Award No. 6695
Docket No. CL-6730

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

William M. Leiserson—Referee

PARTIES TO DISPUTE:

THE NEW YORK CENTRAL RAILROAD COMPANY BUFFALO AND EAST

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

STATEMENT OF CLAIM: This dispute, arising out of a controversy with the Clerks' Organization, is brought to this Board by the Carrier and is described as follows:

> "Dispute with respect to the right of the Carrier to operate its Utica Freight Transfer House by means of staggered working assignments on seven days each week at straight time rates under the terms of the National 40 Hour Week Agreement as adopted by these parties."

It is the claim of the carrier that it has the right, under the terms of the governing agreement, to work its Utica Transfer as a seven day operation, without overtime penalty. The Clerks dispute this right and contend that this facility can only be operated in five or six day service, as defined in the contract, and that any work performed on Sundays must be at the overtime rate.

CARRIER'S STATEMENT OF FACTS:

Description of the Operation

The carrier maintains and operates on its main line at Utica, New York a facility known as the Utica Transfer. This facility, while concerned in a minor degree with local distribution of freight in the city of Utica, is predominately an operation involving the car-to-car transfer enroute of freight in less-than-carload lots. LCL freight loaded at numerous stations on the lines of this carrier and its connections, is moved to the Utica Transfer to be there unloaded and the freight transferred to other cars to be forwarded to final destinations or next transfer point.

Physically, the transfer facility consists of a large freight house and working platforms which are serviced by a total of 18 tracks, upon which cars containing merchandise are placed or spotted during the transfer operations. Tracks 1 to 9 are used for the handling of eastbound freight and accommodate a total of about 165 cars. Tracks 10 to 18, inclusive, hold about 171 cars and are devoted to westbound movement. Thus a total of 336 cars may be spotted and worked at one time. The transfer operation is largely

We have established, and the record shows, that under our Rule 32(c) which was in effect prior to adoption of the National 40-Hour Week Agreement, time and one-half payment was required for Sunday work at freight transfer stations.

We have established, and the record shows, that our present Rule 32(c), effective September 1, 1949 and which conforms to the National 40-Hour Week Agreement, likewise requires payment at time and one-half rates for Sunday work at freight transfer stations.

We maintain that the provisions of Rules 30, 31, 32 and 35, read together, definitely and fully sustain our claim.

It is affirmed that all data submitted herewith in support of our position has heretofore been presented to the carrier and is hereby made a part of the question in dispute. (Exhibits not reproduced.)

OPINION OF BOARD: The Carrier is the Petitioner in this case, and the Respondent Clerks' Organization filed a counter claim stating that the Agreement "precludes management from operating Utica Freight Transfer House on a 7-day per week basis . . . as a means of avoiding payment at time and one-half rates for services performed on Saturdays and Sundays." The different Statements of Claim are merely the respective contentions of the parties as to whether the Carrier has or does not have the right to stagger assignments over 7 days of the week so that Saturdays and Sundays will be ordinary work days paying straight time rates.

The dispute requires interpretation of certain provisions of the 40-Hour Agreement, and no question has been raised as to this Division's jurisdiction to determine the issues in the case. But the dispute appears to be a much broader one than between the two parties here, the New York Central and its employes represented by the Clerks' Organization.

As stated by the Carrier Members in their Memorandum to the Referee: "The request of the carrier . . . is that this Board define the rights of the parties, in a manner similar to a declaratory judgment." They go on to say:

> "The question involved in this case is of extreme importance, not only to the New York Central but to the Railroad industry generally and to the employes as well as to the management. If the railroads are to stay in the transportation business, they must have the right to regulate their affairs in such way as will enable them to continue to serve the public as an effective transportation agency. Without this right they cannot long continue in business and these employes, who have already suffered great losses in employment, will stand to suffer even more.
>
> "If the position of the Organization in this case is sustained, it would mean that operations of these rail carriers would be frozen in the status that existed on August 31, 1949 . . .
>
> "If this industry is to survive and to continue operation as a going enterprise, the position of the Carrier in this docket must be sustained and the position of the Organization denied." (Underlining in original).

That this broader dispute is implied in the Carrier's claim, is suggested also by the manner in which the dispute on the New York Central arose. On December 3, 1952, various Eastern Railroad Companies met in conference with five General Chairmen and a Vice President of the National Clerks' Organization. The conference was called at the request of the carriers for the purpose of seeing what, if anything, could be done to improve railway service and to encourage increase in the volume of LCL freight traffic. According to the Clerks, the chief suggestion of the management representatives for

meeting both these problems was to operate freight transfer stations on a 7-day basis "if we would waive the requirement under our rules agreements that time and one half be paid . . . at such stations on Saturdays and Sundays." Five stations on the Erie Railroad were named, one on the Delaware, Lackawanna and Western, and twenty-one on the New York Central.

The conference reached no agreement, and it recessed with the understanding that the committees on both sides would be kept intact and be subject to call upon request of either party. It was also understood that the matter would be pursued in discussions on the individual properties. The Carrier does not mention the conference in its submission; nor does the record show whether there were any other such conferences of the two committees. On the New York Central, however, the proposed 7-day operation was further discussed at two meetings of this Carrier's representatives with the Clerks' System Committee. One was held on December 22, 1952, the other on April 28, 1953.

Then on June 18, 1953, the Carrier's Vice President in charge of Personnel wrote to the Clerks' General Chairman reminding him that he was to give his final decision after studying the data and information which had been furnished him at his request. This letter concluded:

> ". . . I wish you would advise me your concurrence in our position that the contract permits the establishment of 7-day staggered, straight time assignments at Utica so that we may proceed to make the necessary arrangements without incurring the hazards and disruptions which a controversy with your organization over this matter would entail."

To this letter, the General Chairman replied on June 25:

> "My understanding of your position . . . is that Rule 32 (c) of our Agreement permits Management to establish 7-day, staggered, straight-time assignments at the Utica Transfer. We wish to make it clear that we regard such a construction of this rule as entirely improper, and to advise you that we will not assent to it."

Following receipt of this letter, which also suggested "establishing 6-day operation on a two-shift basis," the Carrier wrote to the Third Division on June 29, 1953, giving notice of its intention to file its ex parte submission in the present case.

