National Mediation Board
NMB Case No. 212

In Arbitration

Between

New York Central Railroad Company

and

Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employes.

Opinion of

Majority of the

Board of Arbitration

Appearances:

For the Carrier

R. C. Bannister, Esq., of Chicago, Attorney
L. B. Fee, Director of Labor Relations

For the Labor Organization

Lester Schoene, Esq., of Washington, Counsel
Earl Kinley, Vice President
George Price, General Chairman
William Winston, General Chairman
G. G. Younger, General Chairman

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On March 28, 1956 the parties named above entered into an arbitration agreement naming L. W. Horning and George M. Harrison as their representative members of the Arbitration Board, and thereafter David L. Cole was duly designated as the third member and Chairman. The issue before the Board is stated in Paragraph Fourth of this agreement as follows:

> "The specific question to be submitted to the Board for decision is: 'Did the party of the first part have the right to establish a five (5) day staggered work-week, including Sunday as a regularly assigned work day, at the freight transfer stations in Utica, Syracuse, and Buffalo, New York, Cleveland, Ohio, Detroit, Michigan, and Gibson, Indiana under the so-called Forty-Hour Week Agreement which is in effect between the parties hereto'."

Hearings were held in Washington, D. C. on seven days between May 3 and May 15, 1956 and the Board met in New York City on June 4, 1956 to consider the evidence and arguments and to arrive at its decision and make its award.

The form of the question submitted was in effect a request for a ruling in the nature of a declaratory judgment. It calls for the construction of certain provisions of the national agreement of March 19, 1949 to which Class I railroads and sixteen cooperating railway labor organizations were parties, including the New York Central Railroad Company and the Brotherhood of Railway Clerks, the Carrier and Organization parties in this arbitration proceeding.

This agreement of March 19, 1949 is usually referred to as the Forty Hour Week Agreement, and its provisions have been incorporated as rules into the collective bargaining agreements on the several railroad properties. The provisions requiring interpretation are part of Article II, Section 1 of the national agreement, and, in identical words, of Rule 35 of the New York Central - Brotherhood of Railway Clerks agreement. We shall use the article and section designations of the national agreement in this opinion, in line with a similar course followed by the parties at the hearings.

Among the six freight transfer stations named in the submitted question is that at Utica. This station has twice been the subject of rulings by the National Railroad Adjustment Board, once in Award No. 314 on October 9, 1936, and again on June 25, 1954 in Award No. 6695. In the earlier award claims of employees at this freight transfer station were sustained, holding that Sunday operation was not necessary to, or a necessary part of, the continuous operation of the Carrier as defined in the Sunday Work Rule of the then prevailing agreement. This is interesting as background material and as a demonstration of the difficulties encountered in determining the meaning of the word "necessary," but since the old Sunday Work Rule has been abolished by the Forty Hour Week Agreement, and the type of necessity there described has been changed by the current agreement, it cannot be held that Award 314 constitutes a binding ruling either under the Railway Labor Act or under the doctrine of res judicata, as to the question before us insofar as it applies to the Utica transfer station.

Award 6695, however, stands on a totally different footing. There the question submitted was essentially the same as that before this Arbitration Board, namely, "the right of the Carrier to operate its Utica Freight Transfer House by means of staggered working assignments on seven days each week at straight time rates under the terms of the National Forty Hour Week Agreement." Moreover, as the case was presented and ruled on, it was governed by the very contract provisions, the same arguments and substantially the same evidence as have been offered and urged in our case, except that we have the benefit of later data. The Carrier urged that Award 6695, as part of an administrative as distinguished from a judicial proceeding is not entitled to the force of res judicata. This, however, by-passes the effect of Section 3 (m) of the Railway Labor Act, which states:

> "The awards of the several divisions of the Adjustment Board shall be stated in writing. A copy of the awards shall be furnished to the respective parties to the controversy, and the awards shall be final and binding upon both parties to the dispute, except in so far as they shall contain a money award. In case a dispute arises involving an interpretation of the award, the division of the Board upon request of either party shall interpret the award in the light of the dispute."

It is true, as the Carrier pointed out, that a number of referees in Adjustment Board cases have overruled prior decisions on the grounds generally that such decisions were unsound in fact or not based on good reasoning. In none of the references to such cases, as submitted in evidence before us, was any mention made of Section 3 (m) of the Act, nor of the fact that Congress as a matter of policy while providing no appeal from Adjustment Board awards nevertheless made such awards final and binding on the parties. By what authority subsequent Adjustment Boards may ignore this clear legislative direction we can not understand, nor can we get any enlightenment from the quoted portions of the opinions accompanying the awards which overrule prior awards in disputes between the same parties on the identical question.

