Award No. 8077
Docket No. CL-7694

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Lloyd H. Bailer, Referee

PARTIES TO DISPUTE:

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

BESSEMER AND LAKE ERIE RAILROAD COMPANY

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

(1) Carrier violated the current Agreement, effective June 15, 1938, revised to and including April 1, 1953, when it compensated Yard Clerk A. L. McKee at Conneaut, Ohio, for eight (8) hours at the pro rata rate for work performed on the seventh day of his work week, i. e., Monday, April 26, 1954, instead of the rate of time and one-half in accordance with the provisions of the Agreement, and

(2) Carrier shall now pay Claimant McKee the difference between the amount paid at the straight time rate of his regular assignment and the amount he should have been paid at the rate of time and one-half for eight hours in accordance with the controlling provisions of the Agreement. (Case 534)

EMPLOYES' STATEMENT OF FACTS: Prior to April 26, 1954, Clerk A. L. McKee was regularly assigned to a yard clerk's position in Carrier's facilities at Conneaut, Ohio, with an assigned work week of five days, from Tuesday through Saturday, with Sunday and Monday as his two consecutive days of rest.

Under date of April 23, 1954, Friday, Claimant was notified by the Carrier that effective Monday, April 26, 1954, his rest days were being changed from Sunday and Monday to Tuesday and Wednesday. Consequently, as a result thereof, he worked as follows:

April 20	21	22	23	24	25	26
Tues.	Wed.	Thurs.	Fri.	Sat.	Sun.	Mon.
W	W	W	W	W	Off	W
April 27	**28**	**29**	**30**	**May 1**	**2**	**3**
Tues.	Wed.	Thurs.	Fri.	Sat.	Sun.	Mon.
Off	Off	W	W	W	W	W

For the work performed on the seventh day of the work week, on Monday, April 26, 1954, Claimant was paid at the straight time rate instead of the proper rate of time and one-half.

McKee's time claim for an additional day's pay account his relief days changed during the week of April 25, 1954, causing him to work only four days.

"Would like to amend this claim by withdrawing the request for an additional day's pay and make claim for time and one-half for April 26th. account worked in excess of 40 hours or 5 days during the work week of April 20, 1954.

"Please consider the above and if conference is desired, set a date, time and place to suit your convenience."

The claim for eight (8) hours at time and one-half rate instead of one day at pro rata rate for Monday, April 26, 1954, was handled at a conference with Supervising Agent S. P. Detweiler on July 12, 1954, and was not allowed. This case was then appealed to General Superintendent W. L. Morneweck and handled at conference August 12, 1954, and was not allowed. It was subsequently appealed to General Manager Roy C. Beaver, the highest operating officer to whom appeals may be made, and was handled at conference October 1, 1954, and not allowed.

The Carrier holds that, under the provision of Rule 39(a), which is quoted in this Carrier's statement of facts, when the rest days of a position are changed, the employe affected has the right to either take the new assignment or exercise his seniority rights to any position held by a junior employe. When the rest days of Mr. McKee's position of yard clerk at Conneaut, Ohio were changed effective Monday, April 26, 1954, and he elected to remain on the position, he started to work on a new assignment and his work on that new assignment could not be tied in any way to his former assignment. There is no basis for the claim for time and one-half payment for work on a regularly assigned work day.

The Carrier's position in this case is supported by the Third Division, National Railroad Adjustment Board Award No. 6211, Docket No. CL-6230, Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employes vs. Southern Pacific Company (Pacific Lines) with Referee Curtis G. Shake participating, which denied a claim for time lost when rest days were changed. Also, Third Division, National Railroad Adjustment Board Award No. 6281, Docket No. TE-6212, the Order of Railroad Telegraphers vs. the Southern Railway Company with Referee Adolph E. Wenke participating, which denied a claim for time and one-half rate in a similar case on the basis that claimant's old work week ended after he had completed his work the day before his rest days were changed and his new work week started on the effective date of the change. Therefore, he performed no work on rest days.

