Award No. 6501
Docket No. CL-6155

6541

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

William M. Leiserson, Referee

PARTIES TO DISPUTE:

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

GREAT NORTHERN RAILWAY COMPANY

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

1. When on Sunday, May 14, 1950 they called Frank DeRosa, Harold Hinds, Dale Lumsden, Roy E. Damschen and Edwin VanDarven and paid them on the call basis for three hours and thirty minutes in violation of the Agreement.

2. That the Carrier now be required to compensate Frank DeRosa, Harold Hinds, Dale Lumsden, Roy E. Damschen and Edwin VanDerven and all others who have been called to perform service of this kind since that date, and each and every day for eight hours that an employe is called during a regular assignment to perform service to augment that shift.

3. In addition thereto, that the Carrier be required to compensate the above named employes and all others at the rate of time and one-half for any work these employes performed before or after the hours of the regular assigned.

EMPLOYES' STATEMENT OF FACTS: The Carrier operates what is known as a Freight Transfer Platform in connection with the Freight House at Havre, Montana, where shipments are broken up in carload lots and transferred to both trucks and other cars for further shipment. Employes work on this transfer dock and are all working on seven day assignments, continuous service seven days a week. Two shifts of employes are assigned to this service. Each employe is assigned five days of work with two days of rest, and relief positions are set up to cover the rest days of all employes. On Sunday, May 14th, and for some time prior to that date, when the work was too heavy or in too great an amount to be performed by the employes of the regular shift, the Carrier would call in a certain number of employes who were off on their rest days and pay them under the Call Rule for the actual time worked at the punitive rate. This practice is still being continued not only on Sundays, but any day of the week when the business is too heavy for the regular employes to handle.

POSITION OF EMPLOYES: There is in existence an Agreement between the Carrier and this Organization, with an effective date of September 1,

under the provisions of Rule 38, we are entirely at a loss to understand just wherein there has been any violation of any rule in the schedule, much less Rule 38 which has been fully complied with.

Perhaps in their presentation to your Board the Employes will cite some of the other rules which they claim have been violated but which up to the present they have not designated, but the Carrier holds that up to the present time at least, it can find no logical argument so far advanced by the Employes relating to the violating of any rule in the agreement.

We hold that Rule 36(e) is the one and only rule in the agreement between the Brotherhood of Railway and Steamship Clerks and this Carrier which specifically provides for the compensation of employes who perform services for the Carrier on their rest days; and we further hold that the Claimants herein have been compensated in full compliance with the provisions of that rule and that, therefore, since no violation of any schedule rules is present in this claim, such claim must be denied.

It is hereby affirmed that all data herein submitted in support of Carrier's position has been submitted in substance to the Employe Representatives and made a part of the claim.

OPINION OF BOARD: As originally presented to the Carrier, this claim alleged violation of the Agreement between the parties only with respect to Sunday work. But later while it was being processed on the property, the claim was amended to include work on rest days other than Sundays.[1] With respect to both, Petitioner claims full days' pay of eight hours at overtime rate is due instead of the payments made under the Call Rule (No. 38).

The facts in the case are not in dispute, except as to whether the Sunday work is irregular within the meaning of the Note to Rule 37. The Carrier operates a freight transfer platform at Havre, Montana, in connection with a freight house, and the work on the platform is continuous seven days a week. From 30 to 40 employes hold regular assignments working five days with the two rest days varying as the beginning of the assigned work week varies. There are also five or more regular relief assignments to fill the positions on rest days, and in addition the Carrier uses furloughed employes or hires outside workers to take care of absences due to illness, vacations, or other reasons.

The record shows that the work at Havre fluctuates widely from day to day. Some days there are only two or three cars while on others it runs up to 20 or more. According to the Carrier this is because ". . . the Universal people at Chicago give us tonnage for two weeks and then ship it otherwise for two weeks . . ." Despite the fluctuations, however, the Carrier maintains no extra list at Havre such as is provided for in Rule 18 (b) of the Agreement.