On the other hand, we see that the United States Circuit Court for the Fifth Circuit in the recent case of Coats vs. St. Louis - San Francisco Ry. Co., et al (March 16, 1956, CCH Labor Cases, paragraph 69,830) found the statutory directive to mean what it says. The Circuit Court sustained the dismissal of a cause brought by an employee who sought reinstatement and claimed to have been wrongfully discharged on the ground that his claim had been ruled on by the National Railroad Adjustment Board and that the Railway Labor Act makes such awards final and binding on the parties irrespective of whether the submission to the Adjustment Board was mandatory or voluntary. Other cases are cited and discussed in the Coats opinion.

The Carrier in our case was the moving party in the case leading to Award 6695, so that there is no point to be made as to whether it was a voluntary or mandatory submission. Nor is there any question concerning the jurisdiction of the Adjustment Board in that case.

The doctrine of res judicata technically applies only to judicial proceedings, and is designed to put an end to litigation between parties over a given issue. A similar doctrine may be made applicable to administrative proceedings, which serve as a substitute for court litigation, either by legislation or by voluntary agreement. No citation of authority is needed at this late date to support the proposition that agreements to arbitrate which stipulate that the award will be final and binding on the parties will sustain a defense in the nature of res judicata if an action is brought in court by the disappointed party after an arbitration award has been rendered. As the Coats case indicates, the same is true of proceedings processed before the Adjustment Board under the Railway Labor Act, because Congress has so directed.

We have observed that the issue and arguments presented in the 1954 Utica case were essentially the same as in our case and that the evidence offered was very similar except that it was later brought up to date. The Carrier frankly requests this Arbitration Board to reverse the Adjustment Board. The statute, however, provides for no appeal from Adjustment Board awards, in fact confining disputes even over interpretation to the division of the Board which rendered the award. The parties are free in the first instance, by mutual agreement, to substitute arbitration for submission to the Adjustment Board, but the disappointed party is not free to urge a subsequent arbitration tribunal sitting on the same dispute between the same parties to disregard the conclusive force of the prior award of the Adjustment Board.

This is so, as indicated, because Congress has made it so. It is not within the proper authority of referees or of the Adjustment Board to set aside or to ignore this legislative mandate.

A distinction must obviously be made between this type of res judicata doctrine and the weight to be given to prior awards on the same or similar issues as between different parties. There the question relates to the value to be ascribed to precedents. This constitutes an area of discretion, because the statute has no declaration or mandatory provision with respect to this. In this area, it would seem, subsequent Adjustment Boards may elect to give little or no weight to prior awards if they find fault with the findings, reasoning or conclusions. They they have done very freely. It has led to conflicting rulings on given subjects and to competitive advantages to the more fortunate parties. But other inconsistent rulings do not relieve the parties from the binding effect of the award in their own case. The situation is not unlike that when two Circuit Courts make conflicting constructions of the same statute or contract. Unless the Supreme Court acts, the parties to each Circuit Court action are bound by their respective judgments or decrees.

Since there is no appeal in the customary sense from Adjustment Board awards, the parties are unqualifiedly bound by the award in their case. The remedy obviously for overcoming inconsistencies is to seek relief through negotiations instituted by a statutory Section 6 notice of desire to modify the rules set forth in the agreement. Such notices may be given at any time, and in 30 days negotiations will be under way. In a sense the Supreme Court in this situation is the bargaining table, and it is a forum readily available and one which when properly used can provide a great measure of flexibility and adjustability.

For these reasons it could be held as to the Utica Transfer that there is in force a final and binding interpretation of the Forty-Hour Agreement which legally and authoritatively determines that at that station, under the Agreement, the Carrier did not have the right to establish the seven-day operation here in question. But it would still be necessary, for two reasons, to inquire into the meaning of the contract provisions because there are five other stations named in the submitted question: (1) Award 6695 is by Section 3 (m) of the Act final and binding only as to the dispute or controversy in that case; (2) the controlling facts and considerations may be different from those at Utica, just as the parties have conceded them to be at the Carrier's East St. Louis Transfer Station which has continually been in operation seven days per week. This being so, the award of this Board as to all six stations will be predicated on its interpretation of the Agreement, with the effect of Section 3 (m) as merely an additional reason or support for the Board's conclusion as to Utica.