Thus the dispute grew out of a conference involving other carriers and their employes as well as the parties here, which sought mutual agreement on ways of meeting problems of common interest to all in attendance. It comes here with the Carrier claiming the right under the existing rules of its 40-Hour Agreement to inaugurate a 7-day operation, while the Clerks contend that even a 6-day operation require a special agreement to authorize it.

With respect to the contention that the Railroad industry generally is so involved in this case that its survival and continued operation depends on sustaining the position of the petitioning Carrier, we can hardly believe that this was meant to be taken seriously. Our function is restricted by law to interpretation or application of existing contracts. If it were indeed true that the railroads had entered into contracts with their employes which threatened the survival of the industry, we would be powerless to save it. For that purpose the carriers would have to negotiate changes in their contracts. We have no authority to change a contract, either to add to or subtract from it. Accordingly, we must confine our consideration to the dispute between the parties here, namely, the New York Central and the Clerks' Organization with respect to the operation of the freight transfer house at Utica, New York.

The evidence shows that prior to the effective date of the 40-Hour Work Week on September 1, 1949, the Carrier operated the Utica Transfer to cover service on six days each week. With the inauguration of the 40-Hour Week, the operation was reduced to five days per week, the employes working from Monday through Friday, and having Saturday and Sunday as assigned rest days. This was apparently done under paragraph (b) of Rule 35 which provides that "on positions the duties of which can reasonably be met in 5 days, the days off will be Saturday and Sunday.

But paragraph (c) of the same rule stipulates that "where the nature of the work is such that employes will be needed 6 days each week, the rest days will be either Saturday and Sunday or Sunday and Monday." Since the Utica Transfer operated on a 6-day basis prior to September 1, 1949, the Carrier could have continued the 6-day operation by staggering the assignments so that some employes would work Tuesday through Saturday while the others worked Monday through Friday. Why it chose to work all of them on a 5-day basis with Saturday and Sunday off is not explained in the record. No did the Carrier claim at that time the right to operate either on a 6-day or a 7-day basis at straight time rates.

The 5-day operation continued at Utica from September 1, 1949, to October 17, 1950, when the parties entered into a Memorandum Agreement to operate six days each week. The Memorandum states that this was done in the belief that it "will prove mutually desirable to both parties by better meeting competition in the transportation field and providing more stability of employment." This 6-day operation was in effect for 15 months. On January 14, 1952, the Carrier abandoned it and restored the 5-day work week, (the Memorandum being cancellable on 30 days' notice). The reason given by the Carrier for the abandonment is "because this six-day per week schedule . . . proved to be entirely unsatisfactory and inadequate;" and it ascribes this to the fact that under the arrangement there was an insufficient force working on Monday which resulted in a greater backlog on succeeding days than under the 5-day operation when a full force works on Monday.

It is significant, however, that in January, 1952, when the Carrier found the 6-day operation unsatisfactory and inadequate, it did not then insist on the right to operate on a 7-day basis at straight time rates. Instead, it chose to reestablish the 5-day operation. Thus, except for the 15-month period of operating six days a week, the Utica Transfer has worked on a 5-day schedule under Rule 35 (b) from the time the 40-Hour Agreement became effective on September 1, 1949, down to the present time. Moreover, neither on September 1, 1949, nor on October 17, 1950, when the 6-day operation was inaugurated, did the Carrier claim the right to operate on a 6-day basis as provided in Rule 35 (c). When the Memorandum Agreement was made on the latter date, it apparently conceded that such a special agreement had to be negotiated with the Clerks and that it was not free to exercise its rights under Rule 35(c).

This Memorandum Agreement stipulated that 50 regular gangs will be assigned to work Monday through Friday, and that there shall be only 25 such gangs assigned from Tuesday through Saturday. Further, that the 50 gangs could be increased, but not decreased, except by mutual agreement. With respect to the 25 gangs, however, the Carrier could neither increase nor decrease the gangs without the assent of the Employes. But on Saturdays the Carrier could work more than 25 gangs on an overtime basis. Rule 35(c) contains no such restrictions. There is no explanation in the record why the Memorandum and the restrictions were necessary. But a special memorandum agreement would be necessary, if both parties understood the provisions of Rule 35 in the same way, namely: that the duties at the Utica Transfer can reasonably be met in five days, and therefore both considered paragraph (b) of this rule to be applicable rather than paragraph (c) and (d) which govern situations where employes are needed six or seven days each week. In that case a supplementary agreement would be necessary, to authorize operations on six days without overtime pay.

It is in the light of these facts as to the operations at Utica both before and after September, 1949, that we must consider the claim of the Carrier in the instant case. The Clerks' Organization stresses the fact that on two previous occasions, this Carrier attempted to secure Sunday work at straight time rates: once in 1931 before an Arbitration Board, and again in 1936 in a proceeding before this Division (Docket CL-320, Award 314). In both cases the attempts were unsuccessful. We do not consider those decisions, and two others on other railroads that were cited, as pertinent to the instant dispute. They were made under agreements different from the 40-Hour Agreement on which the Carrier's instant claim is based, and the rules of this Agreement are controlling as to whether the instant claim is justified or not.

Here the Carrier is claiming that because of a change in operating conditions, Rule 35 (d) of the 40-Hour Agreement is now applicable to the Utica Transfer, rather than 35 (b) or 35 (c). Rule 35 (d) reads:

> "(d) On positions which have been filled 7 days per week any 2 consecutive days may be the rest days with the presumption in favor of Saturday and Sunday."

In addition, paragraph (a) of Rule 35 refers to 7-day service in providing that:

> "(a) Subject to the exceptions contained in this agreement, . . . the work weeks may be staggered in accordance with the Carrier's operational requirements; so far as practicable the days off shall be Saturday and Sunday."

But the exceptions prohibit any staggering when the duties are such that they "can reasonably be met in 5 days;" and if employes are needed six days a week, the staggering is restricted so that the rest days must be either Saturday and Sunday or Sunday and Monday. Since the Carrier is now and has for some years been operating the Utica Transfer only five days a week it relies primarily on Rule 32 (c) which governs Sunday work to justify its claim. This rule provides, among other things, for 7-day operation so that Sunday may be a regular work-day at straight time rates, provided it is established that operating conditions have so changed as to make this necessary. The Rule reads:

> "32(c) Previously existing provisions that punitive rates will be paid for Sunday as such are eliminated. The elimination of such provisions does not contemplate the reinstatement of work on Sunday which can be dispensed with. On the other hand, a rigid adherence to the precise pattern that may have been in effect immediately 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. This is not to be taken to mean, however, that types of work which were not needed on Sundays prior to September 1, 1949 will thereafter be assigned on Sunday. The intent is to recognize that the number of people on necessary Sunday work may change."

