Award No. 5590
Docket No. CL-5634

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Francis J. Robertson, Referee

PARTIES TO DISPUTE:

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

THE NEW YORK CENTRAL RAILROAD COMPANY— LINE WEST OF BUFFALO

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

(1) That the Carrier violated and continued to violate the Clerks' Agreement when they failed to call the regular assigned Assistant General Foremen, Foremen and Checkers, employed at the Orange Avenue Freight Terminal at Cleveland, Ohio, who were available on their regular assigned rest days, to perform work regularly assigned to them during the five (5) days of their work week.

(2) That the Carrier further violated the Clerks' Agreement when, in the absence of extra or furloughed employes, such duties were assigned to junior checkers regularly assigned to work on such days, while the junior checkers' positions were either blanked for the day (in violation of our Five Day Guarantee Rule, Rule 34 (d), as revised by our Forty-Hour Week Agreement) or filled by Class 2 employes regularly assigned to work on five (5) days of their work week in Class 2.

(3) That the Carrier now be required to pay these Assistant General Foremen, Foremen and Checkers, as enumerated in Employes' Statement of Facts, a day's pay at punitive rate for each of the days Carrier failed to call these employes on their rest days to perform work regularly performed by them during their five (5) day week assignments.

EMPLOYES' STATEMENT OF FACTS: At our Orange Avenue Freight house, a separate roster is maintained, covering that seniority district by classes (Class 1 and Class 2), to identify employes who are assigned to work on five (5) days of each work week on either clerical and/or nonclerical assignments.

On September 1st, 1949, the effective date of our Chicago Forty-Hour Week Agreement; all employes at the Orange Avenue Freight Terminal at Cleveland, Ohio were assigned to a five (5) day operation; namely, Monday through Friday, with Saturday and Sunday as rest days.

five days could be performed by employes working at straight time rates. The underlying principle that the Carriers should have the right to avoid overtime in doing this work is reflected, among other places, in Section 1 of Article II and in paragraphs (f) and (i) of Section 3.

As further evidence of the intention of the parties who signed this agreement, there is attached hereto, as Carrier's Exhibit 6, a statement by the Carrier's Vice President in charge of Personnel and Public Relations, who was a member of the Eastern Carrier's Conference Committee during the proceedings leading up to the adoption of the agreement. This statement outlines the basic theory of that agreement as it concerns the right of employes under a 5 day week to claim work in excess of 40 hours. In this statement, Mr. Horning also recites his understanding, based upon written notes made at the time, of the intention of the parties signatory to the agreement on the particular facts and circumstances of the present dispute, as follows:

> "The particular situation involved in the instant claims at Orange Avenue is shown by our notes to have been discussed on February 22, 1949. During the discussions on that day, one of the Carrier representatives, Mr. Gould, inquired of Mr. Harrison, President of the Brotherhood of Railway Clerks, what the situation would be in a freight station where 10 clerks were employed to work Monday to Friday and 5 clerks were assigned to work Tuesday to Saturday. He assumed a situation where the Carrier might need 3 additional checkers on Saturday and inquired as to whether the Carrier might have a right to use available employes qualified to do checker work from the regular Saturday force or whether the Carrier would be obliged to call out some of the Monday to Friday force. Mr. Harrison replied that in this case, he did not think that the Monday to Friday employes would have any claim. He said, in effect, that the Carrier could on any day take a trucker and set him up to checker and pick up a casual for his work and that the Carrier could do the same think on a Saturday under a forty hour week. I then remarked that I was glad that point was clarified and Mr. Harrison went on to say that in a situation where the Saturday forces might be lower than the Monday to Friday force, and an unexpected volume of work arose on a Saturday, that the situation with respect to filling jobs under a five day week would not be any different than under the then existing six day week. He said we could get a bright trucker and let him check freight and, if we wished, go on the outside and hire another trucker. He said that we could do just the same as we would do if a checker was sick on a Tuesday."

There is thus clearly no foundation in fact or theory to be found in the 40-Hour Week Agreement in support of these claims. On the contrary, it was plainly intended by the parties, and reflected in the terms of that agreement, that the Carrier should have the right to perform necessary work by the use of available employes at straight time rates.

CONCLUSION

The foregoing evidence demonstrates conclusively the lack of any merit in the position of the Organization in this dispute, and this board is respectfully urged to deny these claims.

(Exhibits not reproduced.)

OPINION OF BOARD: Effective September 1, 1949, Carrier established its Clerical forces at the Orange Avenue Freight Terminal at Cleveland on five-day assignments with Saturday and Sunday as rest days. Subsequently it became apparent that Monday to Friday coverage of the operation at the Terminal did not meet service requirements. After conference with the employes on February 3, 1950, the operation was changed to six days. The force was staggered with some of the employes being assigned Saturday and Sunday rest days and others Sunday and Monday. On certain Saturdays and

Mondays designated in the Employes' submission some Assistant General Foremen and Foremen did not report for duty on their assignments. Checkers reguularly assigned as part of the Tuesday through Saturday force and as a part of the Monday through Friday force were used as Assistant General Foremen or Foremen on those Saturdays and Mondays. Checkers, Foremen and Assistant General Foremen are Class 1 employes under the provisions of the controlling Agreement. The assignments of the checkers so moved up on these Saturdays and Mondays were filled by Class 2 employes (loaders, stowers or tractor operators) regularly assigned to work on those days. Some of these Class 2 employes, although not regularly assigned as Class 1 employes, also had seniority standing on the Class 1 roster. It is stated by the employes and not denied by the carrier that when it was agreed to put this six-day operation into effect at Orange Avenue it was understood that if the force so staggered could not take care of the operation on either Saturday or Monday, in the absence of extra or furloughed employes on those days, the regular assigned employes who were on their rest days would be used to augment the forces. Employes file claim as indicated.