The Carrier maintains that it must have the right to operate these freight transfer stations seven days each week for the purposes of meeting competition of over-the-road transportation and of some other railroads which are now operating such facilities seven days per week, rendering efficient and satisfactory service to shippers, retaining or attracting new business, and achieving a more efficient use of cars and facilities. These, as stated, were essentially the same reasons asserted in the 1953-4 Utica case. The Carrier urges that Article II, Section 1

contains provisions which entitle them to do so because their experience reflects the type of need called for in these rules to support such seven-day operations, and, further, that a large number of awards of the Adjustment Board have so held.

The contract provisions in question are the following parts of Section 1 of Article II:

"Section 1. Establishment of Shorter Work Week

Note

"The expressions 'positions' and 'work' used in this Article II 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 carriers will establish, effective September 1, 1949, for all employes, subject to the exceptions contained in this Article II, a 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 carriers' operational requirements; so far as practicable the days off shall be Saturday and Sunday. The foregoing work week rule is subject to the provisions of this agreement which follow:

"(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 employes 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."

. . . . . .

"(j) - Sunday Work -

> "Existing provisions that punitive rates will be paid for Sunday as such are eliminated. The elimination of such provisions does not contemplate the reinstatement of work on Sunday which can be dispensed with. On the other hand, a rigid adherence to the precise pattern that may be in effect immediately prior to September 1, 1949, with regard to the amount of Sunday work that may be necessary is not required. Changes in amount or nature of traffic or business and seasonal fluctuations must be taken into account. This is not to be taken to mean, however, that types of work which have not been needed on Sundays will hereafter be assigned on Sunday. The intent is to recognize that the number of people on necessary Sunday work may change."

It is our function to interpret and apply these rules. We are not engaged in a contract-making proceeding, nor are we free to alter or add to the contract provisions, whether we believe them satisfactory or not.

There are expressions used in the rules which on their face seem to justify the conflicting awards which have been offered in evidence. It is submitted, however, that if the pertinent rules and the explanatory letter of the 1948 Emergency Board members are read as a whole, one thread will be found running throughout, which when noted will do much to reconcile the superficial inconsistencies which have led to much of the confusion. This thread is that the abolition of the long established punitive pay for Sunday work as such has been coupled with the safeguard, from the employes' viewpoint, that the types of Sunday work dispensed with by the Carrier prior to September 1, 1949 may not be reinstated. The operational requirements mentioned in 1 (a), the need referred to in 1 (c), and the necessary Sunday work spoken of in 1 (j) must all be related to the specific restrictions placed in Section 1 as a whole on Sunday work. Such work may be done at straight time if it is necessary, but the test of this necessity must be that set forth carefully in the agreement.

Section 1 (a), the general Forty Hour Work Week Rule is explicitly made "subject to the provisions of this agreement which follow." In Section 1 (b) if the duties "can reasonably be met in five days" the positions will have the conventional five-day week. In (c) six-day positions are determined by the proposition that "the nature of the work is such that employes will be needed six days each week." Arguments and disagreements over the facts may easily arise under Sections 1 (b) and 1 (c), because the parties may differ as to whether the duties can reasonably be met in five days or whether the nature of the work is such that employes will be needed six days each week.

But when we examine Section 1 (d) we see no room for argument. A pragmatic, undeniable test is set forth, which is "on positions which have been filled seven days per week."

The Carrier has urged that this merely identifies the days off, but this position cannot be squared with the fact that (b), (c) and (d) are explicit qualifications of the general work week provisions of Section 1 (a). Nor, significantly, can this contention explain away the two pointed sentences in Section 1 (j):

> "The elimination of [punitive pay for Sunday as such] does not contemplate the reinstatement of work on Sunday which can be dispensed with."
>
> "This is not to be taken to mean, however, that types of work which have not been needed on Sundays will hereafter be assigned on Sunday." (Underlining added).

Some light as to what was intended on the subject of Sunday work may be gleaned also from the letter of interpretation of February 27, 1949 which was written, at the joint request of the carriers and the 16 non-operating labor organizations, by the three members of the 1948 Emergency Board. A good deal of the language of Section 1 (j) was taken verbatim from the paragraph of this letter dealing with Sunday work. In this paragraph it was stated that the Board expressly denied the Organizations' requests for a uniform Monday - Friday work week and punitive pay for Saturdays and Sundays as such. It goes on to say:

> "It had in mind the continuous nature of some of the operations on railroads. Work which at one time had been performed seven days per week has been cut down to six days, and avoidable Sunday work has largely been eliminated by force of the penalty pay provisions included in the agreements. Certainly the Board did not contemplate the reinstatement of work on Sundays where it has been found it can be dispensed with. This would be a distortion of its reason for recommending the elimination of penalty pay on Sundays as such."

Then follow four sentences identical with the four concluding sentences of Section 1 (j).

