Award No. 6502

Docket No. CL-6476

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

SOUTHERN RAILWAY COMPANY

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

(a) The Carrier violated and continues to violate the Agreement when effective September 1, 1949, it assigned A. G. Rice, Jr., J. F. Merchant and H. A. Pierson and/or their successors to a work week of Sunday through Thursday, and

(b) Claimants A. G. Rice, Jr., J. F. Merchant and H. A. Pierson and/or their successors shall be compensated an additional day's pay at pro rata rate for each week not allowed to work five days between Monday and Friday, inclusive, (exclusive of weeks in which holidays occur) plus the difference between straight time and time and one-half for each Saturday and Sunday they have been required to work at straight time, such payment to be effective April 28, 1950, the date claim was first filed with the Carrier and continue until the occupants of the positions shall have been assigned to a work week of five days per week with Sunday as one of the two rest days.

EMPLOYES' STATEMENT OF FACTS: Claimants A. G. Rice, Jr., and J. F. Merchant occupy positions of Trace Force Clerk and Claimant H. A. Pierson occupies a position of Stenographer in Office of Superintendent Car Service, Atlanta, Georgia. Each of the claimants holds Group 1 (Clerk) seniority in the seniority district comprising that office.

Prior to September 1, 1949, the positions assigned to claimants were advertised by vacancy bulletin as six-day positions, the days and hours of assignment being 8:15 A. M. to 4:45 P. M., Monday through Friday and 8:15 A. M to 12:45 P. M., Saturday. Three other positions with like duties were assigned the same hours and work week.

Effective with the Forty-hour Agreement, September 1, 1949, claimants were assigned a work week of Sunday through Thursday, the hours of assignment being 8:15 A. M. to 4:45 P. M. The three Clerks senior to

basis for the claim in this case, because the carrier has shown that from sixteen to twenty-four hours of work was necessary to be performed on Sundays prior to September 1, 1949, and that is all that has been assigned to claimants on Sunday under the 40-hour week agreement. Claimants were assigned to perform, and they are performing, the same volume and type of work that was previously necessary to be performed on Sunday.

The purpose of the Brotherhood is obvious. It seeks to have the Board rule that the rest days specified in paragraph (b) or (c) of Rule 25 are applicable to the assignments filled by claimants, in order to force the carrier to work claimants 40 hours Monday through Friday and in addition use them on overtime at the time and one-half rate on the sixth and seventh days of their work weeks to perform the work that is necessary to be performed on Saturday and Sunday. However desirable or undesirable this may be to claimants, the effective agreement does not require the carrier to make such assignments under the facts and circumstances existing in this case.

If carrier correctly understands the Statement of Claim, it is that claimants should have been worked six or seven days per week, with overtime pay for work in excess of forty hours or five days, and the claim for compensation is that claimants be paid the difference between the compensation allowed and the compensation they would have received had they been permitted to work six or seven days per week.

Carrier respectfully submits that claimants were assigned a work week of 40 hours consisting of five days of 8 hours each, with two consecutive days off, as provided in Rule 25 of the effective agreement. Claimant employes of the trace force have been properly compensated for the work performed on their five-day assignments. The agreement does not substantiate the claim for additional or punitive compensation based on some theory or assumption that claimants have been worked six or seven days a week or in excess of their forty-hour week assignments.

Carrier has shown that the work assigned to claimants on Sunday has been necessary to be performed on Sundays for many years prior to September 1, 1949. It has shown that it is the type of work, not the hours of work or amount of work, that governs the assignment of Sunday work under the 40-hour week agreement. It has further shown that claimants were assigned on Sunday to perform the same type of work and relatively the same volume or amount of work that was previously necessary to be performed on Sunday. It has shown that the "work" of these "positions" (service, duties, or operations) is necessary to be performed seven days a week; therefore it was proper to stagger the work weeks of claimants in accordance with the carrier's operational requirements by assigning them a work week of 40 hours, consisting of five days of 8 hours each, with any two consecutive days as their rest days, as provided by Rules 25 (a) and (d).