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[1] The original claim was filed June 9, 1950. About a year later (June 21, 1951), the Employes' General Chairman wrote to the Assistant to the Vice President of the Carrier amending the claim as follows: "Our amended claim is for Sunday, May 14, 1950, for the above named employes and for any and all employes called for service at the Transfer Dock under the same conditions subsequent to this date for each and every day. This means that we are making claim for eight hours for every day that an employe is called during a regular assignment to perform service to augment that shift, and in addition thereto, we are making claim under Rule 16 for all time worked at the rate of time and one-half on the minute basis for any work that these employes performed after the hours of the regular assignment. This to be in addition to the hours claimed for time worked during the regular assignment."

This rule stipulates: "An extra list will be maintained in connection with each seniority district roster, except in the Accounting Department. . . ." (Underlining added.) The Carrier states there is a shortage of labor at Havre which prevents maintaining such a list. Although the Employes' submission emphasizes the lack of such a list, they do not charge that 18 (b) was violated. They admit agreeing "that the present practice should be continued; viz., that the agent at Havre should continue to hire such available freight handlers as he could. . . ."

In the absence of a specially listed group of extra employes to handle the extra work caused by the fluctuations, the Carrier has been using the regular men under the Call Rule to do this work on their days off. In its own words, it "augments the regular shifts" with men on their assigned rest days to get the extra work done. The Employes state this has been done continuously since 1949 when the Forty-Hour Week Agreement became effective, and the Carrier does not deny the statement.

All the above facts are agreed to or admitted, but some of the rest days worked have included Sundays, and the parties disagree as to whether this Sunday work is "irregular" within the meaning of Rule 37. The Carrier submitted in evidence a record of the calls made for the three months November, December 1950, and January 1951, which shows that out of the 13 Sundays in this period, men were called to work only on three. This record was not questioned by the Employes. We note, however, that one of the other days was December 25, and Rule 37 applies to holiday service as well as Sunday work. It is to be noted also that during the period of three months the shifts were augmented on 25 days, mainly by calling regular men on their days off, although some furloughed men or local workers were also hired.

The rules relied upon to support the claims are Basic Day Rule 28, Relief Assignment Rule 29 (e), Overtime Rule 36, and Assignment of Overtime Rule 37. More specifically, reliance is placed on paragraphs (b) and (c) of Rule 36 which provide for overtime pay after 40 hours and after five days in any work-week, but greatest stress is laid on paragraph (f) of this rule and on the "Note" to Rule 37. (The provisions of these rules are discussed below.)

The position of the Employes is that the Carrier does not have enough assigned employes on the platform to handle the business on certain days. It works the assigned crew overtime for one or two hours, and works the additional men on their rest days to "augment the regular shift," but compensates them on the actual minute basis from the time they are called. This, they contend, is contrary to Rule 29 (e) and Rule 36 (f) which make clear that employes on their rest days cannot be worked in this manner "on a day which is not part of a regular assignment." They point out that this has continued over a long period, since September 1, 1949, not only on Sundays but also on week days. "It is our contention (they say) that Rule 38 (Call Rule) . . . definitely provides that continuous service positions will be filled eight hours a day . . . also Rule 37 guarantees an employe eight hours of regular work on Sundays and holidays."

The Carrier argues: "In the first place, we do not agree . . . that this work is performed on a day which is not a part of any assignment since (it is admitted) the regular positions involved are seven-day positions, and therefore, all days must, obviously, be days part of regular assignments." It points out further that "not only are all available extra or unassigned employes . . . called, but, likewise, all of the regular assigned employes are worked on these days and the combination of regular employes plus all available extra list employes are further supplemented by additional employes available and called to work on their rest days, so that we cannot see wherein Rule 36 (f) has any significance whatsoever in this particular case." It contends that Rule 36 (e) "is the sole rule specifically

providing for the method to be used in pay employes worked on their rest days and which rule provides that . . . they shall be paid under the Call Rule (No. 38). . . . Nowhere in Rule 38 is there any provision for the payment of a minimum of eight hours at the time and one-half rate as claimed herein. . . ."

