

Award No. 10865

Docket No. CL-10839

NATIONAL RAILROAD ADJUSTMENT BOARD

**THIRD DIVISION
(Supplemental)**

Harold Kramer, Referee

PARTIES TO DISPUTE:

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

ERIE RAILROAD COMPANY

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood that the Carrier violated the rules of the Clerks' Agreement at Brier Hill Car Shop, Youngstown, Ohio, when on December 7, 1957, it required an employe to change his rest days from Saturday and Sunday to Sunday and Monday, and

That the Carrier shall now compensate employe R. Jack for eight (8) hours at time and one-half rate for Saturday, December 7, 1957 and/or his successor or successors for eight hours at time and one-half rate for services performed on rest days in addition to monthly rate of the position for all subsequent dates until violation complained of is corrected. (Claim #1194)

EMPLOYEES' STATEMENT OF FACTS: The position of Stenographer-Clerk to Wreckmaster-Car Foreman at Brier Hill Shop, Youngstown, Ohio, is a five-day position with rest days of Saturday and Sunday as provided by the Clerks' Agreement. This was determined August 23, 1949 when the following letter was received:

"R. Fuller, Division Chairman:

"Regarding your letter of August 18, 1949, Relief Schedules. Please be advised that all Clerks in Mahoning Car Department will work five (5) days per week.

/s/ T. W. Gabler
Division Car Foreman"

Under date of November 26, 1957, Mr. Jack was notified that effective Tuesday, December 3, 1957, his position was assigned to work Tuesday through Saturday with rest days Sunday and Monday. As a result of this advice, Mr. Jack worked six days in his work week December 2nd, 3rd, 4th, 5th, 6th, and 7th, 1957 and was off on Sunday and Monday, December 8th and 9th, 1957. The employe worked six days in his work week bulletined to start work on Monday.

This claim was handled in regular order of progression up to and including the highest officer designated for handling employe matters. Claim was

which he held. Therefore, under the Agreement and the cited authorities, the claim herein is without merit and should be denied.

All data herein have been presented to or are known to the Organization.

(Exhibits not reproduced.)

OPINION OF BOARD: The facts in this case are not in dispute. It is the applicable rules and the interpretations of these rules under the current Agreement which is involved.

THE FACTS

There were two clerical positions in the Division Car Foreman's Office at Brier Hill, Youngstown, Ohio. Each of the two positions was assigned to work 8:00 A. M. to 5:00 P. M. one hour lunch period, Monday through Friday with Saturday and Sunday rest days.

On November 26, 1957, Mr. R. Jack, occupant of position of Clerk-Stenographer, was given the following notice, Carrier's Exhibit "A".

"ERIE RAILROAD COMPANY

"November 26, 1957

"Mr. Robert Jack:

"This is to inform you that effective Tuesday, December 3, 1957, your position will be assigned to work Tuesday thru Saturday with rest days Sunday and Monday.

"F. C. Main
Div. Car Foreman"

The appropriate part of the effective Agreement under Section 20-2—Work Week reads as follows:

"Note: The expressions "Positions" and "Work" used in this rule refer to service, duties, or operations necessary to be performed the specified number of days per week, and not to the work week of individual employees.

"(a) General

"The Carrier will establish, effective September 1, 1949, for all employees subject to this agreement, a work week of forty (40) hours, consisting of five (5) days of eight (8) hours each, with two (2) consecutive days off in each seven (7); 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. This rule is subject to the following provisions:

"(b) Five Day Positions

"On positions the duties of which can reasonably be met in five (5) days, the days off will be Saturday and Sunday.

"(c) Six Day Positions

"Where the nature of the work is such that employes will be needed six (6) days each week, the rest days will be either Saturday and Sunday or Sunday and Monday."

As a result of the change in rest days, effective Tuesday, December 3, 1957, the rest days of Employee R. Jack were in fact changed from Saturday and Sunday to Sunday and Monday.

