



Award Number 17593

Docket Number MW-18163

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Don Gladden, Referee

PARTIES TO DISPUTE:

**BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES
ST. LOUIS SOUTHWESTERN RAILWAY COMPANY**

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

- (1) The Carrier violated the effective agreement when it changed the regularly assigned rest days of Section Laborer Fred Moss from Saturday and Sunday to Thursday and Friday. (System File N-934/93-729-D-44).
- (2) The Carrier shall be required to pay Fred Moss eight (8) hours each day for every Thursday and Friday he was not allowed to work, due to the improper assignment, beginning August 6, and continuing until our Agreement is complied with.
- (3) The Carrier shall be required to pay Fred Moss time and one-half time for work performed on each Saturday and Sunday, which were his regularly assigned rest days previous to August 6, 1967 and continuing until our Agreement is complied with.

EMPLOYEES' STATEMENT OF FACTS: Claimant Fred Moss is a regularly assigned section laborer at East St. Louis, Illinois. Subsequent to the effective date of the 40 Hour Work Week Agreement, all of the Carrier's section laborers have been assigned exclusively (except for this instance) to a work week extending from Monday through Friday, with Saturdays and Sundays designated as rest days. Whenever section laborers' work was required to be performed on a Saturday and/or Sunday, the necessary number of section laborers were called in their proper seniority sequence and they were compensated for the overtime work performed in accordance with the overtime rules.

The claimant's position was abolished effective at the close of his work period on August 6, 1967. Thereafter he was assigned to a position with Thursday and Friday as rest days. The change in the claimant's rest days was immediately protested and on September 6, 1967, the General Chairman filed a claim in his behalf as follows:

In telegram August 3, 1967, C. B. Mannon submitted bid for position of Laborer advertised in Advertisement No. 13-N. In letter dated August 7, 1967 (Exhibit No. 2) Fred Moss submitted bid on positions advertised in Advertisement No. 13-N, listing the position of Laborer as his first choice, and advised that he would take one week of vacation August 7-11, 1967.

C. B. Mannon was successful applicant for the position of Laborer and Fred Moss was successful applicant for the position of Relief Laborer advertised in Advertisement No. 13-N and were assigned thereto on August 9, 1967, as shown by Assignment No. 13-N attached hereto as Exhibit No. 3.

In letter dated September 6, 1967, (Exhibit No. 4) the Employees filed claim in favor of Laborer Moss for time lost each Thursday and Friday and time and one-half for work performed each Saturday and Sunday, beginning August 6, 1967, on basis that such assignment was improper.

The claim was denied.

Exhibits 1 to 14, inclusive, are attached hereto and made a part hereof.

The applicable schedule agreement is that with the Brotherhood of Maintenance of Way Employees effective September 1, 1947, reprinted July 1, 1967, copy of which is on file with the Board.

(Exhibits Not Reproduced)

OPINION OF BOARD: This is a dispute arising under the Forty-Hour week agreement effective September 1, 1949. The applicable provisions of which are:

"7-2. WORK WEEK.—(a) General—Effective September 1, 1949, subject to the exceptions contained in this rule, the work week shall be 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 operation requirements; so far as practicable the days off shall be Saturday and Sunday. The foregoing work week rule 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.

(c) **—Six-day Positions—**Where the nature of the work is such that employees will be needed six days each week, the rest days will be either Saturday and Sunday or Sunday and Monday.

(d) **—Seven-day Positions—**On positions which have been filled seven days per week any two consecutive days may be the rest days with the presumption in favor of Saturday and Sunday."

The Carrier abolished two 5 day assignments effective August 6, 1967 and created two new assignments 1) a five day assignment with Thursday and Friday as rest days, and (2) a relief assignment. The effect of this action changed an existing five day position to a seven-day position.

The Carrier cited as justification for the change a recent derailment ". . . . together with the difficulties we have experienced in maintaining switches over the weekends in recent months made the need for seven-day pro-

tection evident. As you know, more traffic is now being handled through East St. Louis terminal than ever before and as a result, these main switching leads cannot go two days without attendance."

The Organization questioned the necessity for the change and the reasons given (other than the derailment).

The Organization further alleged that while Claimant was on vacation for three weeks the Carrier did not fill the position. This was conceded by the Carrier.

We believe Rules 7 (a) and 7 (d) authorized the Carrier to establish seven day positions on positions which had, prior to September 1, 1949, been filled seven days per week. We likewise are of the opinion that this language prohibits Carrier from creating additional seven-day positions absent a showing by it of a material change of operational requirements of the Carrier.

" The presumption is that work is not required to be performed on Sunday when it was not required to be so performed before the forty hour week Agreement. The Carrier is required to overcome this presumption by evidence that changed circumstances necessitated the institution of seven day service." Award 7370 (Carter)

The Carrier has not overcome this presumption.

This opinion does not in any manner touch on the application of Rule 7 as it relates to six-day positions. The language dealing with the two circumstances is significantly different and obviously was adopted to apply to distinctly separate situations.

The question as to the nature of the penalty has been raised. Where two or more violations carrying different penalties are established the higher of such penalties is the one to be imposed. Awards 5423, 5549, 6750.

It also appears from the record that Claimant was reassigned on November 20, 1967, and that he was on vacation three weeks during the period he was assigned Thursday and Friday as rest days. He therefore was not held out of service on Thursday and Friday while he was on vacation, nor was he after his reassignment on November 20, 1967.

Consistent with the foregoing, Claimant is entitled to a days' pay on a pro rata basis for each day he was improperly held out of service.

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 the Carrier violated the Agreement.

A W A R D

Claim sustained to the extent as provided in the Opinion.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 25th day of November 1969.