Award No. 11370
Docket No. CL-11126

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

(Supplemental)

John H. Dorsey, Referee

PARTIES TO DISPUTE:

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

CHICAGO & ILLINOIS MIDLAND RAILWAY COMPANY

STATEMENT OF CLAIM: Claim of the System Brotherhood that:

1. Carrier violated and continues to violate the Current Clerks' Agreement effective February 1, 1938, revised and reprinted April 1, 1953, when it unilaterally assigned employes:

Name	Position	Rate
R. K. Cox	Dock Master Mech. #1	$2.61 per hr.
L. H. Nortrup	Dock Master Mech. #2	2.61 per hr.
H. G. Potter	Dock Master Mech. #3	2.61 per hr.
H. E. Payton	Dock Master Mech. #4	2.61 per hr.
J. J. Raridon	Dock Master Mech. #5	2.61 per hr.
L. C. Thompson	Retarder Operator	2.31 per hr.
H. T. Elmore	Barge Haul Operator	2.31 per hr.
F. B. Opp	Lubricator	2.31 per hr.
T. A. Steele	Pusher Operator #1	2.31 per hr.
E. G. Harbison	Pusher Operator #2	2.31 per hr.
D. E. Collins	Car Dumper Operator	2.37 per hr.
W. A. Yardley	Deckhand #2	2.31 per hr.
A. A. Bennett	Laborer	2.01 per hr.
A. B. Reiber	Laborer	2.01 per hr.
N. A. Fletcher	Laborer	2.01 per hr.
F. H. Ray	Laborer	2.01 per hr.
F. F. Buchanan, Sr.	Laborer	2.01 per hr.
R. T. Hertter	Laborer	2.01 per hr.
F. O. Trapp	Laborer	2.01 per hr.
H. L. Yackley	Laborer	2.01 per hr.
H. L. Bubert	Laborer	2.01 per hr.

to a Tuesday through Saturday work week with rest days of Sunday and Monday effective January 12, 1958.

2. That the employes set forth in part (1) hereof, and/or their successor or successors be compensated eight hours straight time rate of their respective positions (plus subsequent wage increases) on Monday, January 13, 1958 and each Monday thereafter withheld from their positions until claim is satisfied.

3. That the employes set forth in part (1) hereof, and/or their successor or successors be compensated an additional four hours straight time rate of their respective positions (plus subsequent wage increases) on Saturday, January 18, 1958 and each Saturday required to perform service thereafter until claim is satisfied.

NOTE: Reparations due employes to be determined by joint check of Carrier's payrolls and such other records that may be deemed necessary.

EMPLOYES' STATEMENT OF FACTS: For many years a Coal Transfer Plant has been maintained and operated at Havana, approximately 50 miles north of Springfield, Illinois for the purpose of transferring coal mined at the several mines located at various points between Taylorville, Illinois and Cimic, which is C&IM and IC connection, located approximately fifteen (15) miles South of Springfield, Illinois, to barges for transportation to Chicago, Illinois for use of Commonwealth Edison Company.

A new transfer plant was completed and put into operation in December 1949. Since completion of the new plant, mines have been closed until only one remains which is located at Ellis, Illinois.

The employes engaged in unloading coal were in 1949, when assigned to the positions required to operate the new transfer plant, assigned a work week, Tuesday through Saturday with Sunday and Monday rest days, with the exception of boat crews and Gate Operator-Clerk positions which were seven-day positions being relieved on rest days. The above mentioned assignments remained in effect until October 12, 1953, at which time Carrier changed the operation to one of seven days with relief on rest days. The seven-day operation remained in effect until date of this claim.

