Award No. 5797
Docket No. CL-5841

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

John W. Yeager, Referee

PARTIES TO DISPUTE:

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

WABASH RAILROAD COMPANY

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

(1) Action of Carrier in requiring Clerks T. F. Connelly and T. E. Cook to work position No. 75, Assistant Rate and Revising Clerk, Local Freight Office, Kansas City, on their assigned rest days, Saturday and Sunday, during period September 3, 1949 to December 31, 1949, inclusive, and paying them under the Call Rule is in violation of the rules of the Schedule for Clerks effective November 1, 1948, Memorandum of Agreements effective September 1, 1949 and Decision 5 of the 40-Hour Week Committee.

(2) T. F. Connelly and T. E. Cook be allowed eight (8) hours at punitive rate of position No. 75, Assistant Rate and Revising Clerk, for each Saturday and Sunday they were worked during period September 3 to December 31, 1949, inclusive, less time paid for on each Saturday and Sunday, as designated in the joint statement of facts.

JOINT STATEMENT OF FACTS: Prior to September 1, 1949, T. F. Connelly, then the occupant of Job No. 75, Assistant Rate and Assistant Revising Clerk, Kansas City, Missouri, was assigned to work this assignment, 4:30 P. M. to 1:00 A. M., seven (7) days per week at a rate of eleven dollars and eighteen cents ($11.18) per day.

Effective September 1, 1949, T. F. Connelly was assigned to work Job No. 75, Assistant Rate and Assistant Revising Clerk, Kansas City, Missouri, 4:30 P. M. to 1:00 A. M., five (5) days per week, Monday through Friday with Saturday and Sunday as assigned days off at a rate of thirteen dollars and thirty cents ($13.30) per day. The days off on that assignment were not included in any relief assignment.

During the period, September 1, 1949, to December 31, 1949, Clerk Connelly was called and worked on his assigned rest days as set out below:

Date	Hours Worked	Time on Duty
Saturday, September 3, 1949	3:30 P.M. to 7:00 P.M.	3 hrs. 30 mins.
Sunday, September 4, 1949	3:30 P.M. to 7:00 P.M.	3 hrs. 30 mins.
Saturday, September 10, 1949	3:30 P.M. to 7:30 P.M.	4 hrs.

It is, therefore, obvious that the rules of the Schedule for Clerks do not restrict the right of the Carrier to give employes, covered by that Schedule, regularly recurring calls on their assigned rest days, and it is likewise obvious that the rules of the Schedule do not require the Carrier to compensate such employes for a minimum of eight (8) hours at the rate of time and one-half when called to perform work on such days.

The contentions of the Committee should be dismissed and the claim denied.

The Carrier affirmatively states that the substance of all matters referred to herein has been the subject of correspondence or discussion in conference between the representatives of the parties hereto and made a part of the particular question in dispute.

(Exhibits not reproduced.)

OPINION OF BOARD: Here are two claims. They are in behalf of T. F. Connelly and T. E. Cook for compensation at the rate of time and one-half for a full day at the rate of the position for all Saturdays and Sundays on which they worked in position No. 75 as Assistant Rate and Revising Clerk, local freight office, Kansas City between September 1, 1949 and December 31, 1949, instead of time and one-half for the time worked under the overtime and call rules, which was paid.

Prior to September 1, 1949 Connelly was the occupant of this job No. 75 which was a seven day position with assigned hours from 4:30 P. M. to 1:00 A. M. Effective September 1, 1949 he was assigned to work five days on the position with Saturday and Sunday his assigned rest days. At that time the job became a five day position. This was done to conform to the 40 Hour Week Agreement which also became effective on September 1, 1949.

At the time Connelly was notified of this change he was also apparently given standing instructions to report at 3:30 P. M. on Saturdays and Sundays to perform necessary work of the position. The Organization so states and no denial has been found. Pursuant to these instructions he worked 23 of the Saturdays and Sundays over the period and T. E. Cook worked the remaining 10. The minimum time for any one day was 3 hours and 30 minutes and the maximum 5 hours.

On January 1, 1950 the position was established as a seven day position with the assigned rest days as Tuesday and Wednesday with another Clerk assigned as relief on those days.