This dispute has been handled in the usual manner up to an including the Chief Operating Officer of the Carrier as prescribed by the Railway Labor Act. All data submitted in support of the Carrier's position were presented to the employes and made a part of the particular question in dispute.

(Exhibits not reproduced.)

OPINION OF BOARD: Claimant A. L. McKee held a regular assignment as Yard Clerk at Conneaut, Ohio with assigned rest days of Sunday and Monday. He was properly given advance notice per Rule 39 (c) that his assigned rest days were being changed to Tuesday and Wednesday, effective Monday, April 26, 1954. Thus his regular work days were changed from Tuesday through Saturday to Thursday through Monday. Claimant worked Tuesday, April 20 through Saturday, April 24, was off Sunday the 25th, worked Monday April 26, was off the following Tuesday and Wednesday, and then worked the next five days. Claim is made that McKee was entitled to overtime, instead of pro-rata rate, for working Monday the

26th which assertedly was the seventh day of his work week. Carrier responds that by electing to remain on the position after the change in rest days Claimant accepted a new assignment in which Monday, April 26 was a regular work day.

We think the interpretation expressed in Awards 7319 and 7320 is controlling in this case. Carrier's action in changing the assigned rest days changed the Claimant's work week but not his assignment. Claimant's new work week began on Thursday, April 29. Thus Monday, April 26, was the seventh day of his work week as of that time, and the overtime rate was applicable for work performed on that date.

FINDINGS: The Third Division of the Adjustment Board, after giving the parties to this dispute due notice of hearing thereon, and upon the whole record and all the evidence, finds and holds:

That the Carrier and the Employes involved in this dispute are respectively Carrier and Employes within the meaning of the Railway Labor Act, as approved June 21, 1934;

That this Division of the Adjustment Board has jurisdiction over the dispute involved herein; and

That the Carrier violated the Agreement.

AWARD

Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: A. Ivan Tummon
Executive Secretary

Dated at Chicago, Illinois, this 25th day of September, 1957.

DISSENT TO AWARD 8077, DOCKET CL-7694

The majority opinion says that:

> "* * * the interpretation expressed in Awards 7319 and 7320 is controlling in this case. Carrier's action in changing the assigned rest days changed the Claimant's work week but not his assignment * * *."

Rule 39 (c) in the parties' Agreement reads:

> "(c) Assigned rest days will not be changed without at least thirty-six (36) hours, advance notice to employes affected."

The majority, in its finding of facts, agrees, and correctly so, that Carrier complied with the above rule in changing the rest days assigned Claimant's position. In its conclusion, the majority says that Carrier's action in changing the assigned rest days changed the Claimant's work week * * *." This finding of fact and the conclusion asserted therefrom was sufficient to warrant a denial of the claim because a change in rest days automatically brings about a change in the work week assigned a positions (**Awards 6281, 6282** Wenke, **and 7918,** Shugrue); hence, the date for which claim was made became nothing more than a work day of the new work week. It necessarily follows then, that Claimant **did not** work in excess of forty hours or five days in "a work week" or "any work week" and the payment here awarded was not warranted under any rule in the Agreement. However, in relying on **Awards 7319 and 7320,** the majority adopted the erroneous theory advanced therein that a change in rest days,

regardless of when Carrier's notification provided the change to be effective, could not be effected until the first work day of the new work week. Such an erroneous theory is not founded on contract construction.

It is the rule of contract construction that except insofar as it has limited itself by agreement, all rights remain with the Carrier (**Award 7296,** Carter). Carrier here has limited itself under Rule 39 (c) **only** to the extent that it will give the employes affected the advance notice specified therein. This, the majority agrees, was done. There is, however, no limitation or restriction in the rule or the Agreement as to when the change in rest days can be made effective, after expiration of the advance notice, and such determination was and is a prerogative of the Carrier. By relying on **Awards 7319 and 7320,** the majority not only disregards the statutory authority vested with this Board to construe the rule as written, but invades a field reserved only to Management. If the parties had intended such a strained and unwarranted "interpretation" placed on their Agreement as advanced in **Awards 7319 and 7320** and adopted by the majority here, it would have been a simple matter for them to have provided the appropriate language to cover (**Award 6044,** Whiting), but as expressed by Referee Carter in **Award 7166:**

> "* * * No such result was intended by the rules and this Board is not authorized to write such an intent into them in the form of an interpretation of the agreement. If any change is to be made it must be by negotiation. * * *"

Further, as to a rule relating to the work week of a regularly assigned employe, the unanimous opinion of the Members of Special Board of Adjustment No. 136, in Case No. 14, was:

> "* * * **There is no prohibition in the rules against assigning an employe to commence work on some day other than the first day of the work week.*** * *"

(Emphasis added.)