The contention of the Carrier that the days on which claimants worked on their rest days were part of regular assignments is a curious one, in view of its statement that Rule 36 (e) provides the sole method for paying employes for work on rest days. This rule does say: "Service rendered by employes on assigned rest days (other than Sunday) shall be paid for under the call rule," but the sentence goes on to say: "unless relieving an employe assigned to such day in which case they will be paid for eight (8) hours at the rate of the position occupied on their regular rate, whichever is higher." The Carrier's words, "augment regular shift," mean that the claimants were occupying positions which were part of regular assignments, then they might well be interpreted to require a full day's pay of eight hours under this rule.

The Employes do not so interpret them. They say: "This is unquestionably a day that is not a part of any assignment and Rule 36 (e) which the Carrier contends is the rule under which they are calling these employes, would have no bearing whatever." Therefore, the Employes insist it is for "Work on Unassigned Days," which is governed by 36 (f), that they are being called. This rule provides that such work "may be performed by an available extra or unassigned employe who will otherwise not have 40 hours of work that week; in all other cases by the regular employe."

Relieving an employe "assigned to such day" can have only one meaning; namely, a day which an employe's bulletined assignment specifies is one of his five regular working days. Plainly then, when, according to the Carrier's record, 11 men were called on their rest days to augment the shift on one day, 37 on another, 27 on a third, etc., these men were not relieving the employes assigned to such days. They were called for the extra work not part of the assignments, for all the regular or relief shifts were working their assignments on those days.

We must, therefore, accept the Employes' contention as correct that the claimants were called under Rule 36 (f) for "Work on Unassigned Days." This rule provides that such work "may be performed by an available extra or unassigned employe who will otherwise not have 40 hours of work that week; in all other cases by the regular employe."

As to the Employes' contention that Rule 37 guarantees an employe eight hours' work on Sundays and holidays, and that Rule 38 definitely provides for eight hours' service, we find no such provision in either of these rules. Further, Basic Day Rule 28 is not pertinent to the present case, for we are concerned here primarily with Overtime, Assignment of Overtime, and the overtime pay specified in the Call Rule. There would be no need to consider the rules which govern these matters, if Rule 28 were controlling. Rule 29 (e) is pertinent to the case, though it deals with Regular Relief Assignments. This has a bearing on whether work is irregular, and permits calls on Sundays and holidays.

Paragraphs (a), (b) and (c) of Rule 36 require payment of time and one-half for work in excess of eight hours per day, 40 hours per week, and five days per week, respectively. Paragraph (d) deals with matters that do not concern us here; and we have already quoted and discussed (e) and (f) in connection with service on rest days other than Sundays and work on unassigned days. Rule 37 deals with overtime on Sundays and holidays. The pertinent parts of this rule read as follows:

> "When overtime work is required by the Company, the incumbent of the position to which such overtime work is necessary shall

be given preference in its performance. The same principle shall apply in working extra time on Sundays and holidays. . . ." (exception not pertinent)

There is no complaint here that the regular employes were not given proper preference under the rule.

A Note to this Rule 37 authorizes the use of the Call Rule on Sundays and holidays, but it will be recalled that Rule 36 (a) in dealing with Service on Rest Days, excepts Sundays, but not holidays. Also the Note makes the Call Rule applicable only to irregular service on Sundays and holidays, whereas 36 (e) says nothing about irregular service. This complicates the issue in the present case, and it is necessary to reproduce the Note in full for close analysis:

"NOTE: This does not in any way nullify the provisions of Rule 38 (the Call Rule). Such rule, however, is only applicable in cases where the necessity for Sunday and holiday service is irregular and does not permit the continued use of an employe for less than eight (8) hours on Sundays over long continued periods; calls can not be included as part of a regular assignment and specific call must be given on each occasion such service is required. It is understood that this arrangement can not in any way be understood to provide a means to avoid filling positions on which continuous service is required on Sundays and holidays, nor to permit the continued use under the Call Rule of an employe on Sundays or holidays over long extended periods, although it is understood that the practice of calling employes for service on such days for several successive weeks due to seasonal increases in business such as the grain rush in the Fall, the beet sugar shipments, fruit rush, etc. is permissible."

