

Award No. 5710
Docket No. CL-5625

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Angus Munro, Referee

PARTIES TO DISPUTE:

**BROTHERHOOD OF RAILWAY AND STEAMSHIP CLERKS,
FREIGHT HANDLERS, EXPRESS AND STATION EMPLOYEES**

**THE CHESAPEAKE AND OHIO RAILWAY COMPANY
(CHESAPEAKE DISTRICT)**

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

(a) The Carrier violated terms of Clerks' Agreement when, on September 1, 1949, it assigned position of Secretary to Assistant General Superintendent, Huntington, West Virginia, in seven-day service, and

(b) That Mr. G. V. Robbins, incumbent of position of Secretary to Assistant General Superintendent, Huntington, West Virginia, be compensated at the rate of time and one-half times the straight time daily rate of \$14.54 for overtime worked on Saturdays and Sundays, subsequent to September 1, 1949, and

(c) That Mr. G. V. Robbins be paid a minimum day at daily straight time rate of \$14.54 for each Tuesday and Wednesday, subsequent to September 1, 1949, account being assigned in such manner as to require him to suspend work on such days to absorb weekly overtime on Saturday and Sunday.

EMPLOYEES' STATEMENT OF FACTS: For a number of years prior to September 1, 1949, Mr. G. V. Robbins was regularly assigned to position classified as Secretary to Assistant General Superintendent, Western General Division, with offices in Huntington, West Virginia. On August 31, 1949, and for a number of years prior thereto, the position and employee here involved were assigned a work week Monday through Saturday. On week days Monday through Friday the incumbent worked the assigned hours from 8:00 A. M. to 5:00 P. M. with a one hour lunch period from 12:00 noon to 1:00 P. M. On Saturday the incumbent worked from 8:00 A. M. to 1 or 2 o'clock in the afternoon, depending on when the mail was received from the grievance department and signed. Under usual conditions the incumbent was entitled to Saturday afternoon off, but remained until the outgoing mail was signed, placed in envelopes and forwarded. The time of release varied with the quantity to be handled. The incumbent of the position was assigned to report on Sundays prior to September 1, 1949, and work from 8:00 A. M. to 12:00 noon in order to relay certain information from the office of Superintendent, Passenger Transportation, located at Richmond, Virginia, to the various division offices located on the Western General Division, pertaining to the

"(b) Employees notified or called to perform work, either before or after, but continuous with their regular work period, shall be allowed time and one-half on the minute basis for such time worked.

"(c) Employees notified or called to perform work on Sunday or a specified holiday will be allowed five hours and twenty minutes at the rate of time and one-half for four hours' work or less. Employees worked in excess of four hours will be allowed a minimum of eight hours at the rate of time and one-half."

No change was made in this call rule in changing over to the 40-hour week. It will be noted that this rule provides how employees will be paid who are worked before or after assigned hours or on Sundays. It is merely a rule providing how employees will be paid when used on a call basis and there is nothing in this rule providing when an employee will be called. This is taken care of by other rules. Nothing in the subsection relied on by the employees required that employees who were used on a call basis to perform certain work on a call basis prior to September 1, 1949, would continue to be used on a call basis subsequent to September 1, 1949, to perform such work. The intent and true meaning was that employees who were used on a call basis subsequent to September 1, 1949, would be paid in the same manner that they had been when used on a call basis prior to September 1, 1949.

It is quite obvious in this case that the Employees are attempting to have the Secretary to Assistant General Superintendent assigned five days per week and worked overtime the other two days. This is certainly not the intent of the forty-hour week provisions of the agreement, and to prove this point we quote from Rule 30, Section (g), Subsection (7), dealing with the assignment of nonconsecutive rest days:

"The least desirable solution of the problem would be to work some regular employees on the sixth or seventh days at overtime rates and thus withhold work from additional relief men." (Under-scoring supplied.)

