Award No. 6017
Docket No. CL-5905

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Jay S. Parker, Referee

PARTIES TO DISPUTE:

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

CHICAGO AND EASTERN ILLINOIS RAILROAD COMPANY

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

1. Carrier is violating rules of Agreement governing the hours of service and working conditions of the Employes by its refusal to pay them for their services performed pursuant to the provisions of said rules;

2. The hours of service assignment for Position No. C-7, Clerk, Oaklawn Roundhouse, requiring service:

7:00 A. M. to 3:00 P. M.—Saturdays & Sundays—rate $12.99 per day

11:00 P. M. to 7:00 A. M.—Mondays—rate $12.21 per day

3:00 P. M. to 11:00 P. M.—Tuesdays and Wednesdays—rate $12.21 per day

Rest days—Thursdays and Fridays

Bulletin No. 3, dated Danville, Ill., August 22, 1949, requires compensation for services performed on Tuesdays of each week at the overtime rate of time and one-half;

3. (a) The Hours of service assignment for Position No. GC-8, Caller and/or Clerk, Oaklawn Roundhouse requiring service;

3:00 P. M. to 11:00 P. M.—Thursdays & Fridays—rate $10.60 per day

7:00 A. M. to 3:00 P. M.—Saturdays & Sundays—rate $10.60 per day

11:00 P. M. to 7:00 A. M.—Sundays—rate $12.21 per day

Rest days—Mondays, Tuesdays, and Wednesdays

Bulletin No. 4, dated Danville, Ill., August 22, 1949, requires compensation for services performed on Saturdays and on the 11:00 P. M. to 7:00 A. M. shift on Sunday at the overtime rate of time and one-half;

3. (b) The regularly assigned occupant of this position be additionally allowed one day's pay at pro rata rate for Monday of each week;

4. Employes assigned to these positions by Carrier's Bulletins O-5 and O-7, dated Danville, August 29, 1945, i.e. R. Dempsey to Job No. C-7 and E. Thornton to Job No. CC-8 and their successors, if there be any, be compensated retroactive to September 1, 1949, as outlined in Sections 2 and 3 (a) and (b) hereof.

EMPLOYES' STATEMENT OF FACTS: On August 22, 1949, Carrier issued Bulletin No. 1 to the clerical force employed at Oaklawn Roundhouse designating the work days and rest days to the employes regularly assigned to Positions Nos. CC-1, 2, 3, 4, 5, and 6. Employes' Exhibit No. 1.

Concurrently therewith Carrier also issued Bulletin No. 3 advertising vacancy for one relief clerk, Job No. C-7, requiring service:

7:00 A. M. to 3:00 P. M.—Saturdays and Sundays—rate $12.99 per day
11:00 P. M. to 7:00 A. M.—Monday—rate $12.21 per day
3:00 P. M. to 11:00 P. M.—Tuesdays and Wednesdays—rate $12.21 per day
Rest days—Thursdays and Fridays.

This position was assigned to R. Dempsey by Bulletin O-5 August 29, 1949, effective September 1, 1949. Employes' Exhibit 2-A and 2-B.

Bulletin No. 4, dated August 22, 1949, advertising a vacancy for one Caller or Clerk, Job No. CC-8, requires service:

3:00 P. M. to 11:00 P. M.—Thursdays & Fridays—rate $10.60 per day
7:00 A. M. to 3:00 P. M.—Saturdays & Sundays—rate $10.60 per day
11:00 P. M. to 7:00 A. M.—Sunday (Clerk)—rate $12.21 per day
Rest days Mondays, Tuesdays, and Wednesdays.

This position was awarded by Bulletin No. O-7 to E. Thornton, effective September 1, 1949. Employes' Exhibit Nos. 3-A & 3-B.