The Carrier, and several referees who have given controlling weight to them, properly inquire, then, as to the meaning and purpose of the expressions or provisions in Section 1 (a) and 1 (j):

(1) "in accordance with the Carrier's operational requirements"

(2) "a rigid adherence to the precise pattern that may be in effect immediately prior to September 1, 1949, with regard to the amount of Sunday work that may be necessary is not required. Changes in amount or nature of traffic or business and seasonal fluctuations must be taken into account."

(3) "the intent is to recognize that the number of people on necessary Sunday work may change"

The operational requirements mentioned in 1 (a) have broad and general application in determining the type of work week and also the fluctuations referred to later in Section 1. It is also of consequence and applicability in sub-sections (e), (f), (g) and (h) which deal with relief assignments, deviations from the Monday-Friday week, non-consecutive rest days, and rest days of extra or furloughed employes. As a general reference, it must give way before more detailed provisions relating directly to specific matters.

The second and third quotations are intended to provide flexibility with respect to the expansion or contraction of the amount of necessary Sunday work. Since the determination of what is necessary Sunday work, under the agreement, depends on the simple test of whether the Carrier has been filling the types of positions in question on Sunday, meaning obviously prior to the effective date of the Forty Hour Agreement, the words "necessary Sunday work" refer to such work as is allowable by the provisions of the agreement. Such types of necessary work may be enlarged in terms of numbers of employes as well as of additional locations. These are the respects in which the Carrier is given latitude, that is to say, in the words of 1 (j), in "the amount of Sunday work that may be necessary" and in " the number of people on necessary Sunday work."

But, to repeat, the determination of this necessity and of the types of work that may be performed on Sundays as part of a staggered work week is governed by the prior practice of the Carrier.

We must remember that, before September 1, 1949, carriers had in force six-day work weeks, and the old Sunday and Holiday Work Rule, adopted in revised form in 1923, called for time and one-half for Sunday work, except where such work was necessary to the continuous operation of the carrier, in which case employes regularly assigned to Sunday service were paid at straight time. In two interpretations of this rule, one in arbitration in 1931, and the other by the National Railroad Adjustment Board in 1936 (Award 314), it was held that typical transfer and freight stations of the New York Central were not necessary to the continuous operation of the Carrier, as defined in this rule, and hence that employes assigned to Sunday work were entitled to time and one-half. Award 314 interestingly dealt with the Utica Transfer Station and the earlier arbitration award with the Carrier's Granton Transfer Station. The factual substance is that even if seven-day operation at Utica Transfer was not necessary to the continuous operation of the railroad, as indeed its operation for years after the making of Award 314 demonstrated, it may still have had some other degree of necessity which would have warranted its operation seven days per week even though this required time and one-half for the Sunday work done by regularly assigned employes. For a period this was done, but, starting in 1947 the seven-day operation was discontinued in favor of six-day operations and this was still in effect on September 1, 1949, the effective date of the Forty Hour Agreement. It thus fell into the category of "avoidable Sunday work [which] has largely been eliminated by force of the penalty pay provisions," to borrow a phrase from the explanatory letter of the Board members in February, 1949, and, in the contract language of Section 1 (j), of "work which can be dispensed with" or "types of work which have not been needed on Sunday."

This leads again to the appropriate measure of need or necessity to be applied.

The difference in language as among Sections 1 (b), 1 (c), and 1 (d), must not be taken lightly. Normally, if similar considerations were intended to be taken into account then similar expressions would have been employed. The five-day, six-day, and seven-day operations could all have been made determinable simply by operational requirements, or by the provision "where the nature of the work is such that employes will be needed." That this was not done is significant, and the explanation is that seven-day positions call for Sunday work at straight time rates, and the withdrawal of punitive pay for Sunday work was coupled with the restrictions against the reinstatement of such work as can be dispensed with and the assignment of types of work on Sunday that have not been needed on Sundays. The five-day and six-day positions are independent of the Sunday work provisions of the contract, but not so with the seven-day positions. It should be added that the provision in Section 1 (a) that work weeks may be staggered in accordance with the Carrier's operational requirements has meaning with reference to six-day as well as seven-day operations, since both call for staggered work weeks, and it also has meaning with reference to numerous occupations, positions and crafts, whether in the Clerks' bargaining units or not, who prior to September 1, 1949 were on a seven-day basis and have continued on that basis since the Forty-Hour Agreement.

It is respectfully suggested that in most of the awards favorable to the Carriers' viewpoint on this subject the majorities on the Adjustment Board neglected to observe or to give proper weight to these language differences and to recognize that the seven-day positions are regulated by both Section 1 (d) and 1 (j). The result has been not only conflicting awards but the introduction of a variety of definitions of need or necessity, together with rules concerning presumptions and burden of proof which do not appear in the agreement itself.