To prove that traffic and business conditions have so changed as to justify changing the Utica Transfer from a 5-day to a 7-day operation, the Carrier has submitted much evidence showing that for some years there has been a steady decline in the amount of LCL freight handled by the New York Central, and the operations at Utica consist mainly of car-to-car transfer enroute of less than carload freight. Over 90% of the total tonnage handled at this point is "transfer freight." But whereas in 1946, the volume of LCL freight was 650,000 tons, by 1952 this had fallen to 273,000 tons, a reduction of 58 per cent. Since that time the decline has been continuing.

But this decline in LCL business is not confined to Utica. At other transfer points on the New York Central and on the railroads of the country generally,

there has been the same pattern of reduced LCL traffic, due mainly to diversion of such freight to highway truck transportation. There has been a corresponding loss of revenue to the railroads, and loss of employment to employes. The evidence presented by the Carrier, however, does not show that the New York Central has lost a greater percentage of LCL tonnage and revenue than have other railroads in the Eastern District; it has consistently done somewhat better than these. And whereas its loss of LCL tonnage was slightly greater than the tonnage lost by all U.S. railroads, its revenues from LCL freight did not decline as much as in the industry as a whole.

The downward trend in LCL freight is not an operating problem that arose on the New York Central at Utica since the 40-Hour Agreement became effective. It is a problem which developed on the railroads generally some years before September 1949, and has continued to face the industry down to the present. The same is true with respect to the "continuously greater requirement for fast and reliable transportation service," which the Carrier argues has caused "a change in the nature and character of less-than-carload merchandise traffic in the past five years." It states that the demand of shippers for fast service is now greater than in 1948 and 1949, and that this is largely due to a change from a buyers' to a sellers' market and dealers carrying reduced inventories. Also, that highway motor carriers have a definite advantage over railway service, and "this transit time is becoming more and more important due to current economical conditions."

The Carrier submitted in evidence many letters from freight traffic managers and others to attest to these changed conditions, but the facts are well known, the Interstate Commerce Commission having called attention to them for a good many years. The question to be determined here is whether such changes in general market, business, and competition conditions were the kind of changes referred to in Rule 32 (c) where it is stated that "The intent is to recognize that the number of people on necessary Sunday work may change;" but that the elimination of punitive rates for Sunday as such "does not contemplate the reinstatement of work on Sunday that can be dispensed with."

In considering this question we must bear in mind that the general downward trend in LCL traffic and the competitive advantage of highway truck transportation were fully known to the parties before September 1949. These matters were discussed at the hearings of the President's Emergency Board which recommended the 40-Hour Work Week. And when the parties here, together with other carriers and organizations, negotiated the detailed rules of the Agreement with the assistance of the former members of the Emergency Board, they were fully advised as to the declining LCL business and competitive highway traffic. The same is true with respect to the change from a buyers' to a sellers' market, and reduced inventories causing need for faster service, though these have intensified since 1949 just as LCL traffic has continued to decline down to the present.

Rules 35 (b), (c) and (d) providing for 5, 6, and 7-day operations and Rule 32 (c) governing Sunday work were therefore written into the 40-Hour Agreement with full awareness of the declining LCL business and the competition of highway truck traffic. The rules are contractual obligations which may not be changed by this Division in the process of interpreting or applying them to particular disputes. If the continuing decline in traffic and increasing truck competition justifies any change in the Agreement made in 1949, this can be accomplished only by the parties themselves negotiating the desired change in conferences such as the Eastern Carriers and the Clerks held in December 1952. This Division is constrained by law to consider only whether the rules as written give the Carrier the right it claims to change its present 5-day operations at Utica to seven days without paying the overtime for Saturday and Sunday work.

With respect to these operations, the Carrier stresses the fact that by working the Transfer House on five days a week, a backlog is built up each

week-end, and cars are delayed from one to as many as six days, a majority being delayed one day, about a third, two days, and the rest from three to six days. This delayed service is serious in its effects on the Carrier's business, and, as it says, on the amount of employment available to the employes. But the Carrier apparently does not consider it necessary or advisable to work the employes at the overtime rates as it has the right to do under the Agreement in order to reduce or eliminate the delays. When the Organization agreed to stagger the gangs to cover 6-day service so that overtime would not be paid for work on Saturday, it tried such staggering and found that delays were not decreased, and went back to 5-day service.

The Carrier's reason for finding the 6-day service unsatisfactory is plain enough. Since only 25 gangs were working on Mondays and Saturdays, the number of gangs that had previously worked on Mondays under the 5-day operation was reduced, and the additional Saturday work of 25 gangs just merely made up the reduction in the number of gangs on Monday. Under these circumstances, it could hardly be expected that more cars would be handled in six than in five days, so as to reduce or eliminate the backlog of delayed cars. To reduce delays by a 6-day operation it would be necessary to employ more gangs on Monday and Saturday than half the number used on the other four days of the week.

But the Memorandum Agreement which established 6-day service required the payment of overtime if more than 25 gangs were worked on Saturday, and the Carrier apparently cannot see its way to pay the punitive rate either for this day or for Sunday. However, if it had chosen on September 1, 1949, to continue the 6-day operation that was in effect prior to this date, it could have employed whatever number of employes it needed both on Saturdays and Mondays at straight time rates in accordance with Rule 35 (c). In the General Chairman's letter to the Carrier, dated June 25, 1953, he offered to agree to operate six days on a "two shift basis," thus enabling more gangs to be used without paying overtime, but the Carrier rejected this offer, and filed its claim that it has the right to stagger assignments on a 7-day basis so that Sundays as well as Saturdays can be worked at straight time rates.

