

Award No. 8304
Docket No. CL-7702

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

H. Raymond Cluster, Referee

PARTIES TO DISPUTE:

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

ST. LOUIS SOUTHWESTERN RAILWAY COMPANY

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

(a) That Carrier violated rules of the Clerks' Agreement when commencing Saturday, September 10, 1949, it changed the rest days of the regular assignee on job of Route Clerk, Henry G. Joerss, Florida Street Station, St. Louis, Missouri, from Saturday and Sunday each week as a five day per week position to a six-day per week position with a regular assignee working it Tuesday to Saturday, Sunday and Monday as rest days, and a regular assigned Check Clerk "stepped up" to the Route Clerk's job on Mondays of each week under the provisions of the Short Vacancy Rule 11-1 of the General Rules Agreement.

(b) That H. G. Joerss, Route Clerk and his successors, if there be any, be paid a minimum day's pay at the overtime rate commencing Monday, September 12, 1949, and continuing thereafter until the rule violation is corrected.

NOTE: Reparation due employees to be determined by joint check of Carrier's payroll and other records.

EMPLOYEES' STATEMENT OF FACTS: Effective with application of the Forty Hour Week Rules on September 1, 1949, of the National Agreement dated Chicago, March 19, 1949, to which both the Carrier and Brotherhood are parties, Management designated position of Route Clerk at the Florida Street Station, St. Louis, as a five-day per week position with Saturdays and Sundays as the occupant's rest days of each week. Henry G. Joerss was the regular assignee to this job as of that date.

On September 6, 1949, Agent Keck notified Route Clerk Joerss:

"Effective Saturday Sept. 10, 1949 your assigned Relief or Rest days on position of Route Clerk will be changed from Saturday and Sunday of each week to Sunday and Monday of each week.

“... (d) That the working rules should conform to the revised workweek and, therefore, employees are not to have the option of continuing former rules which they may regard as more favorable but which are inconsistent with this intent.” (Page 39 of the report). (Emphasis supplied).

It is clear from the above, that the organizations in presenting their case to the Emergency Board plainly indicated they desired a shorter work week without reduction in pay.

Further, the Emergency Board's report indicated it was their intention to apply the forty-hour principle in the manner which would be the least disturbing and costly to the industry.

This intent is further evident from Article II, Section 1 (g) (7) of the Forty-Hour Week Agreement in which it is stated regarding problems arising in connection with non-consecutive rest days:

“(7) The least desirable solution of the problem would be to work some regular employees on the sixth or seventh days at overtime rates and thus withhold work from additional relief men.”

The Carrier respectfully submits there clearly was no violation of Rule 32-8 in the present case. Rest days were properly established and the relief on Mondays was properly handled in accordance with the rules.

Without prejudice to its position, as previously set forth herein, that the claim is entirely without support under the rules, the Carrier submits that the claim that Route Clerk should receive an allowance at time and one-half rate for work not performed is contrary to the well established principle consistently recognized and adhered to by the Board that the right to work is not equivalent to work performed under the overtime and call rules of an agreement. Please see Awards 4244, 4645, 5195, 5437, and 5764. There are many others also.

In conclusion, the Carrier respectfully reasserts that the claim of the Employees is entirely without merit or support under the rules and should be denied in its entirety.

All data herein has been presented to representatives of the Employees.

(Exhibits not reproduced).

OPINION OF BOARD: This case presents essentially the same issue as Award No. 8303 and is governed by the Opinion therein. In that case, a regularly assigned Group 2 employee was used to work on the rest days of a Group 1 position; in the case before us, another regularly assigned Group 1 employee was used for the same purpose. What was said in Award No. 8303 about the effect upon Rule 32-8 of Rule 11-1(b) is equally applicable to Rule 11-1(c), which is involved in this case. The claim is therefore sustained at pro rata, not penalty, rate except for the period from March 23, 1951, the date of the final declination on the property, until May 20, 1955, the date of Petitioner's notice of intention to file with the Board, for which period no compensation shall be paid.

We do not regard the question of the propriety of changing Claimant's position from a five to a six day position as being presented for decision in this case. Although it was part of the original claim, it was not pressed before the Board. Petitioner argued this case on the same basis as Award No. 8303 and we decide it entirely on that basis.

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 Employees involved in this dispute are respectively carrier and employees within the meaning of the Railway Labor Act, as approved June 21, 1934;

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

That the Agreement was violated.

AWARD

Claim sustained to the extent indicated in Opinion and Findings.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: A. Ivan Tummon
Executive Secretary

Dated at Chicago, Illinois, this 8th day of April, 1958.