Carrier insists that it has **not** violated the effective clerical agreement, as alleged by the Brotherhood, and respectfully requests that the Board so hold and that the claim be denied in the entirety.

All relevant facts and arguments in this case have been made known to the employes' representatives.

(Exhibits not reproduced).

OPINION OF BOARD: Rule 25 of the current working Contract between the parties provides among other things:

> "(c) Six-day Positions—Where the nature of the work is such that employes will be needed six days each week, the rest days will be either Saturday and Sunday or Sunday and Monday.

"(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."

A NOTE to this rule explains:

"The expressions 'positions' and 'work' used in this Rule 25 * * * refer to service, duties, or operations necessary to be performed the specified number of days per week, and not to the work week of individual employes."

When these provisions became effective September 1, 1949, Claimants were assigned to work days beginning Sunday and ending Wednesday with rest days on Thursday and Friday. They claim that they were occupying six-day positions prior to September 1, 1949, and have continued to fill six-day positions since then. They contend, therefore, that the Carrier violated Rule 25(c) by not assigning them rest days either on Saturday and Sunday or on Sunday and Monday as stipulated therein.

The Carrier's position is that Claimants were properly assigned under paragraph (d) of Rule 25, applying to seven-day positions. It states: "As the work of the * * * trace force was necessary to be performed seven days a week, (both prior to and after September 1, 1949) their work weeks were staggered in accordance with the Carrier's operational requirements, * * *." Three of the employes were assigned Tuesday through Saturday, and the three Claimants here were given the Sunday through Wednesday assignment. It explains the operational requirements as follows:

"Work of their (the trace force's) positions is required on Sundays to handle and answer all telegrams and calls from offices, terminals and yards on line of road pertaining to home routes on foreign line cars and other requests in connection with car movements and car records requiring immediate attention."

This statement of operational requirements must be accepted as correct, although the Employes question whether some of the detailed Sunday work described was really necessary to be done on Sunday. The record shows that for three years prior to September 1, 1949, some trace force work was done every Sunday. On most of these days, three or four of the six employes did about 4 hours' work. Some Sundays five employes were used, on others only two were worked.

All the Sunday work was done under the Call Rule which provides for "work outside of and not continuous with established hours on days of their regular assignments." There were no positions assigned to work on Sunday. All assignments were for six days. The need for the half day of Sunday work was met by calling some of the six employes in the order of their seniority, as the working Agreement required.

On these facts the Carrier contends that there was necessary trace force work every day of the week, including Sunday, and, therefore, paragraph (d) of Rule 25 applying to seven-day positions authorized staggering the assignments to include Sunday as an ordinary work day. The Employes hold that this was a violation of paragraph (c) because there was no continuous service required through seven days a week, but only six-day service with part of a day's work to be done outside of the established daily working hours which required the use of the Call Rule.

Thus the issue is whether the fact that some work was necessary every Sunday, which could be done on calls by part of the trace force, made the jobs seven-day or six-day positions.

The Carrier argues at length that the whole concept of what a "position" meant under the Agreement prior to September 1, 1949, has been changed by the amendments providing for a 40-Hour-Week. It summarizes this argument as follows:

> "The Carrier is not contending that claimants previously occupied seven-day positions within the meaning of the word 'positions' as used by the parties in the agreement which was in effect prior to adoption of the 40-hour work week effective September 1, 1949. The Board already held in previous decisions that the provisions of the 40-Hour Work Week Agreement require a complete new approach to many problems from that taken prior to its adoption, and that the whole concept of what constitutes a 'position' has been altered. See Award 5555. By reference to the note in Rule 25 it will be seen that the parties have confined the application of the expressions 'positions' and 'work' as used in the 40-Hour Work Week Agreement to Rules 25, 27, 28, 31, 32 and 33 of the effective agreement, which makes it clearly evident that meaning of these words in those rules is entirely different from the meaning of these same words in other rules of the agreement."

