Award No. 5661
Docket No. TE-5560

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Angus Munro, Referee

PARTIES TO DISPUTE:

THE ORDER OF RAILROAD TELEGRAPHERS

NORFOLK SOUTHERN RAILWAY COMPANY

STATEMENT OF CLAIM: Claim of the General Committee of The Order of Railroad Telegraphers on the Norfolk Southern Railway Company that

1. The Carrier failed to give A. H. Whitty proper notice that his services were not required on Sunday, July 3 and Sunday, July 10, 1949, and,

2. The Carrier shall now compensate Claimant A. H. Whitty for eight (8) hours each Sunday, July 3 and July 10, 1949 at the time and one-half rate.

EMPLOYES' STATEMENT OF FACTS: There is an agreement covering rules of working conditions and rate of pay, bearing date August 1, 1937, implemented by Mediation Agreement Case A-2070 (Rest Day Agreement), in effect between the parties to this dispute.

A. H. Whitty, Claimant in this case, was the operator-clerk at New Bern, North Carolina, with assigned hours 7:00 p.m. to 4:00 a.m. one hour off for meal, which assignment, with the exception of few Sundays, he had regularly worked seven days per week, with time and one-half rate for Sunday subsequent to the adoption of Mediation Agreement A-2070 (six-day week agreement), effective March 1, 1945.

New Bern is a station located 31.1 miles from Marsden, North Carolina, on what is known as the New Bern Branch, where the Norfolk Southern has connection with the Atlantic and East Carolina Railway. Marsden is a divisional terminal point on the main line of Norfolk Southern Railroad.

Carrier operates scheduled freight train Nos. 31 and 30 on round trip basis between Marsden and New Bern, which train, with but few exceptions is operated daily. Majority of the tonnage handled by this train is business going to and/or coming from the A&EC Railway, and it is the duty of the operator-clerk at New Bern to make delivery of cars to A&EC, also receive cars from that line; keep proper records and make reports.

Claimant Whitty had standing instructions to work Sundays unless otherwise notified.

On July 3, 1949, Claimant reported for work at the regular starting time of his position and was informed that train 31-30 was annulled and that his

date, and on which date he did not report, work, or perform any service whatsoever beneficial to the Carrier.

The facts are that the Carrier has paid 3 hours at time-and-one half rate, or 4½ hours at straight-time rate—equivalent to ½ hour more than ½-day—because the claimant appeared at his office for a few minutes on Sunday, reported, and was immediately advised his services would not be required. However, this is not satisfactory to the claimant and his representative; they are insisting on payment of 8 hours at time-and-one-half on that date (July 3, 1949) and an additional 8 hours at time-and-one-half on a second date (July 10, 1949), on which latter date the claimant did not even report or appear at his office. This totals 16 hours at time-and-one-half rate—or the equivalent of **3 regular days' work** (24 straight-time hours)—being claimed, and the claimant merely reported for a few minutes on one date. This case strongly illustrates the high degree to which "featherbedding"—"getting something for nothing"—has progressed in the railroad industry, and the serious efforts of employes, backed by their unions, to extend such "featherbedding" beyond all reasonable bounds. "Featherbedding" practices most certainly must not be extended and increased in scope, either through action of the National Railroad Adjustment Board or otherwise, if the railroad industry, which as the main artery of the nation's commerce and so vital and necessary to the well-being of every individual (including the railroad employes, themselves) and the defense and protection of the nation as a whole, is to continue to exist and prosper as it has in the past under a system which has seen this country become the greatest industrial power, and have the best transportation network, in the world, then such "featherbedding" practices must be kept to a minimum and the railroad industry permitted to operate **efficiently** for the betterment of the standard of living not only of its own employes but also of the public and the nation in general. A business which operates on inefficiency—and "featherbedding" is just that—cannot long endure. While the instant case is but one instance, it is illustrative of "what is going on on the railroads."

In view of what has been stated in this "Position" and in the "Carrier's Statement of Facts," and in view of Carrier's Exhibits G and H, it is respectfully requested that the Division rule: (1) That proper and equitable payment has already been rendered the claimant, and, (2) That his claim is denied.

All data submitted in support of the Carrier's position in connection with this case has been presented to the duly-authorized representative of the employes and is made a part of the particular question in dispute.

(Exhibits not reproduced.)

OPINION OF BOARD: There is no dispute between the parties hereto with reference to what occurred upon the dates set out in the statement of claim. What is in dispute is whether the act of Carrier with reference to each period of time constituted proper notice and if not what basis of compensation should be employed.

Petitioner averred Schedule Articles 2 and 6 effective August 1, 1937, Sections 1 and 2 of Mediation Agreement A2070 and the Memorandum Agreement of September 12, 1945, are involved in the dispute.