POSITION OF ORGANIZATION

That the Claimant worked Monday, December 2, 1957 through Saturday, December 7, 1957 a period of six consecutive days or a total of 48 hours in his work week and that during this week Claimant had one day of rest instead of two days rest as provided in Rule 20-2 (a) above quoted.

Further that under the 20-3 (b) and (c) of the Agreement which reads as follows:

"(b) Work in excess of forty (40) straight time hours in any work week shall be paid for at one and one-half times the basic straight time rate except where such work is performed by an employee due to moving from one assignment to another or to or from an extra or furloughed list, or where days off are being accumulated under paragraph (g) of Rule 20-2 (Work Week Rule).

"(c) Employees worked on more than five (5) days in a work week shall be paid one and one-half times the basic straight time rate for work on the sixth and seventh days of their work weeks, except where such work is performed by an employee due to moving from one assignment to another or to or from an extra or furloughed list, or where days off are being accumulated under paragraph (g) of Rule 20-2 (Work Week Rule).

POSITION OF CARRIER: That, that part of the claim reading "and/or his successor" is not valid under Rule 41, which provides in part:

"(a) All claims or grievances must be presented in writing by or on behalf of the employee involved, to the officer of the Carrier authorized to receive same, within 60 days from the date of the occurrence on which claim or grievance is based * * *"

That the existing Agreement does not limit the Carrier from a change in rest days as made in this instant and that proper notice of change was given.

That the change in work week and rest days became effective on the first day in the new work week so that the rest days were the sixth and seventh days. Claimant's new work week began on December 3 and he worked five days and rested December 8 and 9. Therefore, Saturday, December 7 was not a rest day.

That Rule 17 titled "Rights When Assignment is Changed" specifically provides for a change in rest days and that in the instant dispute the Claimant did not choose to exercise his seniority rights.

"Rule 17 — Rights When Assignment is Changed.

"(a) When the established starting time of a regular position is changed thirty (30) minutes or more for five (5) consecutive working days, the assigned days per week changed for a period of four (4) weeks or more, or one or both of the designated rest days changed, the employe affected may, within five (5) days thereafter, upon thirty-six (36) hours advance notice, exercise his seniority rights to any position for which he is qualified, held by a junior employe. Other employes affected may exercise seniority rights in the same manner.

"(b) When the established starting time of an assigned relief position is changed for one (1) hour or more regularly on one or more of the positions covered, or one or both of the designated rest days changed, the employes affected may exercise seniority rights as outlined in preceding paragraph."

OPINION: The assignment in this instant was changed and hence Claimant R. Jack moved from one assignment to another and is therefore not eligible for overtime compensation in accordance with Rule 20-3 (b). Claimant's work week began on Tuesday, December 3, 1957 the date the change became effective and therefore only worked five days during the new work week. We hold in this instant with Award 7918. It is our interpretation of Rule 17 that although only the rest days were in fact changed that this constitutes a change in assignment.

FINDINGS: The Third Division of the Adjustment Board, upon the whole record and all the evidence, finds and holds:

That the parties waived oral hearing;

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 there was no violation of the Agreement.

AWARD

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 19th day of October, 1962.

LABOR MEMBER'S DISSENT TO AWARD 10865

The erroneous decision of the Referee could be described by the use of a mild word, such as "obstinate", defined by Webster's New World Dictionary as "unreasonably determined to have one's own way; not yielding to reason or plea; stubborn; resisting remedy; dogged; mulish".

The entire "Opinion" of the Referee states:

"The assignment in this instant was changed and hence Claimant R. Jack moved from one assignment to another and is therefore not eligible for overtime compensation in accordance with Rule 20-3 (b). Claimant's work week began on Tuesday, December 3, 1957 the date the change became effective and therefore only worked five days during the new work week. We hold in this instant with Award 7918. It is our interpretation of Rule 17 that although only the rest days were in fact changed that this constitutes a change in assignment."

The decision that Carrier's changing of Claimant's rest days resulted in Claimant's having "moved from one assignment to another", constitutes a stubborn resistance to all reason and compensatory remedy for the Carrier's violative action in its improper application of an unambiguous rule.

