Award No. 12565
Docket No. CL-12129

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Louis Yagoda, Referee

PARTIES TO DISPUTE:

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

SOUTHERN PACIFIC COMPANY
(Pacific Lines)

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

(a) Carrier violated and continues to violate the Rules of the Clerks' Agreement at Roseville, California, when it established Position No. 28, Yard Clerk, with rest days of Sunday and Monday; and,

(b) Carrier shall now assign the occupant of Position No. 28, Yard Clerk, rest days of Saturday and Sunday; and,

(c) That the occupant of Position No. 28, Yard Clerk, Mr. J. J. Pugh and/or his successors, if any, shall be compensated eight (8) hours at the rate of time and one-half for service performed on each Saturday and eight (8) hours at straight time for each Monday that he is deprived of performing service, commencing June 21, 1958, and on the same basis for each and every Saturday and Monday thereafter until the Agreement violation is corrected.

EMPLOYES' STATEMENT OF FACTS:

1. There is in evidence an Agreement bearing effective date October 1, 1940, reprinted May 2, 1955, including revisions, between the Southern Pacific Company (Pacific Lines) (hereinafter referred to as the Carrier) and its employes represented by the Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employes, which Agreement (hereinafter referred to as the Agreement) is on file with this Board and by reference thereto is hereby made a part of this dispute.

2. Roseville, California, is situated on Carrier's Sacramento Division approximately eighteen miles northeast of Sacramento, California. The Carrier maintains a yard facility at this location where freight cars are stored, inspected, repaired and OK'd for various types of loading. The clerical work incidental to the operation of this yard facility is assigned to and performed by employes rated and classified under the Agreement.

the matter of non-consecutive rest days, **it is for the employes here to show that some particular operational requirements of the Carrier are not better met by having the work weeks staggered.**

It should be pointed out that in general the Board's intent will be satisfied if employes on positions which have been filled 7 days per week are given any 2 consecutive days off, with the presumption in favor of Saturday and Sunday, and **where the nature of the work is such that employes will be needed 6 days each week, the rest days should be either Saturday and Sunday or Sunday and Monday.** On positions the duties of which can reasonably be met in 5 days the days off will be Saturday and Sunday. These guides are general in nature, and unavoidably so. Situations will be met where because of unusual features, like geographic isolation, arrangements may have to be made in line with the thoughts expressed in the earlier discussion of the consecutive day-off problem.

The Board expressly denied the Organizations' requests for a uniform work week of Monday through Friday, and for punitive pay for Saturdays and Sundays as such. It had in mind the continuous nature of some of the operations on railroads." (Emphasis ours.)

The recommendation of the Emergency Board, amplified as above, formed the basis for the March 19th agreement, from which the contract of these parties has been copied. This record shows clearly that the Board recognized that:

1. The work week could be staggered in accordance with the Carriers' operational requirements;

2. Different positions, in different operations, will have to be filled variously, 5, 6, or 7 days a week;

3. Where the work is such that employes will be needed 6 days each week, the rest days may be either Saturday and Sunday or Sunday and Monday.

In view of the above it is obvious that Position No. 28 was properly assigned to work a work week of Tuesday through Saturday, with Sunday and Monday rest days in strict conformance with the involved rule, and the interpretation of that rule, not only by the interpretation of the framers of the report discussed hereinabove and from which the rule flowed, but from this Division's Award 5555, published subsequent thereto, and directly applicable to this property.

CONCLUSION

The claim in this docket is entirely lacking in either merit or agreement support and Carrier requests that it be denied.

(Exhibits not reproduced.)

OPINION OF BOARD: The Carrier maintains a yard at Roseville, California at which freight cars are stored, inspected, repaired and assembled for various types of loading. The clerical work here involved, — the "capturing" of empties for the use of shipper requirements as received, is assigned to employes covered by the controlling Agreement with the subject Organization.

On June 4, 1958 the Carrier established a new position titled No. 28 Yard Clerk, assigned 7:00 P. M. to 3:00 A. M., Tuesday through Saturday, with rest days Sunday and Monday. Claimant Pugh became the incumbent thereof. The claim submitted is that assignment to said schedule was in violation of the Agreement. It is demanded as compliance and correction that the occupant of Position No. 28, Yard Clerk shall be assigned rest days of Saturday and Sunday and shall be compensated for eight hours at the rate of time and one-half for service performed by him on each Saturday worked and for eight hours at straight time for each Monday not worked, commencing June 21, 1958.

One of the determinative factors in this matter is the question of whether and to what extent the work done by the Claimant in his incumbency of Position No. 26. The record shows that the employe in Position No. 26 was doing the same type of work as Claimant Pugh, i.e., the capturing of empties, on a Monday through Friday work schedule, 7:00 A. M. to 3:00 P. M., at the time the Claimant was assigned to the Tuesday through Saturday work schedule 7:00 P. M. to 3:00 A. M., to do the same thing. The record further shows that the Claimant was the only employe assigned to that specific work-week schedule of days and hours who did said work.