This claim can only be upheld if the contractual provisions of its 40-Hour Agreement with the Clerks permit it. Examining Rule 35 (d) which governs 7-day service, we find that the rule states that any two consecutive days may be the rest days on positions which **"have been filled 7 days per week."** (Emphasis added). Admittedly, the positions at Utica have not been filled seven days a week either before or after September 1, 1949, except by special arrangement during World War II. Accordingly we cannot hold that this rule authorizes the proposed change from the present 5-day service to a 7-day operation.

The Carrier also rests the claim on Rule 35 (a) emphasizing particularly the following words: "the work weeks may be staggered in accordance with the Carrier's operational requirements." But these words are preceded by the phrase: "Subject to the exceptions contained in this agreement," and they are followed by a clause stating Saturday and Sunday shall be rest days "so far as practicable." Obviously the operational requirements here referred to do not mean such requirements as the Carrier may think desirable, efficient or preferable, but they refer to the requirements specified in the three paragraphs immediately following 35 (a), namely: (b), the requirements which can be met in five days: (c) the requirements where employes are needed six days a week; and (d) where positions have been filled seven days per week prior to September 1949. These three provisions are among the exceptions in the Agreement referred to in Rule 35 (a), and the statement in this rule about staggering assignments, therefore, cannot justify the right to 7-day operation that the Carrier claims.

The only remaining rule on which the asserted right could be based is 32 (c) which governs work on Sundays, and the Carrier's main reliance is on this rule. The particular portion of the rule relied upon states that "a

rigid adherence to the precise pattern that may have been in effect immediately 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." But the immediately following sentence says: "This is not to be taken to mean, however, that types of work which were not needed on Sundays prior to September 1, 1949 will thereafter be assigned on Sunday." And there is more in the rule that shows why the right of employes not to work on Sunday, except at punitive rates, is carefully balanced against the right of the Carrier to work them at straight time rates.

The rule begins by taking away the right to overtime pay for Sunday work which employes had for many years before the 40-Hour Work Week was agreed to. The first sentence stipulates: "Previously existing provisions that punitive rates will be paid for Sunday work as such are eliminated." This, however, was conditioned by the statement in the second sentence that "The elimination of such provisions does not contemplate the reinstatement of work on Sunday which can be dispensed with." Then, to guard against freezing of the pattern as it existed prior to September 1949, there follows the provision that a rigid adherence to that precise pattern is not required, but changes in traffic or business must be taken into account. Finally, after explaining that this does not mean that types of work not needed prior to September 1949 will thereafter be assigned on Sunday, the last sentence of the rule sums up that "The intent is to recognize that the number of people on necessary Sunday work may change."

This rule, so carefully balanced to safeguard the respective rights of both parties in the matter of Sunday work offers no basis for a general inauguration of Sunday work where previously this has not been necessary. The decline in LCL traffic, the competition of highway truck transportation, the change from a buyers' to a sellers' market, and the need for faster service on which the Carrier's claim is mainly based, are not confined to the business and traffic at Utica or on the New York Central. They affect all railroads more or less alike. If these conditions were held to justify Sunday work at Utica and at other transfer houses on the New York Central, they would equally justify such expansion of Sunday work on all other railroads which were parties to the national 40-Hour Agreement.

Since the conditions were well known when Rule 32 (c) or its equivalent on other carriers was written, the restrictions or extension of Sunday work would not have been put into the rule, if the intent was to permit changing from 5 and 6-day operations to 7-day operations because of general business conditions prevailing in the railroad industry as a whole. We think it is plain that the right claimed by the Carrier in this case, if upheld, would eliminate the rights of the employes specified in the rule against reinstatement of Sunday work where it has been dispensed with. These rights were part of the bargain which eliminated the provisions for punitive rates for Sunday as such. Only renegotiation of the rule by the parties themselves can make such a change.

This Division and also the Second Division have had occasion to consider the question involved in this dispute in a number of cases. In our Award 5247 the Carrier's asserted right to 7-day operation was denied. In Award 6075 we upheld the Carrier's right to so work certain accounting positions. Similarly, the Second Division ruled in Award 1566 that a carrier could not properly assign certain car maintenance work to be done on Sunday at straight time rates, while in Award 1599 it held that car repair forces could be staggered on a 7-day basis at straight time rates. But these Awards laid down the principles for interpreting rules like 32 (c), namely that the carrier's right to determine his operational requirements are subject to its contractual obligations under the 40-Hour Agreement, and that mere desirability or efficiency is not enough to authorize 7-day operation or Sunday work where this has been previously dispensed with; there must be necessity for such operation or work.

Depending on whether the facts in each case met these principles or not, the right to Sunday and Saturday work at straight time rates was held to be permissible or not permissible. Where such facts were not available, the case was remanded to the parties (Award 5581). We believe this is the proper interpretation of Rule 32 (c), and is controlling in the present case. But it is to be noted that each of the previous Awards dealt with particular operational requirements at specific facilities, and the bases of those Awards were not the general state of business, traffic or competition in the railroad industry as a whole, but were concerned with the facts relating directly with the operational requirements of the particular facility involved in the dispute.

We think the wording of Rule 32 (c) plainly applies to specific needs for Sunday or 7-day service at particular places, and not to general changes affecting the business of most railroads which might make it desirable from the Carrier's point of view to reduce costs by eliminating punitive overtime rates provided for in the Agreement, in addition to the rates for Sunday as such which were eliminated.

In the present case, the Carrier's reason for wanting to change from the present 5-day to 7-day operations is mainly the general state of the LCL business in the railroad industry as a whole. It's supporting evidence with respect to operations at Utica is concerned with the delays caused by not operating on Saturday and Sunday. This is obviously a serious problem, but the Carrier's position is that the only way to deal with this problem is not to pay overtime rates for Sunday and Saturday work. It has submitted a proposal, illustrated by exhibits, which would spread the assigned gangs over seven days of the week, varying the number of different days so that "maximum forces would be employed on Thursday and Friday, when the volume of work is heaviest, and the smallest forces would be employed on Saturday and Sunday." In this way, it states, "all the work would be performed at straight time rates, . . ." And it goes on to say that "the total number of man hours . . . is (to be) the same as those which were actually employed on a five-day basis during the test period."