The following is the work assignments of the employes at the Havana Coal Transfer Plant for the week beginning January 6, 1958:

Name	Position	Mon	Tue	Wed	Thu	Fri	Sat	Sun
R. K. Cox	Dock Master Mech. #1	W	W	W	W	W	R	R
L. H. Nortrup	Dock Master Mech. #2	W	R	R	W	W	W	W
H. G. Potter	Dock Master Mech. #3	W	W	W	W	W	R	R
H. E. Payton	Dock Master Mech. #4	W	W	W	W	W	R	R
J. J. Raridon	Dock Master Mech. #5	W	W	W	W	W	R	R
B. L. Dennison	Mechanic Helper #1	W	R	R	W	W	W	W
F. H. Ray	Mechanic Helper #2	W	W	W	W	W	R	R
H. T. Elmore	Barge Haul Operator	W	W	W	W	W	R	R
D. E. Collins	Car Dumper Operator	W	W	W	W	W	R	R
T. A. Steele	Pusher Operator #1	R	W	W	W	W	W	R
E. G. Harbison	Pusher Operator #2	R	R	W	W	W	W	W

named . . . we should not attempt to decide their claims as they have not been presented to us, nor are they sufficiently brought out in the records before us."

IV Divn. 1214—". . . We hold, therefore, that where the contract provides that claims must be presented 'by or on behalf of the employe involved', a claim filed on behalf of an unnamed individual is so lacking in specificity as to be barred by the contract."

Other awards are: First Division—13473, 15277, 15623 and 16524. Third Division—4117, 5776.

(c) The organization further seeks to unilaterally amend the original claim by injecting a request in the form of a NOTE reading:

"Reparations due employes to be determined by joint check of Carrier's payrolls and such other records that may be deemed necessary."

which would require, if possible, the carrier to develop a claim on behalf of the unnamed claimants as well as the named claimants. In addition to such request being without merit under carrier's position 5(a) and (b), there is no provision in the agreement which requires the carrier to assist the organization in perfecting a claim.

CONCLUSION

Regardless of the carrier's reliance on the apparent fatal procedural defects in the organization's claim and ex parte submission, the carrier reiterates—the rules of the collective agreement (particularly Rule 38/f/ support the carrier's action in this case. The carrier explicitly followed the statement of principles and met each of the conditions contained in DECISION NO. 7 of the FORTY-HOUR WEEK COMMITTEE under which exceptions to Rule 38(b) can be made.

The carrier has produced evidence showing that it was necessary that the claimants here involved work Tuesday to Saturday. The organization has not produced one iota of evidence to overcome that of the carrier.

For all the reasons hereinbefore set forth, the carrier respectfully requests denial of these claims.

All data in support of the carrier's position in connection with claims has been presented to the duly authorized representative of the employes and is made a part of the particular question in dispute.

(Exhibits not reproduced)

OPINION OF BOARD: Since 1937 Carrier has operated its Havana Coal Transfer Plant located at Havana, Illinois. Coal is brought to the Plant in cars loaded at one or more mines in the area. Upon arrival at the Plant the coal is unloaded from the cars and loaded on barges on the Illinois River just north of Springfield, Illinois. The designed daily capacity of the Plant is 240 cars.

Effective September 1, 1949, the parties entered into the Forty Hour Week Agreement which, **inter alia,** provided that 5-day positions, when reasonable, would be assigned Saturdays and Sundays as rest days. The parties found

themselves in disagreement as to the interpretation and application of that provision of the Forty Hour Week Agreement. The dis-agreement was submitted to the Forty Hour Week Disputes Committee and was decided by that Committee in its Decision No. 7, issued on December 16, 1949. In accordance with that Decision the parties reached an agreement, on July 10, 1950, retroactive to the date of the Forty Hour Week Agreement. As a result "The Forty-Hour Week" Rules incorporated in the Agreement, between the parties, so far as here pertinent, read as follows:

"Rule 38. THE FORTY HOUR WEEK. Establishment of Shorter Work Week.

"NOTE

"The expressions "positions" and "work" used in this Rule 38 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 employes.

"(a) General.

"The carrier will establish, effective September 1, 1949, for all employes, subject to the exceptions contained in this Rule 38 of work week of 40 hours, consisting 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 carrier's operational requirements; so far as practicable the days off shall be Saturday and Sunday. This Rule 38 is subject to the following provisions:

"(b) Five-Day Positions.

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

"(f) Deviation from Monday—Friday Week.

"If in positions or work extending over a period of five days per week, **an operational problem arises** which the carrier contends cannot be met under the provisions of this Rule 38, paragraph (b), and requires that some of such employes work Tuesday to Saturday instead of Monday to Friday, and the employes contend the contrary, and if the parties fail to agree thereon, then if the carrier nevertheless puts such assignments into effect, the dispute may be processed as a grievance or claim under the rules agreements." (Emphasis ours.)