To repeat, it is our view that the test as to whether a position may be regularly filled seven days per week is the simple one set forth in Section 1 (d) and in essence repeated in Section 1 (j), namely, has the Carrier been filling it seven days per week. This establishes the need, without room for argument, because the Carrier has demonstrated the need by its prevailing practice.

But what is the nature of the reasoning in awards cited as favorable to the Carrier?

Examining a substantial sample of them chronologically, we see in Award 5247 of March 9, 1951, that Sunday work may be done if it is "essential for prompt performance," but that "merely to show greater efficiency, or that the work could be done more economically, will not alone establish a basis that Sunday work is needed."

In Award 5581, of December 14, 1951, one rule, that which in the agreement relates solely to six-day operations, is applied to both six-day and seven-day positions without distinction. The opinion states:

> "It is apparent that the Carrier in the first instance should be the judge of its operational requirements. It necessarily follows under the Forty-Hour Week Agreement discretion with respect to staggering work weeks of forces

> engaged in work of a nature requiring six or seven day protection rests with the Carrier. . . . .the Carrier's desire in this respect is not absolute. It may not deprive employes of Saturday and Sunday as rest days on an arbitrary or capricious determination that the work is of such a nature that employes will be needed six or seven days per week."

The opinion also places the burden on the employes of overcoming the determination of the Carrier that operational requirements are better met by having staggered work weeks.

On the same day Award 5589 was issued. In this award the right to establish six and seven-day positions is held to be "founded upon the need for employes to protect services, duties or operations that number of days each week." It was also asserted that, in itself, the establishment of six or seven-day operations is evidence of the Carrier's good faith because in doing so the Carrier incurs more payroll expense than in covering such positions only five days.

In Award 1566 (August 1, 1952) the view was expressed that the operation of positions on a five, six or seven-day basis depends on whether the services are necessary but this rule of necessity must be distinguished from mere convenience.

In December, 1952, a series of similar awards was issued, of which the basic one was Award 1599. There it was stated that Sunday work is permissible if "found necessary in the light of the Carrier's operational requirements." The performance or non-performance of work on Sundays just before September 1, 1949 was held to raise a presumption of necessity or non-necessity, and where there is such an affirmative presumption the burden is on the employes who are claimants to show that the Carrier's operational requirements have changed since then so that Sunday operations are no longer necessary. It was also ruled that the employes have the burden of proving that Sunday work at pro rata rates is not necessary to the effective operation of the Carrier. The ruling was favorable to the Carrier in this case on the finding that the employes did not successfully refute the Carrier's evidence that its "competitive position would [otherwise] be somewhat jeopardized and the well-being of shippers and, to some extent, of the country would be lessened."

In January, 1953, in Award 6075, a seven-day operation in a terminal accounting bureau was approved on the ground that it was necessary to the proper and efficient functioning of the railroad.

Shortly thereafter, in March, 1953, approximately a dozen related awards were issued involving the work weeks of carmen. The first was Award 1644. Sunday work had not been regularly assigned before September 1, 1949 but it had been performed on employes' rest days on a time and one-half basis. It was held that:

> "The agreement does not prohibit the assignment of a type of work on Sunday after September 1, 1949, even though it was not so assigned prior to that date, if such work is necessary to be performed on Sundays. The proof required

> must, however, be sufficient to overcome the presumption that it is not necessary to be performed on Sunday because of the fact that it was not so performed prior to the advent of the Forty-Hour Week Agreement. But in the case before us, it is clear that the work was necessary to be performed on Sundays prior to September 1, 1949 and that it was necessary to be performed thereafter. The claimants have failed to establish that Sunday work was not required. . . . . ."

In Award 1712, of September 23, 1953, the rule is interpreted as follows:

> "The record discloses that it has always been necessary to have these services, duties and operations performed on all seven days of the week. Consequently, carrier could assign any two consecutive rest days to employes assigned thereto subject, however, to a presumption in favor of Saturday and Sunday."

