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Award No. 21
Docket No. 21

SPECIAL BOARD OF ADJUSTMENT NO. 166

BROTHERHOOD OF RAILWAY AND STEAMSHIP CLERKS,
FREIGHT HANDLERS, EXPRESS AND STATION EMPLOYES
versus
MISSOURI PACIFIC RAILROAD COMPANY

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

1. That the Carrier's action in operation of its freight warehouse facility at Kansas City, Missouri, seven days per week subsequent to the effective date of Award No. 14 (April 11, 1957) of Special Board of Adjustment No. 166 is a violation of the Clerks' Agreement.

2. That employes engaged in such seven-day service who are required to work on Sundays be paid the difference between time and one-half compensation and the pro rata compensation paid for each such Sunday worked beginning Sunday, April 14, 1957, and a pro rata day each week as an assigned work day account Sunday not properly assignable as a work day of the employe's work-week, claims to continue until the seven-day positions are discontinued.

FINDINGS: The basis of the confronting claims as set out above is the alleged violation of Rule 26(c), which reads as follows:

"(c) Provisions existing prior to September 1, 1949 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 have been 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. When changes such as nature of traffic or service to be provided occur, the General Chairman will be notified and following mutual agreement with the Carrier, seven-day positions will be established even though it may involve a point or location where Sunday work was not previously needed."

The parties hereto, on March 16, 1955, executed a Memorandum of Agreement the subject matter of which concerned the establishment of 7-day positions at the location with which we are here concerned. This Memorandum of Agreement contained a provision which provided as follows:

"It is further understood that this Agreement is made for the purpose named herein and may be cancelled by 30-day written notice of one party to the other."

The above quoted termination provision of the Memorandum of Agreement bearing date of March 16, 1955, was the subject matter with which this Board concerned itself in Award No. 14. In presenting the question to this Board in that dispute, the Organization contended that a notice given by them had the effect of terminating the aforesaid Memorandum of Agreement which permitted the establishment of 7-day positions, while the respondent contended that the Agreement had not been so terminated. This Board found that the notice of termination was effective and that the Agreement stood cancelled, and that the parties were then and there relegated to their respective positions under the schedule rules that existed prior to such Agreement. The confronting claims in that award (Award No. 14) were dismissed as being premature.

The confronting dispute concerns claims that have been filed since the date of Award No. 14, that is April 11, 1957. In view of the fact that this Board has previously found that the parties are presently governed by the provisions of Rule 26(c), it is now necessary that the scope and intended purpose and application of this rule be examined.

The rule, with the exception of the last sentence thereof, while not absolutely clear and without ambiguity, has been subject to numerous decisions by the Third Division of the National Railroad Adjustment Board. A preponderant number of those awards have construed this Sunday work rule to permit the establishment of 7-day service with payment at the pro rata rate for Sunday work where there is a showing of necessity and/or an operational requirement. We are of the opinion that this portion of Rule 26(c) is clear to the extent that it was not within the contemplation of the parties that the respondent's method of operation should be frozen as of September 1, 1949, the effective date of the 40-Hour Agreement. That this is true is evidenced by that portion of the rule which states:

> ". . . a rigid adherence to the precise pattern that may have been 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 . . ."

The rule further provides -

> ". . . The intent is to recognize that the number of people on necessary Sunday work may change . . ."

That the respondent was confronted with operational requirements and made an adequate affirmative showing of necessity concerning the need for the establishment of 7-day positions, together with the Organization's concurrence with such existing conditions, is evidenced by the execution of the Memorandum of Agreement bearing date of March 16, 1955.

That the present need for 7-day service exists is evidenced both by the facts of record and by admissions by the parties hereto.

The Organization contends that upon the cancellation of the aforesaid Memorandum of Agreement, the respondent here was required to revert to the conditions that originally existed and, if Sunday work is needed, that the same is to be compensated for at the punitive rate within the meaning of the rule, inasmuch as the last sentence of Rule 26(c), which reads as follows:

> "When changes such as nature of traffic or service to be provided occur, the General Chairman will be notified and following mutual agreement with the Carrier, seven-day positions will be established even though it may involve a point or location where Sunday work was not previously needed."

makes it incumbent upon the Carrier to secure the acquiescence of the Organization at this time to a method whereby any work performance on Sunday may be compensated at other than the punitive rate.

Award No. 14 of this Board found that the Agreement of March 16, 1955, had been cancelled and that the parties should revert to their respective positions under Rule 26(c). This, as any rule of a collective bargaining agreement, must be considered in its entirety and from an overall viewpoint.

To sustain the position of the Organization herein would have the effect of holding that the last sentence of Rule 26(c) gives to the Organization unilateral right of decision as to whether or not 7-day service is to be instituted, irrespective of the existence of operational requirements or an affirmative showing of necessity therefor. We do not think that this purpose was within the contemplation of the parties when they included this addendum to Rule 26(c). Rather, we think that in all cases it is incumbent upon the Carrier to make an affirmative showing of the need and necessity for the creation of 7-day positions and to confer with the Organization relative thereto, and that there exists a mutual obligation upon the parties to arrive at an agreement relative thereto.

As previously stated, the parties here have mutually agreed that there is a present need for 7-day service and we think that such service can properly be continued.

For the reasons stated, we are of the opinion that the confronting claims must, of necessity, be denied.

AWARD: Claim denied.

SPECIAL BOARD OF ADJUSTMENT NO. 166

/s/ Livingston Smith
Livingston Smith - Chairman

/s/ Ira F. Thomas
I. F. Thomas - Employe Member
I dissent.

/s/ G. W. Johnson
G. W. Johnson - Carrier Member

St. Louis, Missouri
September 23, 1957