# Award No. 5996
# Docket No. CL-5980

## NATIONAL RAILROAD ADJUSTMENT BOARD
## THIRD DIVISION

**Paul G. Jasper, Referee**

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## PARTIES TO DISPUTE:

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

## BOSTON AND MAINE RAILROAD

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

(1) That the Carrier violated the Agreement between the parties, effective May 14, 1948, as amended by Memorandum of Agreement, effective September 1, 1949, for the purpose of effectuating the Chicago Agreement of March 19, 1949, pertaining to the 40-Hour Week, when it refused and continues to refuse to compensate Earl D. Horrigan, Relief Engine Crew Dispatcher, New Engine Terminal, Boston, Mass., at the rate of time and one-half the regular straight time daily rate of his position ($13.028) for the the second eight (8) hour period worked by him within a spread of sixteen (16) continuous hours commencing at 10 P. M. on Saturdays and terminating at 2:00 P. M. on Sundays, September 4, 11, 18 and 25, 1949; and

(2) That the Carrier shall now be required to compensate the Claimant employe, Earl D. Horrigan, for four (4) hours additional pay at the regular straight time daily rate of his position ($13.028) for Sundays, September 4, 11, 18 and 25, 1949, representing the difference between what he was paid at straight time rate for the assignment on those dates 6 A. M. to 2 P. M. and what he should have been paid on a time and one-half basis.

**STATEMENT OF FACTS:** Effective September 1, 1949, the Carrier established, as a result of the 40-Hhour Work Week, a position of Relief Engine Crew Dispatcher (Symbol A-5) at the New Engine Terminal, Boston, Mass., rate of pay $13.028 per day, a position necessary to the continuous operation of the Railroad and to which position Earl D. Horrigan was assigned. This position had a regular 5-day week assignment, Friday to Tuesday, inclusive, with rest days of Wednesday and Thursday—as follows:

| Day | Relieving | Hours of Assignment (EST) |
|---|---|---|
| Friday | F. A. Ward | 10 p.m.— 6 a.m. |
| Saturday | F. A. Ward | 10 p.m.— 6 a.m. |

In Rule 17½ (e), second paragraph, (Article II, Section 1, (e) the word "day" was intended to mean "trick" or tour of duty and no prohibition was intended to prevent such an employe from performing work on more than one tour of duty or trick in a twenty-four hour period.

**3. CARRIER TOOK APPROPRIATE RECTIFYING ACTION.**

The claim in this docket was first brought to the attention of one of Carrier's subordinate officers by a letter dated September 6, 1949. It finally came to the attention of higher officers of the Carrier on or about September 15, 1949. Carrier's subordinate officer was instructed to discontinue the requirement of two consecutive shifts in the regular relief assignment, if at all possible, and the practice was discontinued immediately subsequent to September 25, 1949.

Carrier having taken corrective action within an extremely reasonable time after notification, claim for penalty payments should be denied.

**SUMMARY**

Carrier has shown that the claim should be denied:

(1) Under the Doctrine of Laches.

(2) Because to rule that it was the intent of the Forty-Hour Week Agreement to provide punitive or overtime payment to a regular relief assignment incumbent for working the regular hours of the relief employe defeats the very purpose of the agreement, itself.

(3) Because to rule that "day" means a twenty-four hour period computed from the last starting time would negate the second paragraph of the regular relief assignment rule (Rule 17½ (e) ) and would make a travesty of the first paragraph commanding the creation of "all possible regular relief assignments."

(4) Claimant, not having worked more than forty (40) hours nor more than five (5) days (tricks) in his work week, is certainly not entitled to any punitive payments of any description whatsoever. He merely worked the hours of the employe he was relieving.

(5) Carrier, having corrected the situation almost immediately, should not now be penalized.

The claim should be denied.

All data and argument herein has been brought to the attention of Petitioner's representative.

**OPINION OF BOARD:** Claimant Earl D. Horrigan was a regular assigned relief Engine Crew Dispatcher. Engine crew dispatchers positions at the New Engine Terminal, Boston, Mass. is an around-the-clock service with three 8-hour shifts with starting times at 6 A. M., 2 P. M. and 10 P. M.

The Claimant worked Friday through Tuesday with Wednesday and Thursday as rest days. The Claimant worked Saturday from 10 P. M. to 6 A. M. and Sunday from 6 A. M. to 2 P. M. thereby working 16 straight hours.

Horrigan contends he should have been paid time and one-half for the 8 hours worked on Sunday, which were continuous with his 8-hour shift started on Saturday, as provided under Rule 17 (a) which is as follows:

> "Except as otherwise provided in these rules, eight (8) consecutive hours exclusive of the meal period shall constitute a day's

work. Except as otherwise provided in these rules, time worked in excess of eight (8) hours on any day will be considered as overtime and paid on the minute basis at the rate of time and one-half. Time worked in excess of sixteen (16) hours on any day shall be paid at the rate of double time."

This last cited rule has been in effect for many years and has been unchanged since first adopted. However, since the 40 hour work week was agreed upon Rule 17½ (e) was adopted and became effective Sept. 1, 1949. Rule 17½ (e) provides:

"All possible regular relief assignments with five days of work and two consecutive rest days will be established to do the work necessary on rest days of assignments in six or seven days service or combinations thereof, or to perform relief work on certain days and such types of other work on other days as may be assigned under this agreement. Where no guarantee rule now exists such relief assignments will not be required to have five days of work per week.

"Assignments for regular relief positions may on different days include different starting times, duties and work locations for employes of the same class in the same seniority district, provided they take the starting time, duties and work locations of the employe or employes whom they are relieving."

Rule 17½ (e) must be read in conjunction with Rule 17 (a). Rule 17½ (e) is a special provision modifying the general provisions as to overtime work, however the modification as here made does not allow the Carrier to work a man more than eight hours in a 24-hour period.

The same rule was discussed in Award 5414 and as said therein if a man is to be worked more than eight hours in 24 hours, the rule allowing it must be specific in making the exception. In the instant case the rule is not specific and the Carrier cannot work a man more than eight hours in 24 hours without paying time and one-half up to 16 hours of work and double time for all over 16 hours as provided by Rule 17 (a). We cannot agree with the Carrier's contention that the rules here involved make an exception in which the Carrier could work a man more than eight hours in 24 hours at the pro rata rate. The part of Rule 17 (a) which states "Except as otherwise provided in these rules," does make the second paragraph of Rule 17½ (e) an exception as here contended. A Carrier can work a regular relief man at different starting times each day but the rule does not state that he can be worked more than eight hours in a 24-hour period. The Carrier violated Rule 17 (a) when it paid only the pro rata rate.

The Carrier further contends that this claim should be barred by laches. This claim was denied by the Carrier's highest officer designated to handle claims on November 29, 1949. Notice of filing this case ex parte was given on December 13, 1951. There is no time limit rule involved. On September 25, 1949 the Carrier after the situation was called to its attention stopped working the Claimant 16 hours in 24 hours. The Carrier therefore could not be prejudiced by the lapse of time. No showing is made by the Carrier of any prejudice. The doctrine of laches is not applicable under the facts of this case.

**FINDINGS:** The Third Division of the Adjustment Board, upon the whole record and all the evidence, finds and holds:

That the parties to this dispute waived oral hearing thereon;

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 the Agreement was violated.

AWARD

Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: (Sgd.) A. Ivan Tummon
Secretary

Dated at Chicago, Illinois, this 31st day of October, 1952.