Award No. 12649
Docket No. CL-12539

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

(Supplemental)

John J. McGovern, 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 (GL 4945) that:

1. Action of the Carrier in requiring Roundhouse Clerk P. H. Larscheid to work Position No. 3 at Green Bay, Wisconsin, on his assigned rest day, Saturday, and paying him under the Notified or Called Rule is in violation of the Clerks' Agreement effective September 1, 1949.

2. P. H. Larscheid be allowed eight (8) hours at the punitive rate of Roundhouse Clerk's Position No. 3 at Green Bay, Wisconsin, for Saturday, March 5; Saturday, March 12; Saturday, March 19, and Saturday, March 26, 1960, less time paid for on each of those Saturdays.

EMPLOYES' STATEMENT OF FACTS: This is a continuing violation, and while the claim here covers only four Saturdays, March 5, 12, 19 and 26, 1960, timeslips for subsequent Saturdays have been presented by claimant Larscheid, and are in the process of handling on the property.

Prior to September 1, 1949, and continuing until about February 2, 1960, Roundhouse Clerk Position No. 3, Green Bay, Wisconsin, was assigned to work eight (8) hours per day, seven (7) days per week. Position No. 3 was assigned Monday through Saturday, with Sunday as the rest day prior to September 1, 1949, and Monday through Friday with Saturday and Sunday rest days thereafter.

Effective in March, 1953, the Carrier discontinued furnishing relief on the rest days of Position No. 3, and thereafter required the occupant of Position No. 3 to work the assigned hours of that position on seven (7) days each week. See Employes' Exhibit A attached.

On this issue of the Saturday call, the Employes do not claim that there was more than two hours' work to be done on that day. Since there was only the one train to be serviced, it is doubtful whether there was as much as two hours' work on the Saturdays for which claim is made, and the Claimant received the minimum allowance prescribed by the Call Rule, namely, 3 hours' pay for two hours' work or less. If there had been more than two hours' work, he would have received the overtime rate on a minute basis.

The record shows plainly that the Claimant was given an assignment of five work days and two rest days. There was not enough work necessary on Saturday to require a regular relief assignment, and the Saturday work was clearly on a day that was not part of any assignment, as provided in Rule 37 (f). The asterisk (*) and the footnote on the notice posted, informing the employes of their assigned rest days, indicated that the Saturday work was not a part of the Claimant's five-day assignment, though this might have been made plainer if a statement had been added that this work would be handled under the Call Rule for this reason. In the absence of a qualified extra employe, the Claimant being the regular employe within the meaning of Rule 37 (f), the Carrier was required to call him for this work. Moreover, the 40-Hour Agreement extended the use of the Call Rule from one rest day to two; in this case to Saturday as well as Sunday.

The Carrier did not fail to assign him two rest days because it called him as required. Saturday was his rest day, and Rule 37 (e) provides for 'Service on Rest Days', prescribing also that such service shall be paid as provided in the Call Rule. The Carrier so paid him. It, therefore, did not violate the Agreement, and there is no merit in the claim."

The Carrier submits that under the facts and circumstances present in the instant case the compensation allowed Claimant Larscheid (time and one-half on the minute basis for all time held on duty in excess of 2 hours as provided for in Rule 34(a)) for working a call on one of his rest days (Saturday) is entirely proper and in accordance with schedule rules.

The Carrier further submits that there is no schedule rule or agreement which in any way supports the claim which the employes have here presented in behalf of Claimant Larscheid.

There is no basis for the instant claim.

There has been no violation of the rules.

The Carrier respectfully requests, therefore, that the instant claim be denied.

(Exhibits not reproduced.)

OPINION OF BOARD: A review of the record of this case discloses the facts to be as follows: Prior to the 40 Hour Work Week Agreement Carrier maintained a position of Roundhouse Clerk, which was a 7-day position necessary to the continuous operation of the Carrier. Sunday, a rest day, was part of a regular relief assignment. On September 1, 1949, Saturday and Sunday were rest days, and part of a regular relief assignment. The position

continued as a seven day position until March, 1953, when the Carrier abolished the relief assignment. Thereafter, the regular incumbent of the 5 day assignment was required to work all seven (7) days per week and was paid time and one-half for eight (8) hours on each Saturday and Sunday. Instructions were issued on February 2, 1960, to discontinue the Sunday work, and it was then worked 6 days, Monday through Saturday, the incumbent being paid time and a half for 8 hours' work each Saturday. On March 4, 1960, the following notice was posted by the Roundhouse Foreman.