On these facts the Organization contends that the call rule has no application and that Connelly and Cook are entitled to compensation as claimed. The Carrier's contention is to the contrary.

Previous Awards of this Division which have been examined do not appear to be directly in point on this question. It appears that a decision must depend upon a correlation of previous Awards with the pronouncements or interpretations of the Forty Hour Work Week Committee with previous Awards and of course appropriate rules.

Section 4, of Decision No. 5 of the Forty Hour Week Committee is the following:

> "4. Such rights as existed before September 1, 1949 to make regularly recurring calls or part-time assignments on assigned days of rest with respect to any craft or class on any Carrier have not been restricted, enlarged or changed, except that such rights are now applicable to two rest days where formerly they applied to only one. If before September 1, 1949 there were limitations on the right to have recurring calls or part-time assignments, or if there

were conditions under which such calls or assignments became full-day assignments or entitled to eight hours pay, either because such calls or part-time assignments exceeded a certain length of time or because there were two or more such calls on one day, such limitations and conditions shall apply to recurring calls or part-time assignments hereafter. If these limitations and conditions previously applied to recurring calls or part-time assignments on Sunday because that was previously the only rest day on which recurring calls or part-time assignments were made, they shall nevertheless apply to such calls or part-time assignments on the additional rest day other than Sunday now in effect. Subject to the foregoing, payment for service on recurring calls or part-time assignments shall be as provided for under paragraphs 1 and 2 above."

In short and in brief the statement here as applied to the instant controversy is: What was proper before the 40 Hour Week Agreement with regard to a six day position is under the 40 Hour Week Agreement applicable to a five day position.

With this as a premise then Award 3037, a claim arising on the property becomes a precedent for the consideration of this claim. That was a case of recurring calls on the rest days of an employe assigned on a six day basis. He was called to work on 42 out of a total of 46 Sundays and holidays. The claim was denied on the facts, or more accurately speaking, on an insufficiency of facts.

In principle the decision turned, not on the number of calls, but upon the question of whether or not the work of the position on Sundays and holidays was necessary for the continuous operation of the Carrier. The opinion pointed out quite clearly that whether or not such was the case was a question of fact. The question of fact was decided adversely to the claimant.

The facts here are not largely similar to those there except as to days worked.

Additional facts appearing here are that at the time the position was reduced from seven to five days the Carrier directed work in it regularly on the rest days; work involving a substantial amount of time was regularly performed in it; before September 1, 1949 it was a seven day position; and after December 31, 1949 it again became a seven day position with two assigned rest and relief days.

These facts weighed against the assertion of the Carrier that it was not necessary for continuous operation are rather convincing that it was necessary and that the Carrier so regarded it. This being true Connelly and Cook were entitled to be compensated at the rate of time and one-half for each day they worked respectively in the position on Saturday and Sunday instead of on the call basis.

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 evidence in the record sustains the claims as made.

AWARD

Claims sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

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

Dated at Chicago, Illinois, this 26th day of May, 1952.

DISSENT TO AWARD 5797, DOCKET CL-5841

This is another in a growing list of unfortunate decisions in which referees, unfamiliar with the recent National 40 Hour Week Agreement, have misconstrued the intent and purpose of the parties and have done violence to their contract. In some of these cases a charitable view of the errors which have been committed is that certain of the language of this agreement is not as clear and concise as it should have been, and it is possible that referees have been misled by it. In the present case no such excuse is possible. Here, that part of the agreement in issue has been officially interpreted and its meaning made entirely plain. In a tripartite proceeding which was made final and binding upon these parties in and by their own agreement, the rules involved in this dispute have been construed. Notwithstanding this decision was made fully known to this referee, he has arbitrarily refused to be guided by it and has undertaken, in effect, to overrule and reverse it.

The simple issue in this case is that of whether the carrier has the right to require regular part-time service on rest days. This is the same issue that was presented to, and decided by, the Forty Hour Week Committee in its Decision Number 5. That Committee was created by the parties themselves, pursuant to Article VI of their national agreement, to settle disputes "arising in connection with the revision of individual agreements so as to make them conform to this (national) agreement." Article VI makes the decision of the Committee "final and binding upon the parties," and Section 4 of Decision 5 provides that:

> "Such rights as existed before September 1, 1949 (the effective date of the 40 hour week) to make regularly recurring calls or part-time assignments on assigned days of rest with respect to any craft or clas on any carrier have not been restricted, enlarged or changed, except that such rights are now applicable to two rest days where formerly they applied to only one."