From September 1, 1949 to October 12, 1953, Carrier assigned its employes engaged in the unloading operations at the Plant to a 5-day, Tuesday-Saturday, workweek. On the latter date, because of an increase of the coal output, Carrier changed the positions to 7-day positions plus increasing the number of employes engaged in the operation.

It is to be noted that the 5-day, Tuesday-Saturday, work week was continued for more than three years after resolution of the disagreement between the parties as to the interpretation and application of the 5-day positions provision of the Forty Hour Week Assignment; also it had been in effect about ten months before the resolution of the disagreement. Inasmuch as the parties were unquestionably cognizable of this when they were concentrating

on the interpretation and application of the Tuesday-Saturday workweek—and, Clerks raised no objection, during that entire period, by filing claim—it is only logical to conclude that under the circumstances then prevailing, Clerks' did not consider that the Tuesday-Saturday workweek was a violation of the Agreement. Otherwise stated, Clerks' failure, during that time, to initiate a claim that the existing Tuesday-Saturday workweek violated the Agreement, permits of no conclusion other than that the duties of the positions could not then, under the circumstances, reasonably be met in a five days workweek with "Saturday and Sunday" as rest days.

The evidence is uncontroverted that on January 1, 1958, the coal tonnage handled at the Plant decreased to the amount that was mined prior to October 12, 1953. Further, that on January 6, 1958, Carrier advised Clerks that, because of the decreased tonnage, Carrier was re-establishing the positions on a 5-day workweek, Tuesday-Saturday. Clerks contend that the return to the Tuesday-Saturday workweek violated its Agreement with Carrier (Rules 38(b) and 38(f)) because Carrier did not afford it an opportunity to negotiate as to the workweek. Clerks cite Rule 38(f), **supra**, in support of their contention. In substance clerks' claim, favorably stated, is that the duties of the positions of the Claimants could "reasonably be met in" a Monday-Friday workweek.

Rule 38(f) permits to deviate from the Monday-Friday 5-day workweek, defined in Rule 38(b), to meet "an operational problem;" and, it preserves to the employes the right to process as a grievance any dispute arising, between them and Carrier, as to whether the duties of a position, assigned a 5-day workweek other than Monday-Friday, can "reasonably" be met in a Monday-Friday workweek. See Rule 38(b). In other words Rule 38(f) is applicable only when the parties disagree as to the workweek of 5-day positions. It does not require Carrier to negotiate, as a condition precedent to putting into effect, a 5-day workweek other than Monday-Friday.

When Carrier puts into effect a workweek of 5-day positions other than Monday-Friday, employes disagreeing, Carrier acts at its peril; but, there is no previous restraint contractually imposed on Carrier.

Clerks contend that Rule 38(f) requires that "some" of the employes, in like positions, must work a Monday-Friday workweek before other of the employes, in like positions, can be assigned a different 5-day workweek. We do not agree. Instead, we interpret Rule 38(f) as meaning that "some" employes of Carrier, occupying 5-day week positions, can be assigned a workweek other than Monday-Friday when "an operational problem arises."

In view of the above findings the ultimate issue in this case is reduced to whether the unloading operations of the Plant could "reasonably be met" in a 5-day workweek, Monday-Friday.

Carrier has adduced evidence, uncontradicted, that on and after January 12, 1958 the tonnage of coal to be handled at the Plant was comparable to the tonnage handled from September 1949 to October 1953; and, as in the earlier period could be accomplished in a 5-day, Tuesday-Saturday, workweek.