In conclusion, this claim should be denied for the following reasons:

1. Certain duties of position of Secretary to Assistant General Superintendent are necessary seven days per week in order to maintain an efficient and practical operation and cannot be deferred on Saturday or Sunday which is made clear by the fact that such duties were performed seven days per week prior to September 1, 1949, even though it was necessary to pay time and one-half for such work on Sunday.

2. Therefore, it is proper to assign the position of Secretary to Assistant General Superintendent in seven day service under the provisions of the "Note" to Rule 30 and Sections (a) and (d) of the same rule.

(Exhibits not reproduced.)

OPINION OF BOARD: Prior to September 1, 1949, Petitioner was assigned to a Job whereby he performed his duties on Monday through Saturday. On Sundays he was given a call to perform the duties of his job and was compensated at the punitive rate.

Subsequent to the Chicago Agreement and in particular to the above mentioned date Carrier arranged the job assignment we are concerned with so that Claimant performed his duties beginning on Thursday through Monday.

Both sides agree the above facts raise the issue of whether Carrier's act constitutes a violation of Schedule Rule 30. With reference to part (d) of said rule we note the rule reads 'seven days per week' not seven days or

parts or portions thereof. We think 'days' as used in the Rule means no more, no less than a full working day. The job in question was not filled seven days per week preceding the above mentioned date. Nor do we find those circumstances present in the record which would justify Carrier's act in establishing a seven day job.

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 Employees involved in this dispute are respectively Carrier and Employees within the meaning of the Railway Labor Act, as approved June 24, 1934;

That this Division of the Adjustment Board has jurisdiction over the dispute involved herein; and

The evidence of record warrants an affirmative award with reference parts (a) and (b) of the claim and said evidence does not warrant an affirmative award with reference to part (c) of claim.

AWARD

Claims (a) and (b) sustained. Claim (c) denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: (Sgd.) A. Ivan Tummon
Acting Secretary

Dated at Chicago, Illinois, this 4th day of April, 1952.

DISSENT TO AWARD 5710, DOCKET CL-5625

Prior to September 1, 1949, the Secretary to Assistant General Superintendent at Huntington, West Virginia, was assigned to work six days a week, Monday through Saturday, from 8 A. M. to 5 P. M.

Effective September 1, 1949, the regular incumbent of the Secretary's job was assigned to work from Thursday through Monday with relief days on Tuesday and Wednesday, and a relief employee was assigned to fill this job on Tuesday and Wednesday. The relief assignment was part of a five-day relief job, which also provided relief for two other positions.

Included in the duties of the Secretary's job, in addition to dictation and stenographic work and other general clerical duties, was the duty of relaying instructions obtained from the office of the Superintendent of Passenger Transportation at Richmond to all persons concerned on the Western General Division of this Carrier which had to do with the equipment operated in passenger trains, etc. Since passenger trains are operated seven days a week and since it is not possible to estimate with entire accuracy in advance what equipment will be necessary on those trains, it was necessary both before and after September 1, 1949, to transmit information about passenger equipment to the interested parties on the Western General Division seven days a week. Prior to September 1, 1949, this was done on weekdays by the claimant during his regular hours of work, and it was done on Sunday by the claimant also who regularly was issued a call for Sunday service for this purpose.

Effective September 1, 1949, in order to provide this necessary seven-day service and also in order to comply with the provisions of the 40-Hour Week Agreement, the Carrier set up a five-day assignment for the claimant and provided relief on the other two days of the week by using a regular relief employee.

This case turns upon a proper interpretation of Rules 30, Note, 30 (d), and 39 (a).

Rule 30—Work Week:

"Note: The expressions 'positions' and 'work' used in this rule refer to service, duties, or operations necessary to be performed the specified number of days per week and to the work week of individual employees."

"(d)—Seven-Day Positions.

On positions which have been filled seven days per week any two consecutive days may be the rest days with the presumption in favor of Saturday and Sunday. The application of this Section (d) is subject to the provisions of Rule 39, Section (a)."

Rule 39—Sunday Work—Holiday Work:

"(a)—Sunday Work.

