Award No. 8533
Docket No. CL-8054

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

CHICAGO, MILWAUKEE, ST. PAUL AND PACIFIC RAILROAD COMPANY

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

1. Action of the Carrier in requiring Clerk Homer G. Young to work Position No. 849 at Garner, Iowa on his assigned rest days, Saturday and Sunday, beginning August 1, 1950, and each Saturday and Sunday thereafter, and paying him under the Notified or Called Rule, is in violation of the rules of the Clerks' Agreement effective September 1, 1949.

2. Homer G. Young be allowed eight (8) hours at the punitive rate of Clerk's Position No. 849 at Garner, Iowa for each Saturday and Sunday he was worked and continues to work on Position No. 849, less time paid for on each Saturday and Sunday, retroactive to August 1, 1950.

3. The Rest days of Position No. 849 shall be included within a regular relief assignment.

EMPLOYES' STATEMENT OF FACTS: Prior to September 1, 1949 and continuing until January 27, 1950, Position No. 849, Clerk Garner, Iowa, was assigned to work eight (8) hours per day, seven (7) days per week. The assigned hours of that position were from 8:45 PM to 5:45 AM with one hour lunch period and with Sunday assigned as the rest day. (See Employes' Exhibit "A").

The hours of assignment were subsequently changed to 9:00 PM to 6:00 AM, but as the change in starting time did not exceed thirty (30) minutes, it was not necessary, under the provisions of Rule 14, to rebulletin the position and the records do not show the date that change of hours was made.

Effective January 27, 1950, Position No. 849 was assigned on a split-shift basis. The position continued to work eight (8) hours per day, seven (7) days

Rule 37 (c-5) which was the "Service On Rest Days" rule Decision 5 of the 40 Hour Week Committee, in connection with which your Honorable Board stated in part:

> "Second, that such right as the Carriers had prior to September 1, 1949, to make the regularly recurring calls or part time assignments on rest days will continue to exist on and after September 1, 1949, **except that such rights are thereafter extended to two rest days, whereas they formerly applied only to one.**" (Emphasis ours.)

There is nothing about the opinion or the award from which it can be said that the claim was sustained on the basis that the Carrier did not have the right to make recurring calls. To the contrary, the opinion very clearly indicates that the Carrier would have the right to make recurring calls on the two rest days subsequent to September 1, 1949. However, the sustaining award was based on these facts:

That Rule 37 (c-5) provided for employes to be paid for the service which they performed on their rest days in accordance with the provisions of Rule 43.

That inasmuch as Rule 43 (b) provided a minimum payment of 8 hours at the time and one-half rate for those employes called **regularly on Sunday** under Decision No. 5 of the 40 Hour Week Committee, the "Sunday provision of the call rule governing regular recurring calls applies to both rest days". It was on that basis that the claim for a minimum payment of 8 hours at the time and one-half rate for both rest days was sustained in the case covered by Award 7084.

However, the parties involved in the instant dispute have agreed to a different service on rest day rule. In Rule 33 (b) they have provided the service on the Sunday rest day shall be paid for under the provisions of Rule 34 (d) which provides a minimum payment of 5 hours and 20 minutes at the time and one-half rate and in Rule 33 (a) they have provided that service on other than the Sunday rest day shall be paid for under the provisions of Rule 34 (a), which provides a minimum payment of 3 hours at the pro rata rate.

There is no provision or understanding that supports the claim in the instant case and the Carrier respectfully requests that it be denied.

(Exhibits not reproduced.)

OPINION OF BOARD: Prior to September 1, 1949 Clerk Position #849 at Garner, Iowa was filled on a daily basis, the regular incumbent thereof being assigned Monday through Saturday, with relief provided on Sunday. The bulletined duties were:

> "Sell tickets, handle mail and baggage in connection with Train No. 22 and No. 11. Miscellaneous clerical work as assigned by Agent."

Following the introduction of the 40-hour work week this position continued to be filled seven days per week, the regular Clerk being assigned Monday through Friday, with a relief provided on Saturday and Sunday.

Beginning August 1, 1950, however, the Saturday and Sunday relief was discontinued. Thereafter the regular Clerk, Claimant Young, was regularly called on each of his rest days to perform service. On Saturdays he was on

duty from 8:30 P.M. to 10:30 P.M. to handle work in connection with Train No. 22, for which he was compensated for three hours at pro rata rate per Rules 33 and 34. On Sundays Claimant was on duty from 8:30 A.M. to 12:30 P.M. for work in connection with Train No. 11, being compensated at the appropriate punitive rate under the Rules just cited.