It is true, of course, that the 40-Hour Agreement requires a new approach to many problems, but we cannot agree that the words "positions" and "work" were given "entirely different" meanings in Rules 25 to 33 from the meaning of these words in the other rules of the Agreement. There is no room for misunderstanding what these words mean in the Note to Rule 25. It distinguishes between an individual's work week (five days) and the services, duties or operations that may be necessary to be performed by various individuals on "the specified number of days per week," (i.e. 5 days, 6 days or 7 days). No individual may be assigned to more than five days' work (overtime excepted), but during any calendar week the Carrier's operations may require that the duties or services shall be performed by different individuals through all seven days, or six, or only five.

This does not change the meaning of the word "positions" as it was used in the Clerks' Agreement prior to September 1, 1949, and as it is still being used in the amended Agreement since then. Thus the Bulletin Rules 16 (a), (c) and (d), which were not amended when the 40-Hour Week became effective, provide that "new positions" and vacancies in old positions shall be bulletined. Each bulletin, of course, refers to certain individuals' assignments to five work days and two rest days, but we find nothing in the Note to Rule 25 that changes the meaning of the word **positions** where the nature of the **work** is such that some of the assignments must be staggered to cover six days, and some over a whole week of seven days.

There may have been reasons in Award 5555 for the general observation that the whole concept of a position has been changed. The facts in that case, however, were quite different from those here. There, 49 positions had been assigned in six-day service, with Sunday as rest day prior to the 40-Hour Agreement. When this Agreement became effective, "34 of the positions were assigned Monday thru Friday with Saturdays and Sundays as rest days. . . . The other 15 positions . . . were assigned Tuesday through Saturday with Sundays and Mondays off." The Claimants in that case occupied the 15 positions, and they wanted to be assigned Monday through Friday like the others. They were clearly wrong since service was needed for six days, not for five days. Thus the Opinion in Award 5555 merely observed that the concept of what a position is had been changed. Its ruling was that six-day positions were involved and therefore the men were properly assigned Tuesday through Saturday.

Other Awards cited in support of the Carrier's position are similarly distinguishable from the present case. Thus the claims for punitive overtime rate was denied in Award 6018 because Claimant was **"moved from the furloughed list to the group in which he was called to work"** (Emphasis in origi-

nal). Again in Award 6075 the facts were that some six-day assignments, before the 40-Hour Week became effective, included Sundays as work days with a rest day on another day of the week. Also, the Second Division Awards cited were quite different from the dispute in the instant case. In Award 1714 and the other Awards cited therein, the disputes grew out of the elimination of payment for Sunday work as such. The facts showed that certain running repair work was regularly done on Sundays before and after September 1, 1949. Moreover the Opinion indicated that Sundays were included in assignments, for it stated: "carrier has kept at a minimum the number of men assigned with Sunday as one of their work days," (Emphasis added).

Third Division Award 5247 was also quoted as supporting the Carrier's position here. Actually, however, it rather supports the Employes' position. The Opinion in that Award, as in 5555, contains some general language, which if the facts in the case were disregarded, could be interpreted to uphold the Carrier's position. But the claim in that case was filed by the Missouri Pacific Railroad, not by the Employes. It claimed "the right to establish seven-day-per-week service at its freight warehouses to enable it to currently handle less (than) carload merchandise, which is an operational necessity." The facts in the case were quite similar to those here. Previous to the 40-Hour Agreement, the employes had worked six days a week, and some worked on Sundays under the Call Rule. There was no showing that the amount of necessary Sunday work had so increased as to require the filling of seven-day position. The claim of the Carrier in that case was therefore denied.

It is important to note that Rule 25(d), on which the Carrier in the present case relies, states clearly: "On positions which have been filled seven days" any two consecutive rest days may be assigned. (Emphasis added). There were no positions filled on Sundays before the 40-Hour Agreement became effective. The Carrier admits that positions were filled on only six days. The additional work need on Sunday was for part of a day, and subject to call, with different employes called in various Sundays. The nationally negotiated 40-Hour Agreement specifically provided in Section 3(e) that "Existing provisions relating to calls shall not be changed;" and the Call Rule of the Clerks' Agreement here was not changed. Since the Sunday work was "outside of and not continuous with" the hours and days of the employes' regular assignment, they had to be called and paid under this rule.