The difference between the parties centers on the question of whether the Carrier acted contrary to Rule 9 of the Agreement in not assigning the Claimant to a work-week of Monday through Friday with Saturday and Sunday as rest days. The determination of that issue hinges in turn on the answers to the following questions:

1. Was the assignment a Five-Day Position?

2. If not, did the Carrier act in compliance with the applicable rules of the Agreement in scheduling Claimant Pugh as it did?

Rule 9 of the Agreement makes it quite clear under the heading "NOTE" in its second paragraph that the word "position" is not used throughout Rule 9 so as to be coincidental with the work performed by a single employe, but refers rather to a body of work. The statement in full in that paragraph is:

> "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 employes."

Our Awards have settled that the word "position" is meant in this context to cover a span of work, not the time during which one employe is assigned to it. Thus, in Award 7769, we defined a "six-day position" as having the "plain meaning" of "A position, the work specifically attached to which is necessary to be performed on six days each week, regardless of which employe or employes actually perform that work. . . ."

Therefore, to determine whether a particular body of on-going work is a "Five-Day Position", we must apply the criterion which is stated in Rule 9(b) under that heading: — whether the duties can "reasonably be met in five days", in which event the jobs assigned to such must have Saturday and Sunday rest days.

On the facts available to us we conclude that the duties of the position could not reasonably be met in five days and that in the language of 9(c)

(Six-Day Positions), "the nature of the work is such that employes will be needed six days each week". Therefore, pursuant to 9(c) the Carrier had the option of assigning rest days of either Saturday and Sunday or Sunday and Monday. It had assigned Saturday and Sunday rest days to Position No. 26, one of the two holders of the "Position" (used in the sense of Rule 9). It assigned Sunday and Monday to the Claimant.

The Petitioner has not successfully refuted the Carrier's contention that the work of capturing cars was needed to be performed on Saturday, nor has it controverted the figures submitted to us by the Carrier that there were days on which almost as many cars were tagged on Saturday as on Friday and that for a given period there were only about 28% fewer cars tagged on Saturday than on Friday.

The Petitioner has made two statements on the subject of need. One of these is that the number of cars ordered after 4:30 P. M. on Friday is not in excess of 2%. The other is, that the Carrier could reduce the number of cars ordered after 4:30 P. M. on Friday "to practically nothing" by requesting its shippers to place orders prior to that time. It argues therefrom that there is a lack of "necessity" for more than a five-day span of work for these duties.

The first statement (that only 2% of the business is involved) was not supported and if true, does not by itself establish a lack of necessity. The second statement merely asserts that the Carrier can or should run its business another way. The assurance that it could do so without significant loss amounts to a substitution of the Petitioner's business judgement for that of the Carrier. The usual presumptions of valid managerial assessment of the actions necessary to service and hold its customers can be challenged only if it is clearly shown that they are not really judgments but bad faith circumventions of other obligations, or that the other obligations permit no such choice to be considered or decision to be made. It has not been shown here that the management did not make legitimate appraisal or a necessary choice when it decided to keep the gap in the continuum of capturing cars down to 28 hours by creating a six-day "position" in that work, instead of the 52 hour gap which would have resulted from keeping both clerks within the Monday through Friday five-day framework.

The Petitioner contends that the requirements of a Six-Day Position have not been here met because of the fact that the two employes assigned to capturing cars do not have the same schedule of hours. It is argued that a true "staggering" structure does not exist because one employe does not take up at the same starting hour on the Saturday rest day where the other one began on the day before. As a matter of practical reasonableness, this is not a persuasive argument against the existence of a genuine chain of need between the two jobs and we do not find any evidence of such a factor having so influenced our previous Awards. In Award 10622, we pointed out some useful criteria for identifying positions which could be interlocked in staggered schedules:

> ". . . particularly, where as here, the employes were of the same class, performed the same type of work, receive the same pay and are carried on the same seniority roster."

And in Award 10588, we upheld the right to stagger differing shifts. stating therein,

> ". . . In prior Awards involving the 'Six-Day Positions' no reference has been made whatever to shifts."

The relation of these two positions to the body of needed work meets these criteria.

The Claimant has raised two procedural problems in the Carrier's handling of this matter which it contends have a bearing on the Award we must reach. One allegation is that the Carrier failed to conform to a procedural prerequisite on the property; the other is a charge that the Carrier amended its position from the one taken with the Claimant and its Organization to another one in its presentation of the matter to us.

As to the first of these claims, it is contended that the Carrier violated the Rule requirements in having failed to justify its deviation from the five-day Monday through Friday work-week to the employe representatives before instituting this variance.

The record does not show that the Carrier explained the need first to the Organization before putting the latter on the Tuesday through Saturday schedule. Rule 9(f) states under the heading "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 paragraph (b), of this rule, and requires that some of such employes work Tuesday to Saturday instead of Monday to Friday, and the Organization contends the contrary, and if the parties hereto 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."

