

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Martin I. Rose, Referee

PARTIES TO DISPUTE:

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

FLORIDA EAST COAST RAILWAY COMPANY

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

1. The Carrier violated and continues to violate the agreement when, effective December 1, 1954, it assigned Section Stockman Alma D. Hayes, at New Smyrna Beach, to a work week of Wednesday through Sunday, and
2. Claimant shall be compensated an additional day's pay at the pro rata rate for each Tuesday since December 1, 1954 that she has been improperly assigned.

EMPLOYES' STATEMENT OF FACTS: When the agreement between the parties became effective on January 1, 1938, Rule 50 provided that work performed on Sunday would be paid for at the pro rata rate when the entire number of hours constituting the regular week day assignment were worked. This rule was revised March 1, 1945 to provide that work performed on Sundays would be paid for at the rate of time and one-half, except that employees necessary to the continuous operation of the carrier who were regularly assigned to such service would be assigned one regular day off in seven, Sunday if possible, and when assigned day off duty was not Sunday work on Sunday would be paid for at the straight time rate. Acting in accordance with the provisions of revised Rule 50, on March 8, 1945 the Storekeeper at New Smyrna Beach notified all of the Storeroom employees at that point that their assignments would be daily except Sundays and holidays. See Employees' Exhibit "A" consisting of six pages.

Effective September 1, 1949, Rule 50 was again revised eliminating previously existing provisions that punitive rates will be paid for Sunday as such, but as a safeguard against an abuse of this provision it was agreed that this provision is not to be taken to mean that types of work which have not been needed on Sundays would, after September 1, 1949, be assigned on Sunday.

OPINION OF BOARD: Prior to July, 1951 all Store Department forces at New Smyrna Beach, Florida, worked at the Main Stores. Until September 1, 1949, the two Section Stockmen were assigned daily except Sundays and the specified holidays. When the Forty Hour Week Agreement became effective on September 1, 1949, one Section Stockman was assigned rest days of Saturday and Sunday and the other one was assigned rest days of Sunday and Monday.

For many years prior to September 1, 1949, and since then, Car Department car repair forces at New Smyrna Beach have worked seven days per week and materials have to be furnished to them daily. Until July, 1951 the Car Foreman or Assistant Foreman filled out requisitions to cover and issued such materials from a stock maintained at the car repair tracks and carrier in Store Department accounts. The requisitions were sent to the Main Stores and Store Department forces replenished the stock.

In July, 1951 the Foreman was relieved of the work of issuing materials to the car repair forces. Instead, a Section Stockman was moved to the car repair tracks to take control of the stock there and to issue materials. This Section Stockman was assigned rest days of Sunday and Monday. A relief position was established to provide relief at the car repair tracks on Sunday and Monday. To fill out five days of work, the relief position worked at the car repair tracks on Tuesday and at the Main Stores on Wednesday and Saturday.

In November, 1954 the Main Store was closed. The remaining Section Stockman was moved to the car repair tracks and the relief position was abolished. In order to stagger the work weeks of the two Section Stockmen, the rest days of Claimant, Section Stockman, were changed from Sunday and Monday to Monday and Tuesday, effective December 1, 1954. The position occupied by Claimant was abolished on February 15, 1956, and the issuing of materials at the car repair tracks on Saturday and Sunday has been protected by the use of an extra employee.

The claim was presented to the Carrier on February 13, 1955, and declined. It was progressed on the property without change in decision and is now appealed here.

It is the Petitioner's contention that the change of Claimant's rest days from Sunday and Monday to Monday and Tuesday violated Rules 38 (c) 2, 3 and 50 (a) of the Agreement. Petitioner argues that prior and subsequent to September 1, 1949, the Section Stockman positions were six-day positions so that Rule 38 (c) 2 required rest days of either Saturday and Sunday or Sunday and Monday, and that these positions could not be established after September 1, 1949 as seven-day positions for the reason that the language of Rule 38 (c) 3 and the intent expressed in Rule 50 (a) show that the only positions which may be filled after September 1, 1949, seven days per week so that "any two consecutive days may be rest days with the presumption in favor of Saturday and Sunday" are those positions which were filled or performed seven days per week prior to the date mentioned.