The Brotherhood of Railway Clerks and the Wabash Railroad, the parties here, were parties to the dispute there. The Committee decided that these parties have, under the 40 Hour Week Agreement, whatever rights with respect to recurring calls that they had prior thereto. Hence the only question which the referee had to decide in this docket was whether this carrier had the right to make recurring rest day calls to members of this craft prior to September 1, 1949. He had no right to determine, and was not asked to determine, how or when these rights arose, or whether these rights were fair or equitable to the parties, or anything else about them.

The exact language of Decision 5 was pointed out to the referee. It is not ambiguous. It does not refer to rights of individuals, or of particular

positions, or on particular assignments. It defines the rights of which it speaks as being "the rights **with respect to any class or craft on any carrier.**"

On the record in this docket there is no question but what this carrier had the right to make regularly recurring calls to members of the Clerks' craft prior to the 40 Hour Week. The carrier alleged this and proved it by unimpeached evidence. Among other things, the carrier cited previous awards of this Board in which these same representatives of these same employes not only recognized the right of the carrier to make these calls, but **insisted that the carrier exercise it!** The organization did not offer any proof to the contrary, and so, **on the only evidence in the record,** the fact must be accepted. The referee had no lawful right to reject it and no alternative to the entry of a denial award.

But what did he do After correctly identifying the issue, he took one of the awards which were cited by the carrier solely to show the existence of the practice in question and made an independent inquiry into the reason why the particular claim in that case was denied. The award (3037) was necessarily an old one—rendered under rules which were in effect prior to 1949, and which the 40 Hour Week Agreement cancelled from the agreements. These, known as the "continuous operation" rules, required the carrier to fill all jobs every day under penalty of paying the overtime rate for Sunday. Because, under the old six-day week, Sunday was the only day which could be an unfilled rest day, that was the only day upon which rest day calls could be made. Thus, it was **then** proper to inquire, under these old rules, whether the position in question was one "necessary to the continuous operation" of the carrier.

It is obvious and quite elementary, however, that no such test can be made or should be attempted under the present rules, and it is significant that neither party to the present dispute even suggested such a basis for this Board's decision. Most certainly the carrier did not, as the referee states, make the "assertion that (the job in question) was not necessary for continuous operation."

All jobs are now five day jobs with two days of rest. The old "Sunday as such" and "continuous operation" rules are dead (Awards 5247, 5589 and 5590, among others). To hold, as this referee has done, that railroad operations under the 40 Hour Week Agreement are to be judged under the now extinct rules previously existing, constitutes the grossest kind of error. To go further and find, as he has done, that part-time service on rest days under the present agreement may be rendered only on positions which are not necessary to "continuous operation," is even worse. It is bad enough that this referee has willfully disregarded the clear and binding mandate of the 40 Hour Week Committee in which it defined the application of the parties' agreement. It is incredible that he has gone outside the record and based his decision on a finding that old rules, long since cancelled from the contract, still govern the rights of these parties.

The enormity of the error cannot be exaggerated. This decision if applied generally would substantially destroy the fabric of the 40 hour week on American railroads. By reestablishing the old "continuous operation" rule, the rights of the carriers to stagger working assignments, to regulate forces in accordance with work requirements, to set up appropriate and practicable relief schedules, and to avoid unnecessary and improper penalties, would be terminated. By wrongfully restricting the use of the call rule, vast amounts of constructive payments would be added to the schedules and featherbedding practices would be sanctioned and encouraged. In the place of the carefully devised and workable arrangements which the parties have agreed to, the referee would substitute an inflexible and unjust rule which would not only greatly and unnecessarily increase the burden to the carriers of conducting their operations but would eventually result in great hardship to the employes.

For these reasons we, the carrier members of the Third Division, suggest that the Opinion and Findings of the referee in this docket are unworthy of credit and should not be followed.

/s/ A. H. Jones

/s/ W. H. Castle

/s/ R. M. Butler

/s/ C. P. Dugan

/s/ J. E. Kemp