Rule 31 of the Agreement between the parties provides that "a rigid adherence to the precise pattern that may be in effect 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." The Carrier in this case, however, does not claim that any such changes have occurred to increase the amount of Sunday work. The evidence shows that on the last nine Sundays before the 40-Hour Agreement became effective, it called only three employes, whereas before that four were most commonly called, and sometimes five. It relies entirely on the fact that on the average about four hours' work per employe was necessary every Sunday.

Since there were no seven-day positions prior to September 1, 1949, and the operational requirements could be met by six-day positions supplemented by Sunday calls, we think the rules require the Carrier to continue this method of handling the work, in the absence of changes in traffic or business that might make it necessary to work full days on Sundays the same as week days. (Award 5710 reaches the same result in a similar situation).

Accordingly the Claimants were improperly assigned under Rule 25(d); and there was a violation of 25(c), which provides for rest days either on Saturday and Sunday or Sunday and Monday.

A subsidiary question arises as to part (b) of the claim which asks for compensation at time and one-half for each Saturday worked at straight

time as well for each Sunday. The Carrier had the right under (c) to assign the Claimants to work Tuesday through Saturday, the same as the other three trace force employes were assigned. The claim for Saturdays is therefore not justified. The rest of the claim is valid.

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 Rule 25(c) was violated.

AWARD

Claims sustained except for Saturdays.

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.

DISSENT TO AWARD 6502, DOCKET CL-6476

This case has to do solely with the right of the Carrier to assign employes to perform work on Sunday under the provisions of the 40-Hour Week Agreement.

The attempt of the Referee to construe Rule 25(d) in the narrow, unrealistic fashion here intended, to the effect that a Carrier may not assign employes to work in seven-day service unless employes were **assigned** to work on Sunday prior to September 1, 1949, not only misconstrues that Rule, but ignores Rule 31.

The Board has repeatedly held that these two rules must be construed together and, when so construed, mean that the Carrier may assign employes to work on Sunday at straight-time rates of pay in seven-day service if it is **necessary** to perform the work on Sunday. This is so even if **no** work was done on Sunday prior to September 1, 1949.

Whether the work was performed on Sunday prior to September 1, 1949, merely creates a presumption as to the necessity thereafter. In other words, if it was performed prior to September 1, 1949, there is a presumption that it is necessary thereafter. If it was not performed on Sunday prior to September 1, 1949, there is a presumption that it is not necessary thereafter. These principles have been clearly spelled out in many prior decisions of this Board. As examples, reference is made to Awards 5581, 6018, 6075 and 5247. To the same effect are 25 awards of the Second Division (1599, 1608 to 1617, inc., 1644 to 1655, inc., 1669 and 1714).

Wherever the necessity for performing work on Sunday (in seven-day service) is questioned by the Employes, they have the burden of proving that

it is not necessary. This principle is not only well established by many decisions of this Board, but is in accord with such a well-recognized principle of law with respect to the burden of proof that no one can question it without being guilty of an arbitrary and arrogant disregard of the sound basis upon which that principle rests.

In Award 5581, as an example, this Division said:

> "It is apparent that the Carrier in the first instance should be the judge of its operational requirements. It necessarily follows that under the 40-Hour Week Agreement discretion with respect to staggering work weeks of forces engaged in work of a nature requiring six- or seven-day protection rests with the Carrier. It is also apparent that the Carrier's discretion in this respect is not absolute. It may not deprive employes of Saturday and Sunday as rest days on an arbitrary or capricious determination that the work is of such a nature that employes will be needed six or seven days per week. If the Carrier's determination in this respect is challenged by the Employes the burden is upon them to show that the operational requirements of the Carrier are not better met by having the workweeks staggered."