The proposal, therefore, is not only to avoid payment of overtime, but also to avoid employing any more men in order to avoid delays and give faster service. It may be that the Carrier could get more cars handled by spreading the same labor force over seven days instead of five. But we have seen that during the 15 month experience with 6-day operation, the Carrier could not get more cars handled and delays reduced because it did not employ additional gangs on certain days. But spreading work over seven days for the purpose of having the same number of employes handle more cars or handle them faster is certainly not authorized by Rule 32 (c) or any other provision of the Agreement. The President's Emergency Board in recommending the 40-Hour Work Week clearly stated that one of its purposes was to provide more employment on the railroads or to reduce the decline in employment. It calculated how much more it would cost the roads to get additional employes to get the work previously done in six days accomplished in a 5-day week.

The record does not show whether the Carrier added employes to its force at the Utica Transfer in September 1949 when it chose to reduce operations from a 6 to a 5-day basis. It does show that the attempt to operate on a 6-day basis a year later did not reduce car delays because no additional gangs were employed. Even though the proposal of the Carrier to work the same number of man-hours in seven days at straight time rate as it now works in five, might possibly reduce delays in car handling, Rule 32 (c) does not authorize changing an existing 5-day operation to a 7-day operation in order to avoid employing additional workers to reduce delays or merely to avoid paying overtime rates on Sunday. The proposal submitted by the Carrier is not supported by evidence that the Sunday work is actually necessary. The evidence shows only that it is desired by the Carrier if it is permissible at straight time rates and no additional workers need to be employed.

For the above stated reasons, we find that the claim of the Carrier cannot be upheld.

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 Carrier's claim not authorized by the 40-Hour Agreement.

AWARD

Claim denied.

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.

DISSENT TO AWARD 6695 DOCKET NO. CL-6730

It is apparent that the Referee has written the opinion in this docket in an effort to support his award in favor of the organization, without regard to the actual dispute, the true facts or the plain intent and purpose of the parties in making their contract. The result is an opinion found upon a misdescription of the issue, gross misstatement of material facts and severe and extensive misconstruction of the 40-Hour Week Agreement.

At the outset the Referee confuses the issue in the case. He begins by suggesting that the dispute may involve something more than a controversy between the parties named in this docket. He cites statements by members of this Board and refers to the history of the controversy as evidence that a "broader dispute is implied in the carrier's claim." He indicates a belief that the parties have attempted to make this an industry-wide dispute. But he then proceeds to quite properly reject any such extension of the issues and concludes that "we must confine our consideration to the dispute between the parties here, namely, the New York Central and the Clerks' Organization with respect to the operation of the freight transfer house at Utica, New York."

However, instead of confining his decision to the issue as he has thus correctly defined it, and to the evidence of record bearing on that issue, he has proceeded to render an opinion based upon what he presumes would be the effect of applying the result to all railroads in the country. He says:

"The downward trend in LCL freight is not an operating problem that arose on the New York Central at Utica since the 40-Hour Agreement became effective. It is a problem which developed on the railroads generally some years before September 1949, and has continued to face the industry down to the present."

His award denying the right of this carrier to operate the Utica Transfer as a 7-day, straight time facility is based largely, if not exclusively, on a finding that neither the 40-Hour Week Agreement nor the awards rendered under it permit this result if the effect would be to permit **all** carriers to operate **all** freight transfer facilities at **all locations on this basis.** With respect to the application of the agreement he says it "offers no basis for a **general inauguration** of Sunday work where previously this has not been necessary." (Emphasis added.) With respect to the many awards which were cited to him wherein previous referees on this and the Second Division have made findings favorable to the position of the carrier in this case, he says,

"It is to be noted that each of the previous Awards dealt with particular operational requirements at specific facilities, and the bases of those Awards were not the general state of business, traffic or competition in the railroad industry as a whole, but were concerned with the facts relating directly with the operational requirements of the particular facility involved in the dispute."

Most of the many observations which the Referee makes throughout his opinion with respect to conditions in the railroad industry generally are pure speculation. The evidence of record in this docket was confined primarily and almost exclusively to the situation on the New York Central. The carrier furnished statistics showing the trend of its less than carload freight business over the years since 1948. It also showed, by way of information to the Board, similar statistics for other Eastern railroads as a group. This was necessary in order to show the general conditions under which the Utica operations are conducted and to illustrate the circumstances with which this carrier is confronted in conducting those operations. No information whatever is contained in the record with respect to the situation of other individual railroads, or with respect to any other particular facilities on this or any other railroad.

The only claim presented to this Board, and the only claim upon which the Referee had any license to rule, was the claim to operate this particular facility on a 7-day basis. This is not only abundantly clear on general principles, but the restriction on the dispute which this Board and any referee can decide is mandatory under the Railway Labor Act and under the rules of procedure adopted by this Board pursuant thereto. Both require that no dispute can be considered by this Board unless it has been previously handled and failed of adjustment on a particular railroad property.

To refuse to decide a case on its merits solely because there might be comparable situations on other carriers is to refuse to perform the very function with which this Board is charged. If we were to follow this procedure in all cases we would soon be out of business, because it would be a rare case indeed that would not have a counterpart somewhere on some carrier. The action of this Referee in thus enlarging the issue in this case and rejecting the claim of the carrier because of what he finds would be the effect in the industry generally is not only contrary to the law but is completely impracticable.

In his analysis of the merits of this dispute, the Referee has been guilty of numerous and gross misstatements of vital facts on the one hand and improper and erroneous assumption of equally important facts on the other. The first of these is his finding that upon the effect date of the 40-Hour Week in September, 1949, the carrier operated the Utica Transfer on a 5-day week schedule until October 17, 1950. He says:

"The 5-day operation continued at Utica from September 1, 1949, to October 17, 1950, when the parties entered into a Memorandum Agreement to operate six days each week."

The true fact, stated frequently and without contradiction in the record, is that the 5-day operation at Utica continued only from September 1, 1949, to **October 15, 1949,** a period of about six weeks. The carrier states on page 8 of its original submission that, "in an effort to speed up its service by reducing these week-end delays (which occurred under the 5-day week operation) the carrier experimentally changed from a 5-day operation to a 6-day per week operation of the Utica Transfer on October 15, 1949." The October 15, 1949 date appears again on page 33 of the carrier's original submission and is confirmed on page 2 of the employes' original submission where they state that the "6-day operation of the Utica Transfer * * * was in effect from October 15, 1949 * * *."