Grasping at the only straw available in his vain attempt to support the decision, the Referee refers to Award 7918; one look at that Award is all that it takes to see that the principle in that claim is completely foreign to the principle involved in this docket, and the rules as dissimilar as day is from night.

It is beyond comprehension that the Referee could pass over the principles in Awards 5646, 6382, 5113, 5897 and Award No. 47 of Special Board of Adjustment 174 which are directly in point. It is inconceivable that he completely ignored Award 7319, involving the exact same dispute, same parties, in which Referee Edward F. Carter stated emphatically:

"A change in rest days does not have the effect of terminating the old assignment and creating a new one where the occupant does not exercise his seniority. If such were the case the change of rest days would require that the new position be bulletined. This means, also, that the position remains the same irrespective of the change in rest days and consequently there is no moving from one assignment to another. Awards 5586, 5807. The fact that the occupant of the position may exercise his seniority rights after a change in rest days does not appear to affect the situation when the right has not been exercised. We must necessarily come to the conclusion that the Carrier has the right, after notice, the (sic) change the rest days of a position, and thereby change the work week of the position, but it remains the same assigned position throughout. * * *"

* * * * *

The Carrier contends that the rules do not contemplate any penalty pay when the rest days are changed in accordance with the Rules. The rules do not say that such changes can be made without penalty and it would have been easy to have said so if such a result was intended. It is clear, also, that the right to change rest days does not have the effect of limiting other rules of the agreement, including the overtime and guarantee rules, which could easily have been excepted as to Rule 20-3(e) 3, if such had been the intention of the parties."

The Referee in his obvious desire to write a denial Award, evidently took fragments out of context from Award 7918 in which the principle and claim are altogether different.

All the pertinent Awards above-mentioned were forcefully called to the Referee's attention but it is quite apparent that all of such Awards directly in point were just as vehemently ignored.

The opportunity was made available to the Referee to refrain from voting on this award in order that this despicable decision would not be adopted, thereby permitting the dispute to pass to another referee in a final effort to see that right and justice could prevail; but all efforts were fruitless.

To prove the fallacy of the Referee's reasoning, we have but to refer, in addition to all past Awards, to subsequent Award No. 10901 involving, without variance, the exact dispute, even to the exact days of the old assignment, old rest days, new days of assignment, new rest days, and the notice was given on the exact day (Tuesday) wherein the position of the Employees was rightfully sustained.

For the above reasons, I dissent.

/s/ **C. E. Kief**
C. E. Kief, Labor Member
November 15, 1962

**CARRIER MEMBERS' ANSWER TO LABOR MEMBER'S DISSENT
TO AWARD 10865, DOCKET CL-10839**

This award is entirely correct and no more convincing reason is needed than Rule 17 quoted in the award. The Dissenter resorts to personal attack lacking any basis for a more rational and persuasive approach.

The parties agreed the assignment was changed when the rest days were changed. When the assignment was changed the only possible way Claimant could get to the new assignment was "to move to it". In moving from one assignment to another, the Claimant was excepted from the provisions of Rule 20-3(b) and (c).

The Dissenter's reliance upon Award 7319 (Carter), is ill-advised. While the claim in that case was sustained, it was because the change was not made on the first day of the new work week. In Award 7320 (Carter), the change was made on the first day of the new work week and the claim was denied. In Award 7719, this principle was confirmed. In our case, the change was made on the first day of the new work week and under the principles established in 7319, 7320 and 7719, the claim was invalid. The Majority properly so held.

The Dissenter's assertion that certain awards were "forcefully" called to the Referee's attention and were "just as vehemently ignored", represents a mild description of the proceedings. Fortunately, "right and justice" did prevail. We can only hope it will again in spite of subsequent Award 10901.

/s/ **W. F. Euker**
W. F. Euker

/s/ **R. E. Black**
R. E. Black

/s/ **R. A. DeRossett**
R. A. DeRossett

/s/ **G. L. Naylor**
G. L. Naylor

/s/ **O. B. Sayers**
O. B. Sayers