On both rest days Claimant sold tickets and handled mail, which duties were included in the position as bulletined. Claimant stated that on Saturdays he had an hour and thirty minutes of idle time in the two hour call; and that on Sundays there were approximately three hours and five minutes of idle time during the four hour period (Carrier Exhibit A). Carrier asserts a decrease in the requirements of the service caused the change in schedule here complained of, but it does not offer evidence on the volume of Saturday and Sunday work accruing to the position prior to August 1, 1950. On or about April 2, 1954 Claimant's Saturday and Sunday assignments were discontinued, at which time the U. S. Post Offce took over the handling of the mail. It appears that thereafter the selling of tickets was replaced by the train conductors' acceptance of cash fares. Thus the period covered by the claim is from August 1, 1950 to on or about April 2, 1954.

We note preliminarily that this claim was first presented on January 1, 1954, almost three and one-half years after the protested practice began. It cannot be contended that Petitioner had no knowledge of this practice prior to the filing of the claim. The entirely unreasonable delay in making this protest is a factor to be considered with respect to the extent of the retroactive compensation sought. Nevertheless the merits of the claim are properly before us for adjudication.

Immediately prior to the 40-Hour Week Agreement the subject position involved service necessary to the continuous operation of the railroad. It was filled by the regular incumbent Monday through Saturday, with relief being provided on Sunday at straight time rate, as provided in Rule 33 of the 1946 Agreement. Under that contract Carrier was not entitled to have the Sunday work of the position performed on a regularly recurring basis under the call rule then in effect (Rule 31). Following the adoption of the 40-Hour Week Agreement there continued to be seven days of service to be performed in the position each week, with the result that it was retained as a seven day position under Rule 27 of the 1949 (current) Agreement. Since during the period of the claim work accruing to the position continued to exist seven days per week, we conclude that Carrier was not entitled to have such work performed on a regularly recurring basis during the rest days of the regular incumbent, Claimant Young. Carrier was required to make the Saturday and Sunday work a regular assignment for an employe. This is not to say that Carrier was contractually limited to assigning a relief employe whose only Saturday and Sunday duties were those accruing to the position in question. Thus Carrier had the option of combining these duties with those of another position of similar craft and class being relieved on said days, or of staggering this position with another.

Carrier refers to a past practice of regularly recurring calls on rest days and points to Award 1178, rendered in 1940 and involving these parties, in support thereof. We note, however, that Carrier cites no instances of such practice occurring after the effective date of the 1946 contract, and involving employes assigned to service necessary to continuous operation of the railroad. As stated above, that agreement did not permit such a practice. Decision No. 5 of the 40-Hour Week Committee, to which Carrier also refers, does not con-

flict with the conclusion here reached on the subject claim, but rather supports this finding.

With respect to remedy, the request for the inclusion of the rest days in a regular relief assignment is now moot for reasons already indicated. Because of the unreasonable delay in filing this claim. Claimant has waived his right to compensation for the period prior to January 1, 1954. From that date to the date the rest days calls in question ceased (on or about April 2, 1954), Claimant is entitled to be compensated at pro-rata for that portion of the work day not held on duty on each Saturday and Sunday involved.

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

AWARD

Claim sustained to the extent indicated in the above Opinion and Findings.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: A. Ivan Tummon
Executive Secretary

Dated at Chicago, Illinois, this 20th day of November, 1958.

DISSENT TO AWARD NO. 8533, DOCKET CL-8054

This claim as filed covered the period August 1, 1950 to April 2, 1954, which is subsequent to this Carrier's adoption of the 40-hour week, hence it is subject to the provisions of the September 1, 1949 Agreement between the parties.

The record shows that but 29 and 55 minutes work remained on the disputed position on its Saturday and Sunday rest days, respectively.

The Majority, while recognizing that the position is properly a 5-day one because its duties "can reasonably be met in five days" (Rule 27(b), and stating Carrier could have exercised an option to combine such service with the duties "of another position of similar craft and class being relieved on said days, or of staggering this position with another", holds that this Carrier should be penalized to the extent of payment of a minimum 8-hour day to the regular incumbent of the 5-day assignment on this position when required to perform this minimum amount of service thereon on his rest days on a call basis.

The Majority thereby totally ignores Carrier's further option to have the service performed under the Unassigned Day Rule 28 by the regular employe

in the absence of an available extra or unassigned employe not having 40 hours of work that week—the record does not show the availability of such an extra or unassigned employe. The Carrier properly required the work of the **regular** employe, and properly compensated him therefor under the Call Rule 34 as provided for under Rule 33—Service on Rest Days—See **Award 6694** by Referee Leiserson who served as Chairman of the Presidential Emergency Board that handled the 40-Hour Week Case; also, **Award 7654** by Referee Carey which followed the reasoning and conclusions of **Award 6694.**

With respect to any application of Decision No. 5 of the 40-Hour Week Committee, the record contains ample showing by the Carrier as to the practice that had obtained on this property prior to the adoption of the 40-Hour Week.

By reason of the foregoing, we dissent.

/s/ C. P. Dugan

/s/ J. F. Mullen

/s/ R. M. Butler

/s/ J. E. Kemp

/s/ W. H. Castle