In Award 1599 of the Second Division, the Board said:

> "In a case such as this, the organization is burdened with the obligation of establishing that Sunday work at pro rata rates under a Wednesday-Sunday work week is not necessary to the effective operation of the carrier. One approach to this problem would be to show that before the 40-hour week agreement was signed the carrier did not employ men on 'running' car repairs on Sundays. That is, if such a showing could be made, there might well be a presumption that what was not necessary earlier has not been necessary since 1949. We do not find that the organization has succeeded in sustaining this portion of its burden of proof.****
>
> "There is thus a presumption that Sunday work has been necessary after September 1, 1949. This alone, however, does not conclusively demonstrate that such work has actually been needed since that date. The carrier's operational requirements might have changed.
>
> "The organization has the burden also of establishing the fact of such change. But the record does not disclose that this burden has been adequately borne.****"

Again, in Award 1644, the Second Division announced the same principle as follows:

> "* * * The agreement does not prohibit the assignment of a type of work on Sunday after September 1, 1949, even though it was not so assigned prior to that date, if such work is necessary to be performed on Sundays. The proof required must, however, be sufficient to overcome the presumption that it is not necessary to be performed on Sunday because of the fact that it was not so performed prior to the advent of the Forty-Hour Work Week Agreement. But in the case before us, it is clear that the work was necessary to be performed on Sundays prior to September 1, 1949 and that it was necessary to be performed thereafter. The claimants have failed to establish that Sunday work was not required during the period for which claim is made. We think the applicable provisions of the Forty-Hour Work Week Agreement, particularly Rules 1(e), 1(h) and 6(c), sustain the action of the carrier in its determination that Sunday work was required during the period involved. See Award 1599, Second Division; Awards 5247, 5581, 5545, 5546—Third Division."

Twenty-three other cases (involving exactly the same issue as that in the present case) decided by the Second Division, and referred to above, have followed that principle.

It is clear that the burden is upon the Employes in this present case to prove that the work complained of was not necessary to be performed on Sunday. How have they met that burden? The Referee has supplied the answer when he states in the Opinion that the Carrier "explains the operational requirements as follows:

> "'Work of their (the trace force's) positions is required on Sundays to handle and answer all telegrams and calls from offices, terminals and yards on line of road pertaining to home routes on foreign line cars and other requests in connection with car movements and car records requiring immediate attention.'"

The Referee then states, "This statement of operational requirements must be accepted as correct, * * *."

This unequivocally demonstrates not only that the Employes have failed to prove that the work is unnecessary on Sunday but that, on the contrary, the record shows that it **is** necessary and, consequently, the claim should have been denied.

However, while admitting that the record shows that it is necessary to perform this work on Sunday and while admitting that it was performed on Sundays prior to September 1, 1949, the Referee says the Carrier may not assign men to perform it but must use them under the Call Rule at time and one-half. He holds, in other words, that since the Sunday work was performed prior to September 1, 1949, at the rate of time and one-half, the Carrier must continue to perform it on that basis thereafter. There not only is no such requirement in the 40-Hour Week Agreement, but there is no sound basis in logic or in the practical aspects of the situation to justify any such conclusion. Rule 31 clearly contemplates that if the work is necessary to be performed on Sunday, the Carrier may assign employes to do it at straight-time rates of pay even though the work was **not done at all** prior to September 1, 1949 (see cases referred to above). If the work is not "necessary," the Carrier may still perform it on Sunday if it pays time and one-half. In other words, the only penalty attached to the performance of work on Sunday, even where it is not necessary to be performed, is the penalty payment. Witness the fact that the penalty claimed in this case and allowed by the Referee for the alleged violation of the agreement (i.e., the performance of work on Sunday) is pay at time and one-half. Therefore, even if it were **not necessary** to perform the work in question on Sunday in this case, the only penalty would be the payment of time and one-half to those required to work on Sunday. Yet the Referee applies the same penalty where the record shows —and the Referee admits—that it **is** necessary to do this work on Sunday. Therefore, so far as the reasoning employed by the Referee is concerned, it makes no difference whether it is necessary to perform the work or not. He completely disregards Rule 31 which contains the basis upon which the Carrier is permitted by the agreement to perform work at straight-time rates of pay on Sunday—i.e., the existence of a necessity to do the work—and holds that the Carrier may not do so unless employes were **assigned** to perform the work on Sunday prior to September 1, 1949.