The employes cite many provisions of the Forty-Hour Work Week Agreement as adapted to the Collective Bargaining Agreement between the parties in support of their claim. Particular stress is laid upon Rule 35, sub-division (f) which reads as follows:

> "(f) Relief work not a part of any regular relief assignment and other unassigned work required by the carrier may be performed by extra or furloughed employes who will otherwise not have work on 5 days of that work week; in all other cases by the regular employes in the following order of preference:
>
> (1) The regular employe, if the work is part of the service or operation associated with his regular position.
>
> (2) The senior available and qualified regular employe, if the work is not so associated."

In addition, sub-division (g) has been alluded to. That reads as follows:

> "(g) If in positions or work extending over a period of 5 days per week, an operational problem arises which the carrier contends cannot be met under the provisions of paragraph (b), above, and requires that some of such employes work Tuesday to Saturday instead of Monday to Friday, and the employes contend the contrary, and if the parties fail to agree thereon, then if the carrier nevertheless puts such assignments into effect, the dispute may be processed as a grievance or claim under the rules agreement."

In our opinion neither one of these rules is applicable to the factual situation confronting us in this docket except that part of sub-division (f) which deals with unassigned work required by the Carrier. This latter part of sub-division (f) would apply to those instances where the carrier worked more checkers on a Monday or Saturday than were regularly assigned. The work performed by the checkers in excess of those regularly assigned is conceded by carrier to have been unassigned and carrier has admitted liability for claims in such instances so that further discussion thereof would serve no purpose. The remainder of sub-division (f) is not applicable because the work in question is not relief work in the sense that that term is used in sub-division (f). It was regularly assigned work accruing to employes working on a staggered work week, that being the method used (here by mutual agreement) to afford coverage to this operation six days each week rather than the alternate though related method of creating relief assignments. Sub-division (g), the so-called "Deviation Rule" is not applicable for by the conference agreement the operation has been denominated as a six-day operation and sub-division (g) deals with five-day positions not six-day positions. It is our view, therefore, that, so long as extra work requiring an excess of the working force as staggered

and working on Mondays and Saturdays is not required, the same rules are applicable to regularly assigned forces on Mondays and Saturdays as on other work days.

Rule 1 (Scope) of the involved Agreement divides the employes covered by the agreement in two classes. Checkers are listed in Class 1. Freight handlers and others similarly employed in and around stations, warehouses and storehouses are listed in Class 2. Rosters are kept of all employes in each seniority district, by the classes indicated in Rule 1. Seniority begins at the time an employe is assigned to a position in the class of service covered by the seniority roster. It is patent that under these rules the performance of Class 1 work by a Class 2 employe holding no seniority in Class 1, while there are employes holding seniority in Class 1 available, is an invasion of the seniority rights of the Class 1 employes. The carrier could not, therefore, with impunity assign this Saturday or Monday work to Class 2 employes holding no seniority rights on the Class 1 roster while there were Class 1 employes available to do the work. If there are no furloughed or extra employes in Class 1 available, the carrier is obligated to call the available regularly assigned employes in order of seniority who are on their rest days. To hold otherwise would be to make a sham of the seniority rules.

With respect to the use of employes holding Class 1 seniority rights, although regularly assigned in Class 2, a more difficult question is presented. The rules and interpretations of the same as written by the parties are not clear on the subject. The Agreement does provide for the holding of a "dual" seniority in Classes 1 and 2. The undisputed practice of the parties under the agreement for twenty years or more has been to use Class 1 and Class 2 employes interchangeably depending upon the size of the force reporting for work. As indicated above we are convinced that this practice cannot prevail against the provisions of the agreement markedly dividing Class 1 and Class 2 seniority so as to permit the performance of Class 1 work by employes holding only Class 2 seniority when there are Class 1 employes available. However, where the employe holds dual seniority although more or less regularly assigned to Class 2 work, the practice lends support to the carrier's contention that such an employe holds the status of a furloughed Class 1 employe. The practice is not inconsistent with the provisions of the Agreement and, therefore, must be held to be determinative of the intent of the parties. We conclude, therefore, that it was not a violation of the agreement to use Class 2 employes holding seniority on the Class 1 roster on the dates involved in this claim to perform service as checkers. The checkers who were used as Assistant General Foremen and Foremen might also be properly used. There was no crossing of seniority lines in either instance.

The fact that in some instances checker's positions were blanked when the checker was used as a foreman or for some other reason is not violative of the agreement. There is no requirement under the 40-hour week agreement that positions as such, that is an individual job assignments, have to be filled every day. Guarantees run to the employe rather than the position under the 40-hour week agreement.

The conclusions above reached indicate that this claim should be treated in the following manner:

(1) In those nineteen instances where more checkers than those regularly assigned to work on Mondays and Fridays were used, the claims of the employes who were not worked on their rest days on such Mondays and Saturdays are sustained.

(2) As to those instances where Class 2 employes holding no seniority on the Class 1 roster on the dates involved in this claim were used to perform Class 1 work, claim is sustained on behalf of the senior Class 1 employe on rest day status (it being conceded that were no extra or furloughed employes available) on the Mondays or Saturdays when Class 2 employes holding no seniority in Class 1 were so used but at the pro rata rate only.

(3) Claims of the Assistant General Foremen and Foremen on account of checkers working on Assistant General Foremen's and Foremen's positions on Mondays and Saturdays are denied.

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 Carrier violated the Agreement to the extent indicated in the Opinion.

AWARD

Claim sustained to extent indicated in Opinion.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: A. I. Tummon
Acting Secretary

Dated at Chicago, Illinois, this 14th day of December, 1951.