Following receipt of Bulletins Nos. 3 and 4 on August 23, 1949, I personally, contacted General Roundhouse Foreman Bush and called his attention to the fact that Bulletin No. 3, requiring hours of service of the Clerk on Job No. C-7 Tuesdays 3:00 P. M. to 11:00 P. M. would require compensation at the overtime rate of time and one-half in that this assignment required the occupant to perform sixteen (16) hours service within a period of twenty-four (24) hours (day) working from 11:00 P. M. Monday night to 7:00 A. M. Tuesday morning and from 3:00 P. M. Tuesday afternoon to 11:00 P. M. Tuesday night. At the same conference I also advised Mr. Bush that the hours of service assignment for relief clerk per Bulletin No. 4 requiring service from 7:00 A. M. to 3:00 P. M. Saturday and 11:00 P. M. Sunday to 7:00 A. M. Monday would also require the assignee to be paid for such services on these two (2) days of the week at the overtime rate in that in each instance the assignment required two days' work—sixteen (16) hours—within a spread of twenty-four (24) hours—a day's work.

In this conference with Mr. Bush, whereat I formally filed protest on behalf of the Employes of the irregular assignment, certain suggestions were made to him of proper assignments with due regard to the rules of our Agreement that would eliminate the cause for complaint of the Employes. Mr. Bush declined not only my protest that the assignments he proposed were irregular, but also the suggested hours of service assignment that would meet the requirements of our rules and avoid penalty payments to employes for services performed.

to another. It is the Carrier's position that having construed the contract in this manner for a period of twenty-six years, Petitioner shall not now be permitted to place upon the contract a directly opposed interpretation for the purpose of establishing a penalty claim.

No change was made in the regular assignments effective with the inauguration of the five-day work week, except to add an additional rest day immediately before or following the rest day previously enjoyed. No change was made in the manner of scheduling the relief assignments from that in effect prior to inauguration of the five-day work week. For a period of twenty-six years prior to September 1, 1949, relief assignments at this particular location have been established with less than twenty-four hours intervening between the assignments covered each day. Petitioner's claim in the instant case represents a demand for the repudiation of the accepted interpretation of twenty-six years standing.

The Board has repeatedly asserted that the action of the parties under the agreement is indicative of its intent. Since 1923 the parties hereto have interpreted and applied the agreement to the effect that the provisions of Rule 53, Overtime, do not apply to relief assignments which may on different days have different starting times account moving from one assignment to another. There has been no change in the agreement rules justifying a reversal of this established application of the rule.

As evidenced by the record, relief assignments with less than twenty-four hours intervening between the starting time of the assignments on which relief is performed have been in effect, with the knowledge and consent of Petitioner, for a quarter of a century. Having, as a result, concurred in the interpretation that the overtime rules do not apply to relief positions so assigned, Petitioner is now barred from seeking a contrary interpretation.

It is Carrier's position that the relief assignments here in dispute were established in conformity with the heretofore accepted interpretation of the Agreement rules, and that claimants, holding regular relief positions, are not entitled to additional compensation account working in excess of eight hours in a twenty-four hour period when moving to and from the different positions included within their relief assignment. In the light of this established interpretation of the rule, Petitioner's claim is without merit and should be denied.

(Exhibits not reproduced.)

OPINION OF BOARD: The foregoing claim, the basic facts of which are not in dispute, challenges the manner in which the relief assignments described therein were established at Carrier's Oaklawn Roundhouse on September 1, 1949. The phase of the claim set forth in paragraph 2 thereof is predicated on the overtime Rule 53(a) and Rule 45½(e), relating to the establishment of regular relief assignments, of the Current Agreement. With respect thereto the Organization contends the rules relied on preclude the Carrier from scheduling a relief employe to start any trick within 24 hours of the start of any preceding trick and the overtime rate is claimed for the trick beginning at 3 P. M. on Tuesday, where the preceding trick began Monday 11 P. M., on the theory the employe assigned to position No. C-7 worked 16 hours during the 24 hour period commencing on that day and hour and ending on Tuesday at 11 P. M. Paragraph 3(a) of the claim is based on the same premise, the Organization asking that the penalty rate be applied to two tricks on the assignment for Position No. CC-8, one beginning Saturday at 7 A. M. because the Friday starting time was 3 P. M., and the other begining Sunday at 11 A. M. because the starting time of the first Sunday trick was 7 A. M. Paragraph 3(b) of the claim is founded on Rule 62, the guarantee rule. Under it the Organization contends that a relief employe who works five 8-hour tricks in 4 days is entitled to be paid for an additional day on the theory such rule guarantees him work on 5 different days in a week.