The first question raised by the Note is whether holiday service is governed by 36 (e) or whether this is exclusively covered in the Note. The second question arises because of the condition that Sunday service must be irregular to permit the use of the Call Rule. Is this condition also applicable to calls on the other rest days? The Employes' argument assumes that the condition applies to both while the Carrier argues that it applies to Sundays only, though its position on this point is not entirely clear. A third question is raised by the understanding that the Call Rule will not be used to avoid filling positions on which continuous service is required. The Employes charge that this is what the Carrier has done. But if this is true, then is the remedy they ask—payment of overtime for full eight hour days—the proper one? Does not the Agreement rather require that the Carrier shall assign more regular and relief shifts and maintain an extra list for the rest of the extra work?

As to calls on Sundays and holidays because of seasonal increases in business, it is clear that the work fluctuations at Havre do not fall into this category. It seems equally clear that the Note specifically covers holidays whereas Rule 36 (e) merely mentions rest days other than Sundays. Accordingly, we find the intent of these provisions to be that holiday service shall not be governed by 36 (e) but shall be treated the same as Sundays, as provided in the Note to Rule 37. The remaining two questions both require a determination as to whether the fluctuating work created irregular need for Sunday and holiday service within the meaning of the Note, as the Carrier contends; or whether, as the Employes charge, that the Carrier does not maintain enough regular assignments both on week-days and on Sundays in order to avoid filling positions on which continuous service is required.

This is the crux of the whole issue in the case, but a positive determination cannot be made on the record here, for it contains only the experience of

the three months from November 1, 1950 to January 31, 1951. We do not know how often the Call Rule was used either on Sundays and holidays or on other rest days prior to November 1, 1950 or since January 1951, though admittedly the practice has continued since the 40-Hour Week became effective September 1, 1949. We know only that during the three month period, men who were off on their rest days were called on three Sundays out of 13, and also on one holiday, Christmas. Four days in three months might be irregular enough within the meaning of the Note, but the record also shows that on 19 other days during the same period, employes were called to work on the seventh day of their assignments.

Payment for Sunday work as such was taken out of the Agreements which had such provisions. When this is considered together with calls on three Sundays, one holiday, and on seventh days for 19 more, it can hardly be considered that such calls are irregular within the meaning of the Note to Rule 37, especially if the record of the three months is typical of calls made in all the months of the year.

It is true, of course, that for service on rest days (other than Sundays) Rule 36 (e) does not mention irregular need for such service. This plainly states that such service "shall be paid for under the call rule", the only exception being when relieving an assigned employe. But the Employes charge that the Carrier does not have enough assigned employes to handle the business on the platform, and this, together with the lack of an extra list, does bring the question of the need for irregular service on rest days other than Sundays within the purview of Rule 36 (e) and also Rule 29 (e).

The Employes, however, do not allege that the Bulletin Rule of the Agreement (No. 15) was violated by not advertising assignments for positions known to continue in excess of 30 days. Their charge that not enough regular positions have been established apparently refers to Relief Position, Rule 29 (e), the intent of which, they say, was not to call the employes in the manner that the Carrier is doing (Rec., p. 18). This rule provides, among other things:

> "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 assignment in six or seven-day service or combinations thereof, . . .
>
> "Assignments for regular relief positions may on different days include different starting times, duties and work locations for employes of the same class and the same seniority district, . . ."