Award 6856, released on January 28, 1956, is, except for Award 6695, most closely in point with the case before us. The principal difference is that it arose under money claims filed by employes, whereas in both the present case and that leading to Award 6695 the matter was presented as a question of the right of the carrier to put certain positions at freight transfers on a staggered seven-day basis. In Award 6856 the employes' claims were denied, the Referee being critical of the findings and conclusions of Award 6695. He expressed the view that the Forty-Hour Agreement does not preclude the creation of seven-day positions even if the work was not so assigned prior to September 1, 1949. The test, he found, was necessity, and the non-performance of the work prior to September 1, 1949 constitutes "strong evidence" that it was not required thereafter, but proof may be offered to overcome this "presumption." He also held that the differing language used in Section 1 (b), 1 (c), and 1 (d), the provisions relating respectively to five-day, six-day, and seven-day positions, showed no intent that one was to be construed any differently from the others. Finally, in referring to Section 1 (j) he made no distinction between the references to types of work and amount of Sunday work or number of people that may be necessary.

Reverting briefly to the earliest award offered in evidence, Award 314 of October 9, 1936, we see again the degrees of difference possible when the test revolves around the word "necessary." That case arose under the old Sunday work rule, and "necessary to the continuous operation of the Carrier" was the important phrase requiring interpretation. The Referee said:

> "...the carrier concedes that the word 'necessary' is susceptible of various definitions, and it cites court decisions to the effect that it need not be construed as meaning indispensable or absolutely necessary."

He spoke then of December 1621 of the U. S. Railroad Labor Board and pointed out that

> "The Board in that and other decisions treated the word 'necessary' as indispensable, absolutely essential, and absolutely necessary."

We have seen, in our discussion of most of the awards to which we have been referred by the Carrier, that some referees seem to have had difficulty and to have had to do a certain amount of groping to define the meaning of "necessary." Some have also interpolated a presumption with respect to positions which were or were not filled seven days prior to September 1, 1949, although no such presumption is created by the rule. The rule limits the only presumption it mentions to Saturday and Sunday as the favored rest days.

This suggests that the parties were wise in working out their own simple test of the necessity which would support the Carrier's right to fill positions on a staggered seven-day basis. Having done so, as our analysis indicates they have, this feature of their agreement like all others must be construed and applied as written, intended and understood by the parties.

The type of disagreement possible over the facts bearing on whether seven-day operations are necessary or essential may be illustrated by a few of the factual contentions advanced in this case. The carrier insists that the denial of the right to have seven-day operations has been responsible for its great loss of LCL tonnage. During the war and post-war period and up to 1947 these transfer stations were manned seven days per week to meet the heavy LCL freight load. The unrefuted evidence is that the seven-day operations were discontinued in favor of six-day operations because of the decline in volume of LCL traffic. Thus, the decline in such volume was the cause, not the result, of the discontinuance of seven-day operations. Moreover, the tendency to transfer relatively more of the LCL business to trucks has been going on since 1940, according to expert traffic witnesses called by the Carrier. That 1946 was the peak year does not contradict this, for there were special reasons in the 1941 - 1947 period for enlarged volume as a whole.

The Carrier contends that six-day operations are less satisfactory than five-day operations. It operated on a six-day basis after the Forty-Hour Agreement, starting late in 1949, for a period of some two years, and then reverted to five-day operations. Employe witnesses, however, testified that supervision informed them that this reversion to five-day operations was due again to lack of volume of business and that it was planned later to go back to six-day operations, and this testimony was not directly contradicted.

It has not been proven that the drop in LCL volume has been caused solely or primarily by the five-day week. Carrier's traffic expert witnesses testified that the drift to trucks has been going on since 1940 as truck service has been improving and as customer demands for speedy delivery have been growing, that even while the Carrier was on the seven-day week they found it necessary to use trucks, that shipments from New England to Albany and from Troy to Pittsburgh have often required 8 to 12 days as compared with 2 to 3 days by truck. Surely all this delay is not chargeable to the five-day or six-day operation of the transfer stations. It was also testified that traffic managers now very heavily use parcel post for a major part of certain shipments and that carloading services have been growing, both by companies performing this service and cooperative

shipping associations, as a result of which much freight formerly classified as LCL is now moving as carloads. While this Carrier's LCL tonnage declined sharply from 1948 to 1955, its volume of such carloading traffic increased over 22%.

The fact unquestionably is that the recent seven-day operations have been more efficient at these transfer stations than the prior five-day operations. After March, 1956, when the seven-day schedule was inaugurated, work progressed more expeditiously and there were considerably less cars left over. This may be ascribed partly to the use of more total man hours than in the five-day operation, because production per man hour in fact declined by about 6%. But no one could resonably argue that operations on an every day basis will not tend to diminish delays caused by the weekend accumulation of arriving cars, provided a reasonably adequate work force is employed.

The question before us, we must remember, however, is not whether seven-day operations may not be faster and more economical, but whether they may be instituted under the agreement.

The problems described by the Carrier are not peculiar to Utica alone, nor to the other five transfer stations involved in this case, as distinguished from Utica. So far as the evidence reveals, the problems at all six are identical, with differences only in small degree.