Differently stated, the Referee decides that because the Carrier paid time and one-half (under the Call Rule) to have this work performed on Sunday prior to September 1, 1949, it may not now have the work performed at straight time by staggering individual assignments but must continue to pay time and one-half by using men under the Call Rule. Rule 31 of the agreement (a standard provision taken from the National 40-Hour Week Agreement) provides, in part:

> "Existing provisions that punitive rates will be paid for Sunday as such are eliminated."

Yet, in the face of this provision, the Referee holds that the Carrier must continue to pay time and one-half for this work on Sunday by using the Call Rule.

Whether the Carrier used the Call Rule or assigned men to work a full eight hours prior to the 40-Hour Week Agreement in a situation of this kind, was purely a matter of discretion with the Carrier. In other words, if the Carrier had wanted to assign men to do this tracing work on Sunday (in seven-day service) and pay them for 8 hours instead of using them for a lesser number of hours under the Call Rule, it could have done so. Nothing in the 40-Hour Week Agreement compels the Carrier to give up this alternative and use the Call Rule exclusively. Most certainly no provision can be found in the agreement which states or implies that once having used men to perform work under the Call Rule, the Carrier may not thereafter determine that it will assign men for a full eight-hour tour of duty instead of calling them for a lesser number of hours.

The Referee implies that if it were proved that the volume of work had changed after September 1, 1949, so that the force were needed for a full eight hours on Sunday as compared to the lesser number of hours worked by each individual prior to that date, the Carrier would be justified in making the assignments. The record shows that an average of 16 hours per Sunday were worked prior to September 1, 1949 (by four persons), while 24 hours per Sunday were worked thereafter (by three employes). At the most, therefore, it could only be contended that the Carrier could not assign more than two employes to work eight hours each on Sunday. But the Employes have the burden of proving that unnecessary work is being done on Sunday, and the record is devoid of any such proof. On the contrary, the Referee accepts the Carrier's evidence as to the necessity for Sunday work and the number of persons necessary to do it. How can it then be decided that more work than necessary is being done on Sunday?

Furthermore, the holding that the Carrier must use the Call Rule to get this work done on Sunday implies that regular employes would be assigned Monday to Friday or Tuesday to Saturday, or both, and then those men would be used on their rest days, under the Call Rule, on every Sunday. Thus they would work six days every week. How can such a plan be reconciled with the announced intention of the Emergency Board which recommended the 40-hour week when it said:

> "Its [the 40-hour week] purpose was not to obtain more pay for employees through overtime on the 6th and 7th day of the week, and it sought through the penalty provisions to discourage such work schedules." (Parenthetical insertion added.)

The answer to the problem presented here is clear and simple. As this Board has held so many times and as the agreement clearly contemplates, the Carrier may assign employes to work on Sunday (in seven-day service) at straight-time rates of pay, if it is **necessary** to perform that work on Sunday. The determination of whether the work is necessary or not has nothing to do with whether employes were "assigned" or "called" to perform it prior to September 1, 1949. The fact that the work was performed prior to the 40-Hour Week Agreement is the thing which indicates the necessity. It is the "necessity" which is the governing factor, not the pay rule under which it was performed. This has been recognized in prior decisions of this Board. Thus in Award 5247 the Board said:

> "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.'"

The same conclusion was reached by the Second Division in the 25 cases referred to above. In every one of those cases the record (as set forth in the printed awards) shows that prior to September 1, 1949, no carmen was **assigned** to perform work on Sunday. All employes in the Shop Crafts group involved were assigned, prior to September 1, 1949, to work from Monday to Saturday, inclusive. Work on Sunday was rotated among those assigned from Monday to Saturday and was paid for at time and one-half. When the 40-Hour Agreement became effective, the Carriers involved in those 25 cases staggered the forces to cover seven-day service, assigning th Claimants to work from Wednesday to Sunday, inclusive. The Organization contended that the Carrier violated the agreement (rules identical with Rules 25(c) and (d) and 31 involved in this present case) by establishing such assignments. The Board, in all 25 cases (decided by three different Referees) held that, since the work was performed on Sunday (although in varying amounts and for varying hours) prior to September 1, 1949, even though no employe was **assigned** to work on Sunday, there was a presumption that it was necessary and that the Employes had failed to sustain the burden of proving that it was not necessary. The fact that the work was **not assigned** prior to September 1, 1949, was held irrelevant.