Also see Dissent to **Award 7324.**

The present Award is not only erroneous for the reasons outlined above, but the claim was properly deniable under other rules in the Agreement.

Rule 39(a) of the parties' Agreement reads:

> "(a). When the established starting time of a regular position is changed one hour or more for more than five (5) consecutive working days, or changed in the aggregate of two (2) hours during a period of one year, or either or both assigned rest days are changed, the employes affected may, within five (5) calendar days thereafter, upon twenty-four (24) hours' advance notice, exercise their seniority rights to any position held by a junior employe. Other employes affected may exercise their seniority rights in the same manner."

The very language of this rule confirms that a change in rest days constitutes a change in assignment. Here we find that an affected employe is allowed to:

1. Remain on the position under the changed conditions, or

2. Exercise his seniority by displacing on a position held by a junior employe.

If the employe elects to exercise the latter option, he serves the required advance notice and displaces on a position held by a junior employe, and in doing so moves from one assignment to another; the vacancy thus

created is bulletined for bids and the successful bidder is assigned to the vacancy. There can be no question but that such a move constitutes moving from one assignment to another as provided in Rule 5 (k) and (1).

If the employe elects to exercise his first option and remain on the position under the changed conditions, he likewise moves from one assignment to another. As we held in **Award 7918** with Referee Shugrue:

> "Having upheld the Carrier's right to change rest days it **necessarily follows that such action changes the work week and thereby changes the assignment** but not the position. * * *" (Emphasis added.)

The only part of the position remaining the same is the work content, the employe's assignment thereto is not and cannot be the same. Accordingly, the exception in Rule 5(k) and (l) of moving from one assignment to another would apply. To hold otherwise draws a distinction without a difference. The employe's work week, work days and rest days in the new work week are not the same as in the prior work week.

Award 7319, as well as the Award here under discussion, recognizes that a change in rest days changes the work week of the position. This being so, the employe's assignment is not the same, but rather, is different. The days of work and rest days of an assignment are as important as the rate of pay and daily assigned hours. It is not to be regarded lightly that, when a change in rest days occurs, the employe affected is given full displacement rights to any position held by a junior employe. That the employe may not elect to exercise such displacement rights does not negative the fact that there was a change in the assignment. The parties have agreed that when a change in rest days occurs, instead of bulletining the position in the first instance, they would permit the affected employe to remain on the new assignment if he so desires. Should the employe elect to exercise his seniority, the position would then be bulletined.

The framers of the 40-Hour Week Agreement recognized the impracticability of freezing rest days as established September 1, 1949, and granted Carriers, in order to meet operational requirements, the privilege to change rest days. It was never intended that Carrier would have to pay for that privilege and to that end they framed the language "except where such work is performed by an employe due to moving from one assignment to another" as found in Rule 5 (k) and (l).

The weight of authority for a denial award in this dispute was with Carrier, viz., Third Division **Awards 5854, 5998, 6211, 6281, 6282;** Cases Nos. 14 and 15 of Special Board of Adjustment No. 136, and Awards Nos. 28, 29, 30, 31, 32, 33, 34, 35 and 37 of Special Board of Adjustment No. 117. The Awards of these Special Boards are a matter of record.

For the reasons explained above and as outlined in Dissents to **Awards 7319 and 7324,** and Special Concurrences to **Awards 7320 and 7719,** we dissent.

/s/ C. P. Dugan
/s/ J. F. Mullen
/s/ R. M. Butler
/s/ W. H. Castle
/s/ J. E. Kemp