The Carrier raised the complaint that it is being discriminated against competitively. The denial of the right to work these stations seven days, it asserts, leaves it at a disadvantage with the trucking industry and with a few other railroads which at certain transfer stations are able to work on Sundays. Whether the trucking industry operates comparable transfer operations on Sunday at straight time was not made clear. Of the railroads which have this privilege, there are only three, the Erie, D.L.&W., and Pennsylvania, which are competitive with the New York Central. The half-dozen others which have this right at a restricted number of stations, have it because they conducted such operations on a seven-day basis prior to September 1, 1949, and the Organization concedes that, under the Forty-Hour Agreement, this permits them to continue to do so at the stations in question, just as the New York Central is doing, for the same reason, at its East St. Louis Transfer Station. The Erie was accorded this right at Hornell by Award 6856. The D.L.&W. got it for its Scranton Station by an agreement with the Clerks' general chairman. The Pennsylvania started such operations at several of its stations in the belief that the rules of the Forty-Hour Agreement permit it to do so. In all three cases the Organization has taken action seeking to terminate the practice, in the first two instances by a Section 6 notice to modify the agreement, and in the Pennsylvania case by filing money claims to be prosecuted before the Adjustment Board.

It is worthy of note that in the Erie case the Organization recognizes that it is bound by Award 6856 and that its remedy lies not in an attempt to have this unfavorable award set aside but by undertaking to make out a case to overcome its effect at the bargaining table.

When the Forty-Hour Agreement was concluded on March 19, 1949, the provisions under discussion had been thoroughly aired and were known to all the parties. This agreement was not confined to the crafts or classes within the Clerks' bargaining units, by any means. All the Organizations representing the so-called non-operating employes were parties.

When mention was made in Section 1 (a) of staggering work weeks in accordance with operational requirements, this applied not only to six-day operations but also to seven-day operations where they were and had to continue in force, in a variety of occupations. By no means was this written with the possibility in mind that some five-day or six-day freight transfer stations might subsequently be placed on a seven-day week. In fact, the restrictions in Section 1 (d) and 1 (j) indicate precisely the contrary. There is support for this construction in the fact that overwhelmingly the railroads of the country do not operate such transfer stations on a seven-day basis since the Forty-Hour Week Agreement.

By way of conclusion, it would be well to summarize the controlling considerations in this case. Contract rules incorporated into the agreement may not be altered through interpretation on the ground that conditions have changed and some new provision is needed. Only through negotiations between the parties can this be accomplished.

The congressional intent is clearly expressed in Section 3 (m) of the Railway Labor Act that an award is final and binding as to a given dispute upon both parties. If our interpretation of the Agreement differed from that in Award 6695, we would have a serious problem of how to give different answers to the submitted question with reference to Utica as distinguished from the other five stations, since we see no essential difference in the facts or circumstances governing each of these six stations. Our interpretation of the Agreement, however, is essentially in accord with that in Award 6695, and this problem does not arise.

Referee Carter who wrote the Adjustment Board's opinion in Award 6856 (the Erie case) also participated in several other awards on this general subject of Sunday work. One of these was Award 1644 in which he summed up the view for which the Carrier is now contending in these words:

> "The agreement does not prohibit the assignment of a type of work on Sunday after September 1, 1949, even though it was not so assigned prior to that date, if such work is necessary to be performed on Sunday."

In Award 6856 he cited a number of awards as supporting this view, although the facts in several indicated that the type of work in question had been performed on Sundays prior to September 1, 1949. This fact he called merely "strong evidence" or a "presumption" that it continued to be necessary.

The position of the Organization, on the other hand, is summarized and supported by the following statement by Referee Leiserson in Award 6695:

> "This claim can only be upheld if the contractual provisions of its 40-Hour Agreement with the Clerks permit it. Examining Rule 35 (d) which governs 7-day service, we find that the rule states that any two consecutive days may be the rest days on positions which 'have been filled 7 days per week.' (Emphasis added). Admittedly, the positions at Utica have not been

> filled seven days a week either before or after September 1, 1949, except by special arrangements during World War II. Accordingly we cannot hold that this rule authorizes the proposed change from the present 5-day service to a 7-day operation."