The Referee, in this present case, makes an attempt to distinguish those cases from the present one. He says:

> "Also, the Second Division Awards cited were quite different from the dispute in the instant case. In Award 1714 and the other Awards cited therein, the disputes grew out of the elimination of payment for Sunday work as such. The facts showed that certain running repair work was regularly done on Sundays before and after September 1, 1949. Moreover the Opinion indicated that Sundays were included in assignments, for it stated: 'carrier has kept at a minimum the number of men **assigned** with Sunday as one of their work days,' ".

The first basis of attempted distinction is that the Second Division cases "grew out of the elimination of payment for Sunday work as such." The rules involved in those cases were identical with Rules 25(c) and (d), which the Referee holds were violated in this case. The Rule in those cases eliminating time and one-half pay for Sunday as such, and providing that the Carrier may do necessary work on Sunday by assigning employes at straight time is identical with Rule 31 in the present case. The claims in the 25 Second Division cases were almost identical with the claims in this case and the basis for those claims was substantially the same. In both the Second Division cases and the present one, the Carrier had performed the work in question on Sunday prior to September 1, 1949, **but** no employes were **assigned** to work on Sunday in any of the 25 cases—all employes being called and paid at the overtime rate (for varying hours—in many cases less than eight) for the work on Sunday. The disputes in the Second Division cases grew out of the elimination of penalty pay for Sunday in exactly the same way that the dispute here does—namely, that the Employes contended they could not be assigned to work on Sunday at straight-time rates of pay. There is no essential difference in the claims or the basis therefore between this case and the 25 cases decided by the Second Division—nor, in fact, between this case and decisions of the Third Division cited above.

The second attempted basis of distinction is that in the Second Division cases Sundays were included in "assignments" prior to September 1, 1949. To support this conclusion the Referee quotes from the Opinion in Award 1714: "carrier has kept at a minimum the number of men **assigned** with Sunday as one of their work days,". In making this statement, the Referee in Award 1714 was referring to assignments to Sunday work **after** September 1, 1949, and not before. If the Referee here had taken the trouble to look at the record in that case, he would have discovered that **no one** was assigned on Sunday prior to September 1, 1949, in the case

covered by Award 1714. If he had taken the time to read Award 1714 carefully, he would have seen that the Referee, in using the quoted language, was commenting upon the good faith of the Carrier in keeping Sunday assignments **after** September 1, 1949, to a minimum necessary to do the work.

We see, therefore, that this attempt to distinguish those prior awards of this Board produces no distinction at all and, in fact, only serves to indicate that the Referee here intends to achieve the end result he considers desirable without regard to the facts, the agreement, prior decisions of this Board, or a logical and consistent approach to the issue in the case.