"ALL CONCERNED

Effective Immediately

The R. H. Caller will be available from 8 A. M. to 12 Noon and from 1 P. M. to 5 P. M. Monday through Friday, and from 9:30 A. M. to 12:30 P. M. on Saturdays, to accept information pertaining to the calling of crews.

You will arrange to transact any business you may have with the caller during these hours.

/s/ R. P. Ratachic
R. H. Foreman"

The Organization contends that by so using the services of the Claimant on Saturdays and compensating him under the Notified or Called Rule, Carrier is in violation of the 40 Hour Work Week and Decision No. 5 of the 40 Hour Work Week Committee quoted herewith:

> "Such rights as existed before September 1, 1949, to make regular recurring calls or part-time assignments on assigned days of rest with respect to any craft or class on any Carrier have not been restricted, enlarged or changed, except that such rights are now applicable to two rest days, where formerly they applied to only one."

The Organization maintains that the position "was an established seven (7) day position prior to September 1, 1949, and continued as such until February or March, 1960. Since service 8 hours per day, 7 days per week was required on the position, the Carrier could not reduce it to a 5 day position and apply the Notified or Called Rule to Saturday and Sunday service." They support their position by relying on Award 8533 and Award 5797.

The Carrier maintains that any work that was required to be done on Saturday would be work to be performed on a day that is not part of any assignment and would necessarily have to be performed in accordance with Rule 28, which reads as follows:

"RULE 28 — WORK ON UNASSIGNED DAYS

> "Where work is required by the Carrier to be performed on a day which is not a part of any assignment, it may be performed by an available extra or unassigned employe who will otherwise not have 40 hours of work that week; in all other cases by the regular employe."

They contend that on the dates in question, there were no available extra or unassigned employes to perform the work; hence, in accord with

the provisions of Rule 28, the Claimant, as regular incumbent, was called. They also invoke the provisions of Rules 33 and 34, the former entitled Service on Rest Days, the latter entitled Notified or Called. They assert that Saturday, being one of the assigned rest days, service performed on that day was done in accordance with Rules 28 and 33 (a) with compensation in accord with 34 (a).

They rely on Decision 5, Section 4, wherein it is stated that if the Carrier had the right prior to September 1, 1949, to make recurring calls to an employe on his one rest day, then the Carrier had the same right subsequent to September 1, 1949, in connection with making calls to the employe on his two rest days. They support their contentions by relying on Award 1178, involving the same parties in this dispute.

The principal questions to be resolved are:

Did the Carrier have the right to make recurring calls to any employe on his rest day prior to the September 1, 1949 agreement? If it did, then it is obvious that he had the same right to make such calls subsequent to the agreement.

Did the Carrier have the right to change this position from a 7 day position to a 5 day position, under the circumstances involved?

Are the circumstances in the instant case such that it would warrant a finding that this was in reality a six day position and that by its action, Carrier was attempting to circumvent the agreement? In other words, is this, or should it be, a regularly assigned 6 day position, or can the work to be performed on Saturday, be considered outside the regular 5 day assignment, and thereby subject to the recurring call?

A review of the record, discussions presented in the briefs, as well as the precedents contained in awards given by both sides leads us to these conclusions.

The Carrier did have the right to make recurring calls prior to the September 1, 1949 agreement, and, therefore, had the same right applicable to the two rest days subsequent to that agreement, and the Organization has so recognized that right (Awards 9774 and 9971).

The Carrier did have the right and the authority to change this position from a 7 day to a 5 day position and, indeed, this authority and right have not been effectively challenged by the Organization.