Previously existing provisions that punitive rates be paid for Sunday as such are eliminated. The elimination of such provisions does not contemplate the reinstatement of the work on Sunday which can be dispensed with. **On the other hand, a rigid adherence to the precise pattern that may be in effect immediately prior to September 1, 1949, with regard to the amount of Sunday work that may be necessary is not required.** Changes in amount or nature of traffic or business and seasonal fluctuations must be taken into account. This is not to be taken to mean, however, that types of work which have not been needed on Sundays will hereafter be assigned on Sunday. The intent is to recognize that the number of people on necessary Sunday work may change." (Emphasis added.)

The Employees contended, to use their own words, that the 40-Hour Week Agreement did not intend "that the Carrier would be free to assign its clerical employees in seven-day service where such service was not **assigned** and maintained prior to September 1, 1949." (Emphasis added.) Consequently, they contended that it was improper for the Carrier to establish a seven-day operation for the performance of this work and that the claimant should have been assigned a work-week from Monday to Friday, inclusive, with Saturdays and Sundays as rest days. The Organization then said that if there was any work to be performed on Saturday and Sunday, the Carrier should have used the claimant on an overtime or call basis to perform it.

This amounted to a contention by the Employees that the Carrier cannot establish seven-day service under the 40-Hour Week Agreement unless employees were "assigned" to work seven days a week in that service prior to September 1, 1949.

If the first sentence of Rule 30 (d) were read alone, some support for such a position might be indicated. That sentence says that on positions which have been "filled" seven days per week any two days may be assigned as rest days. However, the second sentence of that same rule says that it is subject to the provisions of Rule 39, Section (a), and that rule merely says that it is not contemplated that work will be reinstated on Sunday **which can be dispensed with.** It says that type of work **which have not been needed** on Sundays will not thereafter be assigned on Sunday, etc. In other

words, the clear intention of the Agreement is that if work is **necessary to be performed seven days a week**, then the Carrier may establish seven-day service in that particular operation. It is not necessary that employes must have been assigned to work seven days a week prior to September 1 nor that employes must have worked every minute of a full eight-hour day seven days a week prior to September 1 in order to establish that the performance of work on Sunday is **necessary** after September 1, 1949.

In Award 5247 this Board said:

“* * * Paragraph (d) must be read with relation to paragraph (a) of Section 2 (paragraph (a) of Section 2 is the same as Rule 39 (a) in the contract on the C. & O.); 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. * * * 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 amended Rule 26 (same as Rule 30 (a) in the C. & O. contract) 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. * * *

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. * * *

It is apparent from this Rule that an essential condition precedent to assigning work to include Sunday is that the work must be necessary. * * *

* * * it is apparent that the parties did not intend to authorize work on Sunday beyond that which was essential for prompt performance. * * * 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.’” (Parenthetical insertions added.)

It is not denied that the work in question here is “necessary” seven days a week—the Employes do not deny that it must be performed on Sunday—they simply want it paid for at penalty rates on Sunday.

The intention of the parties to the Chicago Agreement, the Emergency Board that made the report upon which that Agreement was based, and the parties to this dispute who incorporated the provisions of the Chicago Agreement into the Agreement on the C. & O. intended that if work was “necessary” to be performed seven days a week the Carrier could establish seven-day

service to perform it. If, on the other hand, it could be postponed without detriment to the Carrier's operation and its service to the public, then it was not to be performed on Sunday.

The narrow, completely artificial construction which the majority places upon the provisions of Rule 30 not only does violence to the intention of the parties, but ignores one of the fundamental bases upon which the Emergency Board and the parties rested the 40-Hour Week Agreement, namely, as stated by that Board:

"It is perfectly clear that it is completely unrealistic to suggest that the railroads operate only Mondays through Fridays. Work must be done on every day of the year, and the imposition of penalty rates on certain days will not alter this fact."

For the reasons stated, we dissent.

/s/ C. P. Dugan
/s/ R. M. Butler
/s/ W. H. Castle
/s/ A. H. Jones
/s/ J. E. Kemp