Premised on this false statement, Referee concludes and comments extensively upon the "fact" that the agreement of October 17, 1950 constituted evidence that the parties had conceded that the Utica Transfer was a 5-day facility within the meaning of the contract and that a special agreement was necessary in order to permit it to be operated six days a week. His opinion indicates that he has laid great stress on this point and he finds it to be greatly to the prejudice of the position of the carrier in its present petition to operate the facility seven days a week. He says:

"When the Memorandum Agreement was made on the latter date, it apparently conceded that such a special agreement had to be negotiated with the Clerks and that it was not free to exercise its rights under Rule 35 (c)."

The fact is that this facility was operated six days a week without any agreement whatsoever for a period of more than a year before the confirmatory memorandum of October, 1950 was executed. There is nothing in the record to indicate that there was any dispute on the property with respect to the right of the carrier to operate this facility six days a week and the organization does not even suggest that the making of the agreement more than a year later should be considered as an admission against the carrier. This gross misstatement of the evidence, leading as it has to a conclusion which the Referee perceives to be vital to the merits of the case, impeaches the award.

Again, with nothing in the record to support it, the Referee states in three separate places in his opinion that the carrier did not claim the right to operate this facility on either a 6 or 7-day basis at any time between the effective date of the 5-day week and the filing of this petition. He indicates his belief that this "fact" is greatly to the prejudice of the carrier; apparently concluding that the failure of the management to act sooner demonstrates a lack of confidence in the merits of its position. Both the facts and the reasoning of the Referee on this point are false.

As to the use of a 6-day schedule, the record shows without dispute, as indicated above, that the carrier, independently and without seeking the consent of the employes, established 6-day service at this facility on October 15, 1949, and continued it for more than two years. The record shows that it was abandoned because the only scheduling of employes possible under this arrangement results in a partial force on Saturdays and Mondays—the days when a maximum force is needed.

As to 7-day service, while the carrier has not deemed it advisable to arbitrarily establish this basis of work, there is absolutely nothing in the record, the decisions of this Board or the law which attaches any adverse effect to such forbearance. For all that appears of record in this case, the carrier may have continually and persistently claimed the right to inaugurate 7-day service at this facility and refrained from doing so only because the

employes strongly resisted it. Aside from the harmful effect of such procedure on relations with its labor organizations, the carrier may well have been hesitant to take arbitrary action because of the disproportionately great liability which would accrue if its action had been later declared improper. While LCL is desirable traffic it is also high cost traffic and the margin of profit may well be insufficient to afford the punitive penalties which would accrue. Finally, the record shows that the situation with respect to loss of traffic was one which became steadily worse over the years after commencing in 1948. The record does not show, and it is impossible for this Referee to properly say at what point the management of this carrier should have determined that the expedient of operating this transfer facility 7 days a week should have been resorted to. It should be held to the credit of the carrier, and not to its detriment, that all of the other improvements in its LCL service which the record shows were made were undertaken before finally reaching the decision that 7-day service was necessary.

Even if the assumptions which the referee has made were true, they could have no bearing upon the proper interpretation of the contract. There is no limitation in the law or in this agreement; no time specified within which the carrier must exercise the rights which the agreement gives it. This theory of the Referee, if tenable, should apply equally to the converse of the situation. Would the Referee conclude that if the carrier had established 7-day service in 1949 it would have been approved?

Another instance of false and improper assumption of facts by the Referee is found in his speculations respecting the handling of LCL traffic by this carrier.

He says:

> "The downward trend in LCL freight is not an operating problem that arose on the New York Central at Utica since the 40-Hour Agreement became effective. It is a problem which developed on the railroads generally some years before September 1949, and has continued to face the industry down to the present."

He also says that:

> " * * * the general downward trend in LCL traffic and the competitive advantage of highway truck transportation were fully known to the parties before September 1949. These matters were discussed at the hearings of the President's Emergency Board which recommended the 40-Hour Work Week.",

and again that:

> " * * * the facts are well known, the Interstate Commerce Commission having called attention to them for a good many years."

The only evidence in this record on the LCL tonnage and revenue on this or any other carrier is for the years 1947 through the first half of 1953. The carrier alleged and proved a changed condition within this period, consisting of a loss of 65% in LCL tons originated and of 31% in LCL revenue. (Carrier's Exhibit 8). The loss from 1947 to 1948 (the latest figures available at the time the 40-Hour Week Agreement was signed early in 1949) was only 23% in tons and less than 2% in revenue. Obviously, on the record in this case, the parties cannot be said to have "fully known" the situation. Nor did they in fact know it, aside from the record in this case, because the fact is that LCL tonnage and revenue did **not** decline in the period prior to 1947. LCL tonnage originated by the New York Central in 1947 was actually greater than for any year since 1931, excepting only 1946, and the drop from 1946 to 1947 was only 2% (from 2,264,000 tons to 2,212,000 tons). This compares with 1,903,000 tons in 1945, 1,515,000 tons in 1942 and 932,000 tons in 1939. In terms of LCL revenue, 1947 was the **best** year in the history of the railroad.

Income from LCL freight in that year amounted to $46,600,000, compared with $41,000,000 in 1946, $31,400,000 in 1945 and $15,200,000 in 1939.

The truth is, then, that there was no downward trend in this traffic prior to a period very shortly before the proceedings in 1948 which culminated in the 40-Hour Week Agreement. There was then no operating problem; no changed condition. Even at the time they signed the agreement in March of 1949 the parties were apprised of nothing more than the fact that traffic had fallen off somewhat, for the first time, in the preceding year, with revenue remaining substantially unchanged. There was nothing even to suggest the drastic and precipitous decline in both tonnage and revenue which subsequently occurred. The statement by the Referee that "the conditions were well know when Rule 32 (c) was written" is both unsupported and unsupportable.

The reference by the Referee to statements by the Interstate Commerce Commission is likewise fanciful and meaningless. The only statements by the Commission of record in this Docket were those applicable to the years 1951 and 1952. The Referee has not identified the other statements which he says were made by the Commission "for a good many years". So far as is known, there were no statements by the Interstate Commerce Commission made at any time prior to the effective date of the agreement which are in any manner pertinent to this dispute. Any statements that the Commission could have made would have necessarily disclosed a situation on the railroads generally which was similar to that which prevailed on the New York Central, where less carload tons originated more than doubled in the period 1940-1947, and less carload revenues increased almost three-fold.

