Award No. 15462
Docket No. CL-15845

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

George S. Ives, Referee

PARTIES TO DISPUTE:

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

STOCK YARDS DISTRICT AGENCY

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood (GL-5868) that:

(1) The Stock Yards District Agency (hereinafter referred to as the Carrier) violated, and continues to violate, the provisions of the effective Clerks' Agreement when effective February 1, 1965 it reduced Position No. 140, Head Clerk, at the Wood Street Terminal from a six (6) day position to a five (5) day position and then beginning Saturday, February 13, 1965, and on each Saturday subsequent thereto, filled the position by use of recurring calls of four (4) hours duration.

(2) The Carrier shall compensate Head Clerk William A. Rusteck, and/or his successor or successors, in interest, namely, any other employe or employes who may have stood in the same status as claimant, and who were adversely affected, eight (8) hours pay at the rate of time and one-half, less the amount paid for the assignment on Position No. 140, for Saturday, February 13, 1965, and for each Saturday subsequent thereto until the violation is corrected.

EMPLOYES' STATEMENT OF FACTS: Prior to February 1, 1965, Position No. 140, Head Clerk, Wood Street Terminal, was a six day position, Monday through Saturday, assigned hours — 8:00 A. M. to 4:30 P. M., rest days, Saturday and Sunday. Relief Position No. 167 provided rest day relief for Position No. 140 on Saturday.

The principle duties assigned to the position are listed as follows:

"Supervision, correspondence, payroll, special report. Handle telephone on all matters and checking files."

On or about January 22, 1965, Carrier issued Bulletin No. 8, no date shown, (copy of which is attached hereto and made a part hereof and is identified as Employes' Exhibit A) advising that among others, Position No. 167 would be abolished with the termination of tour of duty January 31, 1965, and in so doing reduced Position No. 140 to a 5 day assignment, Monday through Friday.

For your ready reference we wish to quote the governing rules:

"RULE 36(e)
SERVICE ON REST DAYS

(1) Except as otherwise provided in Paragraph (2) of this rule, service rendered by an employe on his assigned rest day or days shall be paid for under Rule 37.

(2) Service rendered by an employe on his assigned rest day or days filling an assignment which is required to be worked or paid eight hours on such day, will be paid at the overtime rate with a minimum of eight hours.

(3) Regularly assigned rest days shall not be changed except after such advance notice to the employe affected."

Rule 37 is the standard NOTIFIED OR CALLED RULE.

The fact that certain positions were set up as seven-six-or-five day operations on September 1, 1949, does not bar the Agency from making adjustments when conditions change as they have here.

In view of the foregoing, the Agency did not make these changes to circumvent the Agreement but in fact are complying with the current Agreement and the claim should be denied.

OPINION OF BOARD: Effective February 1, 1965, Carrier reduced position No. 140 from a six day position, Monday through Saturday, rest days, Saturday through Sunday, to a five day position. Commencing Saturday, February 13, 1965, Carrier called in the incumbent on a regular recurring basis to perform work assigned to the position. Petitioner contends that Carrier violated the Agreement between the parties by reducing a six (6) day position to five (5) days and concurrently using the Call Rule of said Agreement to circumvent the retention of the six (6) day position. Petitioner maintains that Carrier either must make the Saturday work in issue a part of a regular relief assignment or compensate the regular incumbent at the overtime rate with a minimum of eight hours under Rule 36(e) (2) of the Agreement.

Carrier's defense is that neither the Agreement between the parties nor the Forty Hour Work Agreement prohibits Carrier from abolishing a six day position, Monday through Saturday, and establishing in lieu thereof a five day position with regular recurring calls to the incumbent on unassigned Saturday's, the sixth assigned day of the former position.

The instant dispute arose out of several changes made by the Carrier as a result of a general reduction in business, particularly on Saturdays. Prior to February 1, 1965, Relief Position No. 167 provided rest day relief for Position No. 140 on Saturdays. Concurrent with the reduction of Position No. 140 to five days, Position No. 167 was abolished as well as Position No. 141, a six day clerical position at Wood Street Terminal, and the remaining duties of the latter position were assigned to Position No. 140 upon its abolishment.

Following the adoption of Forty Hour Week Agreement, Position No. 140 was established as a six day position with regular relief on the sixth day, Saturday, by a Relief Clerk. Even though the disputed reduction to a five day assignment may have resulted from a business decline at the Wood

Street Terminal, additional work was added to Position No. 140 which formerly had been assigned to abolished Position No. 141.

The pertinent provision of the Agreement reads as follows:

"RULE 36(e).
SERVICE ON REST DAYS

(2) Service rendered by an employe on his assigned rest day or days, filling an assignment which is required to be worked or paid eight hours on such day, will be paid for at the overtime rate with a minimum of eight hours." (Emphasis ours.)