Pages two and three of the Opinion contain a discussion of the meaning of the word "position" in the 40-Hour Week Agreement as compared to its meaning in other older rules of the agreement. What the relevancy of this discussion is to the decision made is not apparent. Nevertheless, it exhibits the same type of confusion and contradiction which characterizes the whole Opinion. The Referee first states that the term "position" in the 40-Hour Week Agreement does not refer to the individual assignment or work week of an employe but means the "services, duties or operations that may be necessary to be performed by various individuals on 'the specified number of days per week,' (i.e. 5 days, 6 days or 7 days)." So far so good. Then he makes the surprising statement that this meaning of the word "position" is the same as the meaning of "position" as used in the other rules of the agreement (in existence prior to the 40-Hour Week Agreement), and to support this conclusion cites the "Bulletin" Rules. He states that these latter rules provide that new "positions" and vacancies in old positions shall be bulletined. He then says: "Each bulletin, of course, refers to certain individuals' assignments to five work days and two rest days." In other words, the use of "position" in the older rules, such as the Bulletin Rules, refers to an individual assignment—the very thing which he has just said the word "position" in the 40-Hour Week Agreement does **not** refer to. Nevertheless, his conclusion is that there is no difference in the meaning of the term in the two types of rules. Such complacent circumlocution is hard to understand and impossible to accept. It is by this type of reasoning that the Referee concludes that when Rule 25(d) says, "On positions which have been filled seven days per week any two consecutive days may be the rest days * * *", it means that Sunday work must have been part of a bulletined assignment prior to September 1, 1949, in order for a Carrier to assign employes to perform it thereafter. The word "position" in this rule does not refer to a bulletined assignment. By definition in the Note to Rule 25 it means "service, duties, or operations necessary to be performed the specified number of days per week." Seven-day service, duties or operations were necessary to be performed seven days a week, as the record shows and the Referee admits. Consquently, even if Rule 25(c) were considered alone, "positions" were filled seven days a week prior to September 1, 1949. However, this rule cannot be considered alone. It must be read with Rule 31 (which the Referee ignores entirely). Rule 31 provides that a Carrier may do work on Sunday at straight time if it is "necessary" to do so. The record here clearly shows that it was and is necessary, and the Referee admits it—as explained above.

Finally, the Award itself is inconsistent with the Opinion. The latter states that the Claimants should have been assigned with either Saturday and Sunday or Sunday and Monday as rest days. It then holds that the Carrier had the right to assign the Claimants from Tuesday through Saturday and that, consequently, the claim for pay for Saturdays is denied. The Opinion then states that "The rest of the claim is valid." The "rest" of the claim includes a demand for compensation for Friday —and this claim is apparently sustained along with the claim for time and one-half for Sunday. If no pay is due for Saturday because Carrier could have assigned Claimants to work from Tuesday through Saturday, then, by the same

token, no compensation is due for Friday, since the assignment from Tuesday through Saturday—which the Referee says the Carrier could have made—would also include Friday.

For the reasons stated we dissent.

/s/ C. P. Dugan

/s/ R. M. Butler

/s/ W. H. Castle

/s/ E. T. Horsley

/s/ J. E. Kemp

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

INTERPRETATION NO. 1 TO AWARD NO. 6502, DOCKET NO. CL-6476

NAME OF ORGANIZATION: Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employes.

NAME OF CARRIER: Southern Railway Company

Upon application of the representatives of the carrier involved in the above award, that this Division interpret the same in the light of the dispute between the parties as to its meaning and application, as provided for in Section 3, First (m) of the Railway Labor Act, approved June 21, 1934, the following interpretation is made:

The question in dispute is whether the award sustained the money claim for Fridays. The carrier argues that no money award was made for Fridays. The employes contend that the award clearly upheld the claim for Fridays as submitted to the Board.

There is no ambiguity in the award. It states clearly that the claim (as written at the head of the award) is sustained, "except for Saturdays." In addition to the claim for Saturdays and Sundays, there was claim for days "each week not allowed to work from Monday to Friday, inclusive." Friday was the day claimants were not permitted to work. The Board upheld the contention of the carrier with respect to Saturdays and only this part of the claim was excepted from the award. All the rest of the claim was sustained, thus including Fridays.

In submitting its application for interpretation, the carrier noted an obvious error in the printed award. Claimants' assignments were stated in the opinion as "beginning Sunday and ending Wednesday with rest days on Thursday and Friday," when it should have said "ending Thursday, with rest days on Friday and Saturday." This misstatement was called to the attention of the Board at the time the award was adopted, but it was not corrected in the printed copy. It in no way affects the award or this interpretation.

Referee William M. Leiserson, who sat with the Division as a member when Award No. 6502 was adopted, also participated with the Division in making this interpretation.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: (Sgd.) A. Ivan Tummon
Secretary

Dated at Chicago, Illinois, this 25th day of June, 1954.