The Carrier contends that regardless of who performed it, the work was and is of such nature that it is necessary to be performed seven days per week so that under Rule 38 (b) it constitutes service, duties or operations necessary to be performed seven days per week, that for such reason Claimant's assigned rest days of Monday and Tuesday were in accordance with Rule 38 (c) 3, and that the work of issuing materials at the car repair

tracks to car repair forces was and is necessary Sunday work within the meaning of Rule 50 (a).

The relevant provisions of Rule 38 read as follows:

"Work Week

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

"(c) Subject to the provisions of Paragraphs (b) and (d) of this Rule and to the subsections of this Paragraph (c), the work week will consist of forty hours, composed of five days of eight hours each, with two consecutive days off in each seven. The work weeks may be staggered in accordance with the Railway's operational requirements; so far as practicable the days off shall be Saturday and Sunday.

"2. Six-day Positions—

"Where the nature of the work is such that employees will be needed six days each week, the rest days will be either Saturday and Sunday or Sunday and Monday.

"3. Seven-day Positions—

"On positions which have been filled seven days per week any two consecutive days may be the rest days with the presumption in favor of Saturday and Sunday."

Rule 50 (a) is entitled "Sunday Work" and states that:

"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 be 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 have not been needed on Sundays will hereafter be assigned on Sunday. The intent is to recognize that the number of people on necessary Sunday work may change."

The Carrier's basic contention is that the work of issuing materials to the car repair forces at the car repair tracks has been and still is necessary seven days per week. The car repair forces work and have worked for many years each day of the week. However, the controversy here involves the Section Stockman position. This position was not assigned to the issuance of materials to the car repair forces and did not work at the car repair tracks prior to the Forty Hour Week Agreement which became effective September 1, 1949 and for almost two years thereafter. During this period, the position was not assigned to Sunday work, and, with the advent of that forty hour week, it was designated as a six day position by the Storekeeper. While Rule 38 (b) defines "positions" and "work" in terms of "service, duties or

operations necessary to be performed the specified number of days per week", it does not specify the number of days per week for such work or define "necessary". Thus, Carrier's justification for the assignment of Claimant to the Sunday work of issuing materials at the car repair tracks to the car repair forces depends on the view that such work is necessary Sunday work under Rule 50(a).

We are not free to impose our own notions of what may be necessary Sunday work on the basis of the factual situation presented, and the parties are likewise circumscribed in this respect. The agreement meanings and intent embodied in Rule 50 (a) bind us as well as the parties.

While Rule 50 (a) eliminates the punitive rate for Sunday work and states that such elimination "does not contemplate the reinstatement of work on Sunday which can be dispensed with", it also suggests some allowable variation from the "precise pattern" which existed just before September 1, 1949, with regard to the amount of Sunday work that may be necessary". The reasons, designated as "changes", which may permit such variation are stated in, and limited by, the fourth sentence of the Rule thusly: "Changes in amount or nature of traffic or business and seasonal fluctuations must be taken into account." The remainder of the Rule admonishes that "This is not to be taken to mean, however, that types of work which have not been needed on Sundays will hereafter be assigned on Sunday and that "The intent is to recognize that the number of people on necessary Sunday work may change."

This construction of Rule 50 (a) is not new or novel. See Awards 5247 and 7370. Award 7370 states:

"It is not contemplated by these rules that Carrier's method of operation is frozen as of September 1, 1949, the effective date of the forty hour week Agreement. It is specifically provided in Rule 33 (c) that 'a rigid adherence to the precise pattern that may be in effect immediately prior to September 1, 1949, with regard to the amount of Sunday work that may be necessary is not required'. But this authority is limited by other language in the rule. It is stated therein that 'the elimination of such provisions does not contemplate the reinstatement of work on Sunday which can be dispensed with'. It further states that 'changes in amount or nature of traffic or business and seasonal fluctuations must be taken into account'. It is stated definitely that types of work which have not been needed on Sundays will not be thereafter assigned on Sunday. Construing the rules as a whole, they simply mean that Sunday assignments will remain as they were before the forty hour week except where there has been such a change in operating conditions due to a change in the nature or amount of business, or other changed conditions which makes Sunday work necessary."