Carrier avers that Position No. 140 was re-assigned as a five day position during the period involved in this dispute and that Saturday was no longer part of the assignment. Hence, Claimant was not called to "fill an assignment" on Saturdays and was properly compensated pursuant to Rule 37, the Call Rule. Petitioner contends that the Notified or Called Rule (Rule 37) is being used as a subterfuge to evade the fact that the work of the position in question cannot be performed in five days and regularly requires the filling of the assignment by the incumbent on the sixth day.

We have thoroughly reviewed the various awards cited by the parties in support of their respective positions. Carrier contends that Award 12649 constitutes a sound and controlling precedent for this case, whereas Petitioner cites Award 14899 as directly in point with the instant dispute. Said Awards are conflicting even though they involved the same parties, agreement and facts. We find most persuasive the Opinion in the more recent Award 14899, which concludes that "Carrier is not entitled to have work performed on a regularly recurring basis on the incumbents' rest days, because work accruing to that position continues to exist six days a week."

Accordingly, we find that the Claim must be sustained.

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 violated the Agreement.

AWARD

Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 5th day of April 1967.

CARRIER MEMBERS' DISSENT TO AWARD 15462, DOCKET CL-15845 (Referee Ives)

This Award is without foundation in reason or fact and should not be enforced. Its basic finding is wholly repugnant to the conclusion that the claim should be allowed.

The basic finding is that Award 14899 is controlling, and the later Award in turn expressly states that it is controlled by Award 8533. Under our ruling in Award 8533, this case turns on a single clear question, namely, whether the agreement between these parties effective immediately prior to the adoption of the Forty Hour Week Agreement prohibited Carrier from making regularly recurring calls on a Sunday rest day of positions like the one involved. If there was no such restriction then, there is now no restriction against making such calls on a Saturday rest day and this claim is invalid.

Since the record before us clearly shows that the agreement in effect immediately prior to adoption of the Forty Hour Week Agreement contained no rule restricting Carrier from making regularly recurring calls, this claim is necessarily invalid under the rule applied in Award 8533.

Neither this Award nor Award 14899 discusses the rules and facts that were found controlling in Award 8533 and, hence, it is necessary to examine Award 8533 to establish the basis of these decisions. Fortunately, Award 8533 gives us this clear statement of the contractual and factual basis of that Award:

> "Immediately prior to the 40-Hour Week Agreement the subject position involved service necessary to the continuous operation of the railroad. It was filled by the regular incumbent Monday through Saturday, with relief being provided on Sunday at straight time rate, as provided in Rule 33 of the 1946 Agreement. Under that contract Carrier was not entitled to have the Sunday work of the position performed on a regularly recurring basis under the call rule then in effect (Rule 31). Following the adoption of the 40-Hour Week Agreement there continued to be seven days of service to be performed in the position each week, with the result that it was retained as a seven day position under Rule 27 of the 1949 (current) Agreement. Since during the period of the claim work accruing to the position continued to exist seven days per week, we conclude that Carrier was not entitled to have such work performed on a regularly recurring basis during the rest days of the regular incumbent . . ." (Emphasis ours.)

Thus, Award 8533 rests squarely upon these two findings: First, immediately prior to adoption of the Forty Hour Week Agreement Rule 31 of the agreement there in evidence prohibited that Carrier from having the Sunday work on a "continuous operation" position performed on a call basis; and second, the specific position involved in that claim was a "continuous operation" position before the Forty Hour Week Agreement was adopted and continued to be such at the time involved in the claim.

Rule 31 (The Call Rule) which was thus held controlling in Award 8533 contained this restriction on regularly recurring calls:

"Employes notified or called to perform work on Sunday or a specified holiday, as referred to in Rule 33, will be allowed five hours and twenty minutes at the rate of time and one-half for four hours' work or less. Employes worked in excess of four hours will be allowed a minimum of eight hours at the rate of time and one-half. **The provisions of this pargraph do not apply in connection with employes necessary to the continuous operation of the railroad as referred to in Rule 33.**" (Emphasis ours.)

It is the underlined proviso that was construed as precluding Carrier from applying the Call Rule to Sunday work associated with a position which included service that had to be performed everyday.

Having found that the agreement prohibited regularly recurring calls to do Sunday work on a "continuous operation" position immediately before the Forty Hour Week Agreement was adopted, Award 8533 necessarily concluded that under the Forty Hour Week Agreement the prohibition continued and became applicable to any rest days of the position. The interpretation of the Forty Hour Week Committee, which is binding upon all parties, states that where the controlling agreement did not limit Carriers' prerogative to make regularly recurring calls on a rest day immediately prior to adoption of the Forty Hour Week Agreement, the prerogative remains and is "applicable to two rest days." No new restriction regarding "regularly recurring calls" was created by the Forty Hour Week Agreement and "If before September 1, 1949 there were limitations on the right to have recurring calls . . . such limitations and conditions shall apply to recurring calls . . . hereafter." (Section 4 of Decision 5, Forty Hour Week Committee.)