The facts in this case can be distinguished from those in Award 8533, upon which the Organization principally relies, and we hold that decision not to be controlling in this case. This case simply involves extra work on Saturday from 9:30 A. M. to 12:30 P. M., over and above the regular assignment. It is not an eight hour work period on Saturday, and Sunday is not in question. We think this situation falls clearly within the purview of Rule 28. We think this is the type of situation that was in the contemplation of the parties when they agreed to the provisions of Rule 28, and we disagree therefore that this Saturday work was or should have been part of the regular assignment. Factually speaking, the notice upon which the Organization relies, wherein it is stated that the R. H. Caller will be available from 9:30 A. M. to 12:30 P. M. on Saturdays, does not specify that the regular incumbent will be available on Saturdays. It merely states the R. H. Caller will

be available, which could mean an available extra or unassigned employe, who otherwise might not have had 40 hours of work that week. Since none were available, the services of the regular incumbent were used. In addition to Rule 28, we deem Rule 33 (a) to be applicable to this case, since it is our judgment that the service rendered was on an assigned rest day, other than Sunday, and as such, the proper compensation allowable would be in accord with the provisions of Rule 34 (a). Claim is denied.

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 19th day of June 1964.

LABOR MEMBER'S DISSENT TO AWARD 12649, DOCKET CL-12539

I strongly suspect that one of the reasons there is such a backlog of cases before this Board, and so many erroneous decisions emanating therefrom, is because of that which can be demonstrated from and is evident in Award 12649, Docket CL-12539. In short — because of the wrong questions being raised, the wrong answers are given.

In this case a question raised in the mind of the Referee and used for determining and denying this claim is set out in the Award as:

> "Did the Carrier have the right to change this position for [sic] a 7 day position to a 5 day position, under the circumstances involved?"

Referee then proceeded to answer that question and deny the claim by holding:

> "The Carrier did have the right and the authority to change this position from a 7 day to a 5 day position and, indeed, this authority and right have not been effectively challenged by the Organization."

If that was what happened, there would have been no dispute. The question and answer is all well and good, except that it was not the question before us which needed answering and which required a sustaining award.

The fact of the matter is that Carrier did not change the position from a 7 day to a 5 day position. Furthermore, the Carrier never intended to change the position from a 7 day to a 5 day position. In the first place, the position involved both prior and subsequent to the date of the instant claim was a six (6) day position as that term is used in the Agreement. The service, duties and operations of the position here involved was necessary six (6) days per week. Consequently, it was and remained a so-called six (6) day position. Carrier desired to reduce it and did. It reduced the position from one of six days per week to one of 5⅝ days per week, and regardless of this erroneous award, it did not have authority to so act. The position remains a "six day position" and is erroneously assigned but three (3) hours' work on Saturdays. The Claimant is not enjoying the forty-hour work week, consisting of five eight-hour days followed by two rest days, which was assured him by the Agreement effective September 1, 1949.

For the above reasons, I dissent.

D. E. Watkins
Labor Member 7-16-64

CARRIER MEMBERS' ANSWER TO LABOR MEMBER'S DISSENT TO AWARD 12649 DOCKET CL-12539

It is elementary that the jurisdiction of this Board is limited to the questions duly submitted by the parties. The petitioning Employes in **Award 12649** submitted the following question:

> ". . . In consideration of the fact that Position No. 3 was an established seven (7) day position prior to September 1, 1949 and continued as such until February or March of 1960, and service eight (8) hours per day, seven (7) days per week was required on the position, the Employes contend the Carrier was not privileged to reduce Position No. 3 to a five (5) day position and apply the Notified or Called Rule to Saturday and/or Sunday service; especially so in view of Decision No. 5 of the 40 Hour Week Committee. . . ."
>
> (Taken from fourth paragraph of Position of Employes.)

Carrier conceded that the above-quoted contention of the Employes stated the question before the Board and devoted its submission to the task of disproving the Employes' contentions that the 40-Hour Week Agreement, as interpreted by Decision No. 5 of the 40-Hour Week Committee, enjoined the Carrier from converting what had been a seven-day position to a five-day position with regular recurring calls.

The record contains abundant and eloquent proof that the Carrier's submission and the decision which the Board has rendered are precisely in point with the issue framed by the petitioning Employes and are unimpeachable from the standpoint of both logic and precedent.

G. L. Naylor
R. E. Black
R. A. DeRossett
W. F. Euker
W. M. Roberts