It is clear that Rule 50 (a) hinges deviation from "the precise pattern that may be in effect immediately prior to September 1, 1949, with regard to the amount of Sunday work that may be necessary" on "changes in amount or nature of traffic or business and seasonal fluctuations". The record contains no evidence of any such "changes in amount or nature of traffic or business and seasonal fluctuations". The record shows that car repair operations on a seven day basis and the need for issuing materials at the car repair tracks to the car repair forces remained unchanged for many years prior to September 1, 1949, and thereafter. Manifestly, relieving the Foreman and Assistant Foreman of the latter work was not a change within the meaning of

Rule 50 (a). See Award 5247. Nor is there evidence to suggest that the completion of the dieselization of the Carrier's property, the closing of the Locomotive Department and the Main Stores, which occurred in November, 1954, were changes, or were related to the car repair work so as to constitute changes in regard thereto, within the meaning of the Rule.

For these reasons, we do not reach the question of the effect of Rule 38 (c) 3, relied on by Petitioner. For the same reasons, Award 6502, cited for Petitioner, and 6856, cited for Carrier, are not apposite here.

The principles applied in Awards 1599 and 1644, Second Division, lead to the conclusion we have reached. According to those cases, the nonperformance of the work by Section Stockmen before September 1, 1949, and for almost two years thereafter, raises a presumption, or "constitutes strong evidence", that the work was not required of the position on Sunday after that date, and, there is no evidence of changed conditions to overcome the presumption.

The record establishes that the position occupied by Claimant was abolished with the close of her tour of duty on February 15, 1956. Claim (2) must be limited accordingly to that date.

On panel reargument on behalf of the Carrier, it was again contended, *inter alia*, that acquiescence in the Sunday work occurred because no protest was made and no claim was filed by Petitioner when in July, 1951, a Section Stockman was assigned to the car repair tracks with rest days of Sunday and Monday and a relief position of five days of work was established to furnish relief at the car repair tracks on those rest days of the Section Stockman. Even if such silence on Petitioner's part were regarded as acquiescence in those events, it would constitute no more than a waiver of any claim based thereon. It cannot be construed by itself as consent to a modification of the rules agreement which served to relieve the Carrier from the application of Rule 50 (a) approximately three years later. The claim here is based on events since December 1, 1954.

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 Employee involved in this dispute are respectively Carrier and Employee 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 in accordance with the Opinion.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois this 21st day of September, 1960.

DISSENT TO AWARD NO. 9568, DOCKET NO. CL-8878

In this Award the majority holds that Carrier violated Rule 50 (a) despite the fact the majority found, and could do no other, that the work involved was necessary to be performed, and was performed, seven days per week prior to September 1, 1949, as of September 1, 1949, and ever since. This was not a case where for the first time subsequent to September 1, 1949, the work was required to be performed on Sundays. Neither did the case involve, with regard to that work, a deviation from the pattern in effect immediately prior to September 1, 1949, nor the reinstatement of work which had been or could be dispensed with on Sundays. Hence, Carrier was not debarred under Rule 50 (a) from continuing to require this necessary work seven days per week.

In this Award the majority not only takes a most unrealistic view of Rule 50 (a), but fails to give due regard to the operative facts in the case under the plain language of the rule. At no time was it ever contended that the work involved was not of a type properly assignable to employees covered by the Clerks' Agreement. The effect of the Award, and the resultant erroneous-ness, is that although at all times pertinent, and admittedly so, the work was necessary to be performed, and was performed, seven days per week, the performance of same by employees covered by the Clerks' Agreement on the same basis somehow and in some undisclosed manner operated to change the character of the work from that as had always been required and performed.

This Award is in serious error and we dissent.

/s/ C. P. Dugan

/s/ R. A. Carroll

/s/ W. H. Castle

/s/ J. E. Kemp

/s/ J. F. Mullen