Our study of the Rules, the statements of the 40-Hour Week Committee and of the related Awards leads us to reject the Petitioner's position. Neither Rule 9 of the Agreement nor Decision No. 7 of the Committee which deals with this aspect of the procedure, require us to invalidate the institution of a six-day week spread if finally supported when there has not been an advance Carrier effort to explain the reason for instituting it.

Decision No. 7 was one of a series of decisions which by its own statement involved the early stages of implementation of the Committee's Forty-Hour Week findings and the Agreement of March 19, 1949 with the sixteen cooperating Railway Labor Organizations. Attached to Decision No. 7 were exhibits which "involved the question of how individual agreements should be revised to conform with the intent of Article II, Section 1(f) of the March 19, 1949 Agreement. . . ." Said referred-to proviso was incorporated in identical language in the Agreement before us (with changes only in reference numbers and letters) as contained in Rule 9 (f) which is quoted above. Article II, Section 1 (f) of the 1949 Agreement and its reproduction in the Agreement before us does not make it specifically mandatory, under pain of penalty, that the Carrier explain first and only then act. It merely states that if "the parties fail to agree thereon" and the Carrier nevertheless persists, the dispute becomes one for grievance under the applicable rules, with the Carrier running the risks of liability for an improper act.

However, in setting down a "statement of principles" which "should be used as a basis" for disposing of disputes under the above cited proviso "and as a guide in the future application of that Section," the Committee included these statements:

"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."

In Award 7769, this Board addressed itself to the question of whether a claim of violation of the Rules covering deviation from the five-day Monday through Friday work-week should be sustained on the grounds of the failure of the Carrier to have explained it in advance to the duly-accredited representative of the employes and an effort made to reach agreement.

We then stated in that Award:

"It was urged in argument by the Petitioner that Decision No. 7 of the Forty-Hour Week Committee requires that under Section 1(f), 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 to reach agreement; and that since the record does not show that this was done, Carrier had no right to establish a Tuesday to Saturday assignment on a five-day position and the claim should be sustained on that basis.

We cannot agree that such a literal application of Decision No. 7, which is a 'guide' to interpretation of paragraph 1(f), is required in this case. It appears to us that of necessity the operational problem involved — namely the Saturday train from Washington — was known to the representative of the employes, if not before the assignment was made, certainly immediately thereafter. The employes had the right to file their grievance or claim on the basis that the operational requirement was not a valid one, and should have done so. There is nothing in the record in this case, submitted by employes, to indicate that the operational requirement asserted by Carrier as the reason for establishing a Tuesday through Saturday five-day assignment is not a valid and legitimate one. From the facts available to us, it appears that it is valid and legitimate, and for this reason the claim cannot be sustained."

In the absence of any findings known to us of a contrary conclusion by this Board, the foregoing is dispositive of this particular aspect of the issue and requires us to reject the Claimant's contentions in respect thereto.

In following this Award, we are influenced by the fact that we do not find under the present circumstances, — holding as we do for the Carrier on the merits of the substantive issue, — a monetary loss specifically resulting from not having conferred with the Organization beforehand.

The Petitioner also raises the question of variance in the Carrier's position before us from the one expressed to the employe's representatives on the property. The record bears out that in its communications and discussions with

the Petitioner before the controversy reached us, the Carrier described the situation involved as a "seven-day position". In its submission and reply to us, the Carrier described the scheduling of car-capturing as carried out by employes in Clerks' Positions No. 26 and No. 28 on a "six-day position" and argued the right to such an arrangement.

We do not regard this deviation as one which materially changed the Carrier's posture before us from the one expressed and defended earlier to the Petitioner. The issue from the beginning to the end has been whether a necessity existed for scheduling an employe for other than a five-day Monday through Friday work-week. The responsibility was on the Carrier to show that the longer work-week "Position" or schedule was necessary. That burden was met by a showing, not successfully controverted, that it was necessary to continue the operation through Saturday, the sixth day of a span of needed work.

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 Agreement was not violated.

AWARD

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 28th day of May 1964.

LABOR MEMBER'S DISSENT TO AWARD NO. 12565
DOCKET CL-12129

We believe the Referee grossly erred in his decision.

The Carrier's file plainly states there were seventeen (17) seven (7)-day positions with proper relief on the rest days and in addition two (2) five (5)-day positions, one working Monday through Friday, the other Tuesday through Saturday.

This claim involves the Tuesday through Saturday assignment wherein the Carrier made no effort or pretense to comply with the provisions of Paragraph (f) of Rule 9 captioned "Deviation from Monday-Friday Week".

Here we have a situation where the rule and facts of record are ample and the claim should have been sustained. However, both the rule and the facts of record were completely ignored by the Referee; and, instead of being governed by a specific rule, he permitted himself to wander into the general rules and notes, thereby evading the clear and unambiguous rules and facts of record.

For these reasons, we must vigorously dissent.

C. E. Kief
Labor Member