We subscribe basically to the interpretation of Referee Leiserson. We do so, in brief, because we find that the parties in agreeing upon Sections 1 (a), 1 (b), 1 (c), 1 (d) and 1 (j) made it clear that seven-day operations stand on different grounds from six-day and five-day operations, by using guarded and carefully drawn language distinguishing the three kinds of work weeks. We find that the seven-day operation, unlike the other two, is closely tied to the Sunday Work Rule, which rule did away with the long-established practice of premium pay for Sunday as such, but assured the employes that seven-day types of work previously dispensed with by the Carrier would not be reinstated now that it may be done at straight time and that types of work which have not been needed on Sundays will not hereafter be assigned on Sunday. To avoid misunderstanding or misquotation, however, it must be pointed out that neither Section 1 (d) nor Section 1 (j) stipulates that the prior Sunday work must have been paid for either at the rate of time and one-half or straight time. Read with the test stipulated in Section 1 (d) that speaks of seven-day positions as those which have been filled seven days per week, this makes the intent of the parties quite plain.

The reference to staggered work weeks in accordance with operational requirements applies to six-day operations, as distinguished from five-day, and also to seven-day operations which may properly be carried on by one or more of the many classes or crafts of employes who are parties to the agreement, and in any event is definitely and explicitly qualified by the more specific sections which follow Section 1 (a). The provisions in Section 1 (j) which speak of non-rigid adherence to existing patterns, and taking into account changes in traffic and seasonal fluctuations, relate to changes in the amount of allowable Sunday work and to changes in the number of employes on necessary Sunday work. These provisions provide a framework within which the Carrier has latitude and flexibility, but they do not permit the inclusion of a new type of Sunday work which does not meet the essential contractual test.

This test set up in the agreement is a simple pragmatic test which leaves little possibility of disagreement or dispute over the meaning of the word "necessary" or over the facts, unlike the tests applicable to five or six-day operations. The efforts of the parties in arriving at the language indicates that they meant to set up a simple and undebatable test. Enlisting the services of the former members of the Emergency Board as interpreters, mediators, and finally as arbitrators shows this.

What may the Carrier do to meet its problem? We suggest a careful exploration of the other sub-sections of Section 1 as one possibility. If no solution is found there, recourse to the bargaining table remains. We agree that the solution does not lie in working regular employes on the sixth or seventh day at overtime, for Section 1 (g) (7) shows that the parties agreed this should not be done if it could possibly be avoided.

It is our conclusion that the specific question submitted to this Board of Arbitration must be answered in the negative, which is to say that the Carrier did not have the right to establish a five-day staggered work week, including Sunday as a regularly assigned work day, at the freight transfer stations in Utica, Syracuse, Buffalo, Cleveland, Detroit and Gibson.

Dated: June 4, 1956

David L. Cole, Chairman

George M. Harrison, Member

In Arbitration

Between

New York Central Railroad Company

and

Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employes

NATIONAL MEDIATION BOARD

NMB CASE NO. 212

AWARD OF
BOARD OF ARBITRATION

Appearances:

For the Carrier

R. C. Bannister, Esq., of Chicago, Attorney
L. B. Fee, Director of Labor Relations

For the Labor Organization

Lester Schoene, Esq., of Washington, Counsel
Earl Kinley, Vice President
George Price, General Chairman
William Winston, General Chairman
G. G. Younger, General Chairman

Pursuant to an arbitration agreement entered into by the above-named parties on March 28, 1956, under the provisions of the Railway Labor Act, and in accordance with the extension of time within which to file its award agreed upon by the parties, the Board of Arbitration consisting of L. W. Horning, Carrier-named member, George M. Harrison, Labor Organization-named member, and David L. Cole, Chairman, having duly heard the parties and considered their evidence and arguments, does hereby make its award as follows:

It answers the specific question set forth in paragraph "Fourth" of said arbitration agreement in the negative; that is to say that the party of the first part, the Carrier named above, did not have the right to establish a five (5) day staggered work-week, including Sunday as a regularly assigned work day, at the freight transfer stations in Utica, Syracuse, and Buffalo, New York, Cleveland, Ohio, Detroit, Michigan, and Gibson, Indiana under the so-called Forty-Hour Week Agreement which is in effect between the parties hereto.

S/ DAVID L. COLE
David L. Cole, Chairman

June 4, 1956

S/ GEO. M. HARRISON
George M. Harrison, Member

STATE OF NEW YORK)
) SS
COUNTY OF NEW YORK)

On this 4th day of June, 1956, before me personally appeared David L. Cole and George M. Harrison, to me known, and known to me to be the persons described in and who executed the foregoing Opinion and Award, as Chairman and Member of the Board of Arbitration, and who acknowledged to me that they executed the same.

S/ HARRY A. SKIFF
Notary Public
Harry A. Skiff
Notory Public, State of New York
No. 60-3695515
Qualified in Westchester County
Certs. filed with N. Y. Co. Clerk
Term expires March 30, 1957.