This then is the situation which existed and of which the parties had knowledge when they made this contract. The false statements and false assumptions by the Referee to the contrary, going as they do to the very essence of his award, render his findings worthless.

It is true that figures showing the condition prior to 1947 were not in this record. The subject for prooof was a change of conditions **after** 1947, not before. But that gave the Referee no license to speculate on what happened prior thereto. If he deemed this information pertinent he could have asked for and received correct information during his consideration of the case. Or he could have remanded the case. To do as he did and speculate falsely and then proceed to base his decision on erroneous data constitutes a gross miscarriage of justice.

The Referee has demonstrated an unbelievable lack of knowledge of, or respect for, the terms and conditions of the 40-Hour Week Agreement. With respect to the matter of assigning forces, he says:

> "If it (the carrier) had chosen on September 1, 1949, to continue the 6-day operation that was in effect prior to this date, it could have employed whatever number of employes it needed both on Saturdays and Mondays at straight time rates in accordance with Rule 35 (c)."

The only way a carrier can work forces in 6-day service under this agreement is by dividing them and working part Monday to Friday and the balance Tuesday to Saturday. This necessarily results, as was thoroughly explained in this Docket, in a part force on Saturday and a part force on Monday—the total man-hours worked on Saturdays and Mondays combined must equal the man-hours on any one other day. The evidence of record shows that the volume of work to be done on Mondays in the Utica Transfer facility is gerater than on any other day of the week, so that the carrier requires a maximum force on that day, and a substantial force on Saturday. The only way that this could be accomplished under the agreement would be to double the number of employes in the total force, with the result that twice as many employes as needed would have to be worked during the mid-

days of the week. It was for this very reason that the carrier found the 6-day operation at Utica unsatisfactory and abandoned it.

Another striking misapplication of the agreement by the Referee appears in connection with his attempted definition of the term "operating requirements." He says that this phrase, as used in the statement "the work weeks may be staggered in accordance with the carrier's operational requirements" means the requirements "specified in the three paragraphs immediately following". These are the paragraphs which designate rest days in 5, 6 and 7-day service. They contain no definition of "operating requirements" or of anything else, and constitute no exception to the general rule. They merely supplement the general rule by providing what the rest days shall be when "operating requirements" indicate what type of job coverage is necessary.

While the term "operational requirements" is not anywhere defined in the agreement, its meaning and effect on other provisions of the contract are made abudantly clear by reference to statements made by members of the Emergency Board which coined the language. In its letter of interpretation addressed to the parties under date of February 27, 1949 the members of the Board, referring to this phrase, said:

> " 'consistent with their operational requirements' qualifies the entire 40-hour program recommended."

The contrary and unsupported conclusions of the Referee on this matter indicate confusion or rationalization.

His treatment of Rule 32 (c)—the Sunday work rule—demonstrates a similar process. While admitting that the purpose of the rule is to "guard against freezing of the pattern as it existed in September, 1949" and that "changes in traffic or business must be taken into account," he refuses to apply the rule on the ground that the changes referred to in the rule must be changes involving only a particular, single facility. He rejects and refuses to apply the rule because, he says, changes of the kind shown in this record are "not confined to the business and traffic at Utica or on the New York Central. They affect all railroads more or less alike." Elaborating, he says "We think the wording of Rule 32 (c) plainly applies to specific needs for Sunday or 7-day service at particular places, and not to general changes affecting the business of most railroads * * *." What wording? Not one single word in the entire rule either provides or remotely infers any such limitation. On the contrary the broad and unrestricted language of the rule clearly demonstrates an intention of the parties to apply it to any situation —local, system-wide or national—which meets the specified requirements. He compounds the error by adding that the rule would not have been written as it is "if the intent was to permit changing from 5 and 6-day operations to 7-day operations because of general business conditions prevailing in the railroad industry as a whole."

There is not the slightest evidence either in the agreement itself or in the events leading up to its execution which lend any support to these statements. The facts are entirely to the contrary. Much of the evidence introduced before the Emergency Board which heard the 5-day week request of the labor organizations was devoted to the necessity of the carriers, in performing their transportation function, to exercise a considerable freedom in the scheduling of work of various types in order to meet demands of the public for transportation service. Much evidence on the operation of freight handling facilities, yards, freight houses and freight transfer operations was introduced. The Board in its report recognized the problem and the continuous-process nature of the railroad industry when it said:

> "However desirable it may be to have all workers have their rest days on Saturdays, Sundays and holidays, it is obviously not possible to achieve this result in rail, air, and marine transportation, or in other continuous-process industries."

The entire tenor of the Board's report discloses an intention to look to the broad requirements of the industry or of a particular railroad, not just to local conditions or problems which might arise at particular stations or facilities. The arbitrary and highly restrictive interpretation given this rule by the Referee is totally without foundation, does great violence to both the agreement and the purpose of the parties in making it, and condemns his decision.

This Referee attempts to distinguish prior awards of this Board which he admits have been based upon the very question involved in this case by stating "it is to be noted that each of the previous awards dealt with particular operational requirements at specific facilities, and the bases of those awards are not the general state of business, traffic or competition in the railroad industry as a whole, but were concerned with the facts relating directly with the operational requirements of the particular facility involved in the dispute."

Under the awards referred to by this Referee to which the above quoted statement is intended to apply, were 26 awards of the Second Division of this Board, decided by three different referees, beginning with Award 1599*. Each of those cases dealt with the identical operational requirements of the carrier at a number of different points in exactly the same way as the present case dealt with the operational requirements of the carrier at Utica. The evidence which the Board in those cases held was sufficient to establish the necessity for 7-day operations was summarized in this way in Award 1599:

> "The weight of the evidence favors the carrier's assertion that its competitive position would be somewhat jeopardized and the well-being of shippers, and to some extent, of the country would be lessened if such repairs were held over until Monday."

