Division in making this interpretation.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: (Sgd.) A. Ivan Tummon
Secretary

Dated at Chicago, Illinois, this 28th day of January, 1953.

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

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