In support of its action in assigning a 5-day workweek, Tuesday-Saturday, on and after January 12, 1958, Carrier has introduced evidence that the mines producing the coal regularly worked Monday through Friday; the coal loaded on the cars at the mine were hauled to the Plant during the day or evening of the loading at the mine; the cars, of which there were about 200, were unloaded at the Plant the day following their loading at the mine and then

were hauled back to the mine for loading. This uncontroverted evidence makes it obvious that since the mines regularly worked Monday through Friday the exercise of prudent judgment would dictate that the unloading operations at the Plant, to achieve efficient utilization of the approximate 200 cars, be performed Tuesday through Saturday. To hold that cars loaded at the mines on Friday, with arrival at the Plant on Saturday, should be held at the Plant for unloading until Monday, and consequently not be available at the mines for loading on Monday, would be unreasonable. Otherwise stated, the duties of the positions of Claimants—unloading the cars at the Plant—could not "reasonably be met" in a Monday-Friday workweek. We will, therefore, deny the claim.

We have considered Clerks' evidence that the mines have not worked on every Friday. Granting this to be so, it does not effect the preponderance of the evidence that the regularly scheduled workweek at the mines was Monday through Friday. The record contains no evidence that Carrier had any control of the mining operations.

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 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 did not violate 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 26th day of April, 1963.

LABOR MEMBER'S DISSENT TO AWARD 11370 (Docket CL-11126)

The Referee grievously erred in his "Opinion", when he stated, in part, as follows:

"* * * The disagreement was submitted to the Forty Hour Week Disputes Committee and was decided by that Committee in its Decision No. 7, issued on December 16, 1949. In accordance with that Decision the parties reached an agreement, on July 10, 1950, retroactive to the date of the Forty Hour Week Agreement * * *."

* * * * *

"* * * It does not require Carrier to negotiate, as a condi-

tion precedent to putting into effect, a 5-day workweek other than Monday-Friday.

When Carrier puts into effect a workweek of 5-day positions other than Monday-Friday, employes disagreeing, Carrier acts at its peril; but, there is no previous restraint contractually imposed on Carrier.

Clerks contend that Rule 38(f) requires that "some" of the employes, in like positions, must work a Monday-Friday workweek before other of the employes, in like positions, can be assigned a different 5-day workweek. We do not agree. Instead, we interpret Rule 38(f) as meaning that "some" employes of Carrier, occupying 5-day week positions, can be assigned a workweek other than Monday-Friday when "an operational problem arises."

Decision No. 7 referred to above reads in part as follows:

"(f)—**Deviation from Monday-Friday Week**

If in positions or work extending over a period of five days per week, an operational problem arises which the carrier contends cannot be met under the provisions of Article II, Section 1, paragraph (b), above, and requires that some of such employes work Tuesday to Saturday instead of Monday to Friday, and the employes contend the contrary, and if the parties fail to agree thereon, then if the carrier nevertheless puts such assignments into effect, the dispute may be processed as a grievance or claim under the rules agreements.

This decision was made by the Forty-Hour Week Committee with Wm. M. Leiserson of Washington, D. C., acting as Referee and sitting as a member thereof.

In reaching its decision on this question the Committee finds that the following statement of principles should be used as a basis for disposing of disputes under Article II, Section 1(f), and as a guide in the future application of that Section.

1. There is no absolute right to make work assignments from Tuesday to Saturday on any positions the duties of which can reasonably be met in five days as specified in Section 1(b). Section 1(b) governs such assignments.

2. Section 1(f), however, permits exceptions to Section 1(b) under certain conditions.

3. The first condition is that there must be an operational problem which cannot be met under the provisions of Section 1(b).

4. The second condition is that the operational problem "requires that some of such employes work Tuesday or Saturday instead of Monday to Friday."

5. **Another condition is that the operational problem and the necessary number of Tuesday to Saturday assignments to meet it must be explained to the duly accredited representative of the employes and an effort made to reach agreement.**

6. **If the parties fail to agree,** the management then may put into

effect the assignment it deems necessary to meet the operational problem, but it does so at its risk, because when Section 1(f) is included in the agreement, this gives the employes the right to process as a grievance, or claim their contention that the assignment itself is improper." (Emphasis ours)

The word **some** referred to in Item 4 doesn't mean **all.**

The record is replete with evidence that the Carrier made no attempt to explain the change to the employes or make any effort to reach an agreement as provided in Item 5 or as furthered in Item 6, by providing "if the parties fail to agree." Here the Employes didn't have a chance to agree before such assignments were put into effect.

This change was arbirtraily made by the Carrier.

C. E. Kief, Labor Member

April 30, 1963