A finding that Award 8533 is controlling necessarily carries with it the holding that under the Forty Hour Week Agreement there is no restriction against handling work on rest days with recurring calls unless some restriction was imposed by the agreement in effect immediately prior to the adoption of the Forty Hour Week Agreement.

It is obviously contradictory and without foundation in reason or fact to say that this case is controlled by Award 8533 and at the same time to say that Carrier is precluded from making recurring calls under the Forty Hour Week Agreement in the absence of a showing that such a restriction existed before that agreement was adopted. Having adopted the ruling in Award 8533 as correct and controlling, the Referee could not logically sustain this claim without finding that the agreement in effect between these parties immediately prior to adoption of the Forty Hour Week Agreement prohibited Carrier from making recurring calls on Sundays.

The call Rule in effect on this property prior to the Forty Hour Week Agreement did not contain the "continuous operation" proviso that was found controlling in Award 8533. The entire Call Rule in the parties' agreement read:

"RULE 37.
NOTIFIED OR CALLED

Employes notified or called to perform work not continuous with, before, or after the regular work period or on Sundays and specified holidays shall be allowed a minimum of three (3) hours for two (2) hours' work or less and if held on duty in excess of two (2) hours, **time and one-half will be allowed on the minute basis.**"

Patently this rule did not restrict Carrier from making recurring calls on Sunday. Furthermore, in this record the Employes do not contend that this or any other rule of the agreement effective before the Forty Hour Week Agreement prohibited Carrier from making recurring calls on rest days. The Employes in this record do not even allege that any rule of the agreement prohibited the Carrier from making recurring calls prior to the Forty Hour Week Agreement, much less submit proof on the point.

Their attempt to restrict Carrier from making recurring calls on this particular position is based expressly on the theory that there is something in the Forty Hour Week Agreement itself that creates the restriction. The Day's Work Rule [31(a)] and the Filling of Assignments Rule [36(e) (2)] which they cite are admittedly and by their own express terms inapplicable unless Carrier was otherwise required to maintain this position as a six-day position.

On the point that Carrier must continue this position as a six-day position instead of establishing a five-day position and making recurring calls on Saturdays, they merely cite various provisions of the Forty Hour Week Agreement [Rule 31½(a), (c), and (e)] and argue that:

> ". . . Position No. 140, Head Clerk at the Wood Street Terminal was established as a 6 day position in September, 1949 (with the advent of the 40 hour week) and that said position was relieved on the sixth day, Saturday, by a Relief Clerk.
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> * * * * *
>
> Certainly the parties to the 40 hour week Agreement recognized the Carrier's need for 6 and 7 day positions and consequently made appropriate provision therefor. However, it was never intended that the work day of a 6 day position should be anything less on the 6th day than that on the other 5 days, namely, 8 hours."

The Employes here overlook the fact that the Forty Hour Week Agreement, according to the binding interpretations of the Forty Hour Week Committee, recognizes that regularly recurring calls on the sixth day of the week do not convert a position assigned five days per week into a six-day position unless some provision of the agreement in effect prior to the adoption of the Forty Hour Week Agreement so provides. Further, they overlook the fact that Section 3(f) of the Forty Hour Week Agreement expressly repudiates the thought that such agreement is to have the effect of creating any kind of minimum daily guarantee. The pertinent provision of that section states:

> ". . . Nothing in this agreement shall be construed to create a guarantee of any number of hours or days of work where none now exists."

In the absence of any evidence whatever that prior to the adoption of the Forty Hour Week Agreement Carrier was prohibited by the controlling agreement from handling work on the Sunday rest day by recurring calls, this Board cannot properly find that such a restriction existed.

During the discussion of this case with the Referee, the Labor Member stated that he had served as General Chairman on Respondent's property

and he knew that Respondent had paid claims exactly like this one and had thereby agreed that it did not have a right to make these recurring calls. This information was not only wholly inadmissible and improper under our rules and the law, but according to Respondent no such settlement has ever been made.

The provisions in the law making Awards of this Board final and binding do not empower the Board to validly make a finding or an Award that is not supported by any relevant evidence. Both the Federal Courts and the Congress have noted that Awards which have no foundation in reason or fact are invalid and should not be enforced by the Courts. **Barnett** v. **Pennsylvania-Reading Seashore Lines,** 145 F. Supp. 731, affirmed 245 F. 2d 579. **Gunther v. San Diego &Ariz. E. Ry.,** 382 U.S. 257 (1965). Report No. 1201 of Committee on Labor and Public Welfare, U.S. Senate, dated June 2, 1966, in connection with bill (H.R. 706) to amend the Railway Labor Act.

We Dissent.

G. L. Naylor
R. E. Black
T. F. Strunck
P. C. Carter
G. C. White

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