Also pertinent in this connection is the following from Rule 43:

> "After all possible five-day relief assignments have been established . . . and three or four days of relief work still exists, one or two days of other work may be arranged so as to provide an assignment of five days and permit the bulletining and filling same . . . Where only one or two days of unassignable relief work exists, . . . Rule 37 shall apply."

The intent of these provisions is clearly to establish as many regular and relief five-day assignments as possible, and thus avoid both work on rest days and ordinary overtime work as much as possible. The same intent is evident in Rule 18 (b) which stipulates that an extra list "will be maintained," and by 36 (f) which gives preference to extra men until they have had 40 hours' work.

But whether all possible regular and relief assignments have been made, as the Carrier argues, or whether this has not been done, as the

Employes charge, we are unable to determine on the basis of the rest day and Sunday calls for three months out of a total period of about four years. This is all the information there is on the subject in the record, and it shows that such calls were made almost every week during the three months. Such calls were made on 25 days with the number of men called each day ranging most frequently between 7 and 37. Only on two days were the number of men called lower than 7; one day 4 were called, another day there were only 2. If this three month record were typical, it would mean that the Carrier finds it necessary to call men for work on their assigned rest days 100 days during a year.

The record of Sunday and holiday calls alone shows a smaller proportion, four days in three months. But when this is considered together with the 19 other days on which men were called on their seventh day, the underlying fact stands out that the Carrier finds it necessary to work men under the Call Rule on an unusually large number of seventh days of their assignments, and about one out of every three Sundays and holidays, and this not in a period of seasonal increase in business such as is provided for in Rule 37. The issue here is whether enough regular relief assignments have been established; not only the frequency of Sunday and holiday calls are to be considered but also the number of other rest day calls.

It may be that another three month period would show a different picture, but we have no information on that, beyond the undenied statement of the Employes that the Call Rule is more or less so used throughout the year. One purpose of the provision for an extra list in Rule 18 is to reduce the need for an excessive number of such calls. But the Employes having assented to a continuation of the present arrangement, are as much responsible for the failure to maintain an extra list as is the Carrier. In addition to the required extra list, the provisions of Rule 29 (e) and 43, quoted above, offer means of increasing the number of regular relief assignments, including the use of non-consecutive rest days. But there is nothing in the record to show that these have been considered by the parties.

Lacking this information, as well as data as to rest day calls beyond the three month period given, and in view of the failure to meet the obligation to maintain an extra list, we can only conclude that there has not been enough investigation and consideration by the parties as to the possibilities of establishing more regular and relief positions, and thus reducing what appears to be an extraordinary number and frequency of calls for service on rest days. It hardly was intended by the 40-Hour Week Agreement that men shall give up their rest days for as many as 100 days a year to do extra work on unassigned days. On the other hand, the Employes did assent to not maintaining an extra list.

Accordingly, the dispute is remanded to the parties for investigation and consideration of the methods provided in the rules mentioned for reducing the excessive use of calls for service on rest days, including the possibility of establishing and maintaining an extra list. If no settlement can be reached, the dispute may be resubmitted here with sufficient data to show the use of the Call Rule for a typical year, as well as adequate data to make possible a determination on whether the failure to maintain the required extra list is justified or not.

The above deals only with the issue in paragraphs (1) and (2) of the claim. In addition thereto, paragraph (3) claims overtime pay for the named employes and all others "for any work these employes performed before or after the hours of the regular assigned." The record contains no evidence as to this part of the claim. No date is given as to when such overtime was worked without proper overtime pay, and nothing is said as to whether the work was continuous with the assignment or otherwise. Nor do the submissions contain any arguments on these matters. Paragraph (3) of the claim was therefore not considered, and must be dismissed.

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

Further investigation and consideration of the dispute by the parties is necessary.

AWARD

Parts (1) and (2) of claim remanded as per Opinion and Findings.

Part (3) dismissed as per Opinion and Findings.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: (Sgd.) A. Ivan Tummon
Secretary

Dated at Chicago, Illinois, this 16th day of February, 1954.