In all those cases, the carrier contended that it was necessary to perform running repairs to freight cars on Saturdays and Sundays in order to avoid delay to such cars and consequent inability to make prompt delivery of freight shipments to consignees in exactly the same way that the carrier in this present case has established that it is necessary to handle cars at Utica Transfer on Saturdays and Sundays in order to avoid delay in the delivery of these shipments to consignees. In each of those cases decided by the Second Division the carrier contended that failure to perform running repairs over the weekend would lessen its competitive position with other forms of transportation and deprive it of business in exactly the same way that the carrier in this case has established conclusively that it has suffered a tremendous loss of LCL freight business because cars are not handled at the Utica Transfer on weekends.

In all of those cases decided by the Second Division it was held that such evidence constituted evidence of operational requirements sufficient to enable the carrier under the 40 Hour Week Agreement to stagger its forces so as to perform the work on Saturday and Sunday at straight time rates of pay. No sound bases of distinction exist between those cases and the present one.

Not content with this abuse of the agreement, the Referee goes on to condemn the proposal of the carrier in this Docket on the ground that it would not add more employes to the payroll. He says in his opinion that:

> "The proposal, therefore, is not only to avoid payment of overtime, but also to avoid employing any more men in order to avoid delays and give faster service."

---

*1599, 1608 to 1617, incl., 1644 to 1655, incl., 1669, 1712 and 1714.

and again

> "Rule 32 (c) does not authorize changing an existing 5-day operation to a 7-day operation in order to avoid employing additional workers * * *."

The Referee attempts to support his position by reciting that:

> "The President's Emergency Board in recommending the 40-Hour Work Week clearly stated that one of its purposes was to provide more employment on the railroads or to decrease the decline in employment."

The fact is that the term "spread and maintain employment" to which the Referee refers appears in the February 27th letter of the Board solely in connection with explaining the intention of the Board that the carriers should not effectuate the reduced work week through the device of working existing employees six or seven days a week and paying the overtime rate for time in excess of 5 days. Reference to spreading employment was therefore confined to a requirement for the use of additional employes working relief assignments, where necessary, to perform needed work on the sixth and seventh days. It was never intended to mean that the carriers should employ unnecessary men or that the carriers should engage in featherbedding practices. The intention was only to spread existing employment; not to create unncessary new employment. Yet this Referee suggests that a simple solution to the problem of this carrier is to do just that. He says in effect, if not actually, that the carrier could solve its problem by working the present force 7 days a week and paying the overtime rate for the sixth and seventh days. He condemns the carrier because it "apparently does not consider it necessary or advisable to work the employes at the overtime rates as it has the right to do under the agreement in order to reduce or eliminate the delays." This is the very thing the Emergency Board said should be avoided at all costs when it said that—

> "The least desirable solution to be used only as a last resort in keeping with the main purpose of the Board would be to work some regular employes on the sixth or seventh days at overtime rates * * *."

What the carrier proposes in this Docket is merely that its present force at the Utica be rearranged so that employes could be scheduled to work on the days that work is required to be performed. To refuse to grant the request on the ground that it does not contemplate the hiring of any additional employes is to thwart the mainfest intention of the parties and of the Emergency Board in drafting the agreement.

As in other of his recent opinions, the Referee has been guilty of disregard and misuse of previous decisions by this Board. He has selected, in attempting to support his finding, certain awards which he perceives to be favorable to his decision and has arbitrarily ignored other awards which express contrary views. Even in the cases of awards relied upon, the Referee has in several cases improperly or incompletely described the opinion in order to make it appear favorable to the position he has taken.

For example, his only reference to Award 5247 is to the effect that the carrier's asserted right to a 7-day operation was denied. An examination of that award will disclose that the carrier, while urging that Sunday assignments would be more efficient, offered no evidence whatsoever of the necessity for Sunday work. No showing was made of any changed condition and if the Referee had properly stated the conclusion which was reached in that case he would have indicated that if a showing of changed condition had been made, 7-day service would have been approved.

The Referee states that Second Division award 1566 held that "a carrier could not properly assign certain car maintenance work to be done on

Sunday," but here again the examination of the award shows that the Referee in that case found that the carrier made no showing of an operational requirement or necessity to work the employes there involved (painters and upholsterers) on Sunday. As in 5247, the Referee found that if there had been a showing of necessity, Sunday work at straight time rates would have been permitted. The Referee there said that the carrier "must show that it was necessary, in the operation of its business, that the work be performed on Sundays."

The Referee makes no mention whatsoever of a number of other awards which were cited to him wherein this and the Second Division of this Board have repeatedly construed the Sunday work rule of the agreement to permit the establishment of 7-day, straight time, service, under proof of necessity much less compelling than that which has been made in this docket. Included among these awards are 5548, 5549 and 6018 of the Third Division and a large number of awards commencing with 1644 of the Second Division. All of these awards, including those to which the Referee has referred, announce the general principle that the carriers, under the Sunday work rule, have the right to inaugurate 7-day service where such service is necessary. In defining what is necessary, these awards have properly interpreted the Sunday work rule as authorizing 7-day service where it is found to be "essential for prompt performance" of work, where it is "necessary in the operation of its business," or "necessary in the light of the carrier's operational requirements," or in the interest of the "competitive position" of the carrier or "the well-being of shippers."

The Referee refuses to permit 7-day service to be established in this case on a finding that "the proposal submitted by the carrier is not supported by evidence that the Sunday work is actually necessary." What kind of evidence would the Referee require to convince him of necessity? The undisputed evidence of record in this docket is that this carrier has suffered a loss of 67% of its less-carload tonnage and 32% of its less-carload revenues over the past five years since the adoption of the agreement. How much must it lose? Would the Referee require a carrier to suffer a loss of 75% of its business or 90% of its business, or all of its business, before he would agree that a change in conditions has taken place?

It is difficult to imagine how any carrier, in connection with any service or operation, could make a more compelling demonstration of the need for 7-day service than this carrier has made in this docket. This is not a matter of mere desire or convenience; it is a matter which has been demonstrated to be of the utmost importance and urgency, going as it does to the very heart of the rail transportation industry and its effort to survive as an effectively competing instrumentality of commerce. The opinion and award of the Referee in this case not only does great violation to the agreement and to the obvious intent of the parties, but is so contrary to justice and good reason that it is not worthy of faith and credit. We vigorously dissent to its adoption.

/s/ C. P. Dugan

/s/ R. M. Butler

/s/ W. H. Castle

/s/ J. E. Kemp

/s/ E. T. Horsley