Rule 53(a), **supra,** relied on by the Organization in support of paragraphs 2 and 3(a) of the claim, provides:

> "Except as otherwise provided in these rules, time in excess of eight (8) hours, exclusive of the meal period on any day, will be considered overtime and paid on the actual minute basis at the rate of time and one-half."

The pertinent portions of Rule 45½(e), also relied on for the same purpose, read:

> "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."

With commendable candor Carrier, sensing the import to be given a long line of awards (see e.g. Awards 5414, 5796, 5051, 2340, 3258, 2887, 2346, 2053, 2030 and 687), impliedly admits, if in fact it does not actually concede, that the foregoing rules standing alone, as heretofore interpreted by this Division, sustain the Organization's position with respect to paragraphs 2 and 3(a) of the claim and makes no argument to the contrary. Instead the gist of all contentions advanced by it in defense of such portions of the claim is that assignments of the character here involved, under prior agreements containing similar provisions, have been in effect on its property continuously for a period of at least 26 years prior to the reduction of the work week to 5 days on September 1, 1949, with the knowledge, consent, and acquiescence of the employes and that hence, past practice of long standing discloses the interpretation placed upon the agreement by the parties and is controlling notwithstanding the rules heretofore quoted and the decisions of this Board construing their force and effect.

Carrier directs our attention to Awards 3194, 3727, 4086, 4240, 4342, 5013, 5404 and 5439 asserting they hold that where parties by their conduct have agreed upon a manner in which an agreement shall be applied, this Board will recognize the interpretation thus resulting. We have examined such awards. The trouble with them, from Carrier's standpoint, is that the rule therein announced is limited to situations where the agreement in question is silent on the issue involved or its provisions with respect thereto are ambiguous and uncertain. Then, and then only, as is pointed out in the opinions of some of the very awards on which Carrier relies, is past practice controlling.

Where—as here—the involved rules of an agreement are definite and unambiguous the applicable rule, so well established as to hardly require citation of our decisions supporting it, is that a long existing practice does not change the clear terms of the agreement and repeated violations thereof, even though acquiesced in, do not affect enforcement of and compliance with its applicable and expressed terms. See Awards 561, 4513, 4543, 5100, 5386, 5404, 5526 and 5819.

In the instant case it is undisputed the existing assignments were protested orally prior to the effective date of the Memorandum Agreement, executed to conform to requirements of the 40-Hour Week Agreement, and prior to placing such assignments in force and effect. Likewise it is not disputed that formal and written notice of the present claim, wherein the alleged violation was spelled out and Carrier was advised the punitive rate for all time in excess of 8 hours in a 24 hour spread would be claimed thereafter for each employe herein involved, was filed with the Carrier on September 1, 1949. Therefore, since we have found the assignment violated the Agreement and Carrier's position respecting past practice cannot be upheld, paragraphs 2 and 3(a) of the claim should be and they are hereby sustained from September 1, 1949.

Under the facts of record we are not convinced the regularly assigned occupant of position CC-8 should be allowed an additional one day's pay at the pro rata rate for Monday of each week under provisions of the guarantee rule of the Agreement, hence the portion of the claim identified as 3(b) will be 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 the Agreement was violated.

AWARD

Claims made in paragraphs 1, 2 and 3(a) of the claim sustained; paragraph 3(b) of the claim denied; the claims made in paragraph 4 sustained as to overtime, denied as to compensation on Monday; all as set forth in the Opinion and Findings.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: (Sgd.) A. Ivan Tummon
Secretary

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