Coming now to the facts in the case before us, Petitioner secured the position we are concerned with by responding to Bulletin No. 987, issued on March 10, 1942. Under and by virtue of the terms of said bulletin Claimant had an assignment to protect the work involved in the position therein described. Whether the position we are concerned with at this time was a 7-day position or not we cannot determine from the record. However we do know at such time in event Claimant performed the duties of said position on

Sunday he was compensated at the pro rata rate. At some time subsequent to Claimant assuming the assignment referred to in said bulletin and evidently prior to the adoption of the rest day agreement Carrier issued what the disputants describe as a "standing call," that is, unless directed contrariwise Claimant was to report for duty each and every Sunday thereafter at the same time as set out in his work assingment. Subsequent to the rest day rule Claimant received compensation at the rate of time and one-half upon the occasions he worked on his rest day. We are not here concerned with the times prior to the dates in question when Claimant did not work.

We will now take up the question of whether or not the position we are concerned with was what is styled a 7-day position. Such a position is one that is necessary to the operation of the railroad. Going further into the matter and using the above test we must inquire with reference to what factors there were about the position involved without which operation of the railroad could not be maintained. We find on the dates in question as well as on previous periods of time the work or duties incident to such position did not exist, yet we cannot find how such fact affected or impaired the operation of Carrier's business. That Claimant recognizes this principle is shown by its asertion the character of the position as determined by the regularity of work determines the status. The work was not regular. Accordingly we find this was not a 7-day position.

We come now to what compensation, if any, Petitioner should be allowed for each of the dates in question. Schedule Article 6(a) has no application in that the periods of time we are concerned with were outside of Petitioner's assignment. Nor does Mediation Agreement A-2070 give much aid in solving the problem in that we are not concerned with a 7-day position. We do know, however, subsequent to it the Carrier paid time and one-half for work performed on the seventh consecutive day by an employe. Our question is not about work performed but about being called and not used upon one's rest day and subsequent to issuance of such call what notice with reference to the time element must Carrier issue to avoid the same. It seems clear had Carrier notified Claimant upon the previous day not to report for duty no claim would have been filed with this Board. In this connection we think Claimant admits such to be the case in that this claim alleges proper notice was not given. On the other hand Carrier admits notice not issued until reporting time does not constitute proper notice as evidenced by its proffer of payment under the terms and provisions of Section 2, Case A-2070. What about notice not to report issued and received some 3 hours and about 10 mniutes prior to reporting time?

Claimant avers the very purpose and intention of the "rest day rule" was to permit an employe to conduct himself in a manner he had not hitherto enjoyed; that by reason of the "standing call" he was prohibited and prevented from conducting himself in a manner he otherwise would have or could have. For example, Claimant states he might have gone fishing, further, that by reason of the terrific climate at Newbern, N.C., he was forced to torture himself in seeking sleep and rest during the diurnal period in order that he be physically able to perform the duties incident to the job during the nocturnal period.

By way of defense Respondent contended practice and no shedule rule required a particular type of notice to avoid the standing call. Respondent further averred in regard to avoiding its standing call "it is possible that on both of the dates in question the Claimant would have preferred to have had more notice; however, life and the railroad service being what they are, full of pitfalls, uncertainties, and even human errors, the Claimant and his representative, the Petitioner, must expect to ocassionally cope with such situations without expecting in each such instance a great bonanza of overtime penalty payment." With reference to atmospheric conditions prevailing at the location we are concerned with Carrier was of the opinion the pleader was a stranger to said location and hence not intimately acquainted with the same.

After carefully reviewing the record and hearing the arguments by the opposing parties upon hearing hereof it is our opinion that Carrier did not give proper notice upon either date. Notwithstanding the argument advanced by Carrier that no rule supports the claim for either date it confesses equity requires the payment of a call on the first date set out in the claim. As against such reasoning it is urged the function of this Board is to construe and interpret rules. We have no quarrel with such argument, indeed we find a rule violation under the theory and holding as set out in Second Division Award 1438, opinion by Referee Swacker. Nothing herein is to be construed as our finding a notice issued and received more than 3 hours and some minutes prior to reporting time is not proper notice, we do find under all the facts and circumstances here presented the notice for the dates of July 3 and July 10 to be not proper. We further find an inconsistency for Carrier to urge no rule supports pay for the July 3 date and yet admit something is due.

It seems to us Carrier's opinion with reference to paragraph 2 of Section 2, of Case A-2070 should apply to both periods of time and it is so found.

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 theron;

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 has violated the Schedule to the extent indicated in the above and foregoing Opinion

AWARD

Claim sustained in accordance with the Opinion and Findings.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: A. Ivan Tummon
Acting Secretary

Dated at Chicago, Illinois, this 21st day of February, 1952.