Award Number 314
Docket Number CL-320

NATIONAL RAILROAD ADJUSTMENT BOARD
Third Division

Robert G. Corwin, Referee

PARTIES TO DISPUTE:

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

THE NEW YORK CENTRAL RAILROAD COMPANY

DISPUTE.—

"Claim that the Sunday operation at the Transfer and Freight Station, Utica, New York, is not necessary to, or a necessary part of, the continuous operation of the carrier as defined in Paragraph 'C' of Rule 32 of the Agreement between the parties involved in this dispute; that all employees regularly assigned or required to work Sunday, June 23rd, 1935, or any Sunday thereafter, should be compensated at the rate of time and one-half for all Sunday work performed; that the carrier violated Rule 33 of the said Agreement by requiring employees regularly assigned to work Sundays to lay off one day per week, other than Sunday, and that such employees should also be compensated at the rate of straight time for each day thus required to lay off."

FINDINGS.—The Third Division of the Adjustment Board, upon the whole record and all the evidence, finds 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.

This Division of the Adjustment Board has jurisdiction over the dispute involved herein.

The parties to said dispute were given due notice of hearing thereon.

As a result of a deadlock, Robert G. Corwin was appointed as Referee to sit with the Division as a member thereof.

The claim made in this case is in behalf of employees regularly assigned or required to work Sunday, June 23, 1935, and on Sundays thereafter at the Utica Transfer and freight station at time and one-half for such service and for straight pay for week days on which such of said employees as were regularly assigned were required to lay off. The rules involved are numbered 32 and 33 in the agreement between the carrier and the Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employees, effective September 1, 1922, and revised April 1, 1923, which were in operation during and after June, 1935. The pertinent part of Rule 32 provides that:

"Work performed on Sundays * * * shall be paid for at the rate of time and one-half, except that employees necessary to the continuous operation of the carrier and who are regularly assigned to such service will be assigned one regular day off duty in seven, Sunday, if possible, and if required to work on such regularly assigned seventh day off duty will be paid at the rate of time and one-half time; when such assigned day off duty is not Sunday, work on Sunday will be paid for at straight time."

It may be said in passing that this is one of the standard rules included in the schedules of almost all railways and the Clerks, and some other labor organizations. Its meaning and application, to such extent as they are involved herein, we leave until later.

It is difficult to determine from the statements and arguments submitted just what kind or kinds of employees are involved in the claim. Much of the

argument has been directed to a discussion of the carrier's liability arising out of the question as to whether the employees' Sunday services were necessary to its continuous operation. But it must be observed that the exception to the general provision of the rule applies only to those who are regularly assigned to continuous service of the nature involved.

Is there any issue as to regular assignment in the dispute? If not, we have no desire to inject it. Careful study of the docket, however, convinces us that we cannot avoid it.

The terms "regularly assigned" and "regular assignments" have well established meanings in the vernacular of railroad men. An employee may have a regular assignment or work irregularly under the rules. A regular assignment under the schedule before us must have a fixed starting time. If the employee reports for work and is not used he is entitled to compensation. The assignment covers a designated course of duty and is the property of its possessor, subject to and protected by seniority rules. It has frequently been held that it must be definite and certain and the word "regular" implies as much. The particular work is assigned by bulletin, etc.

Now it is a matter of which we must take notice that freight handlers do not ordinarily enjoy regular assignments. They are hourly paid men and work according to their seniority when they report and work is available. Evidently, such men were engaged in the operation under consideration and they can be included in that part of the claim mentioning employees required to work on Sundays. The claim itself refers to some employees regularly assigned to work on Sunday and required to lay off one day a week. In the employees' statement of facts this sentence appears: "Such of these employees as were regularly assigned to work Sundays were assigned one day off in seven." This would imply that some were regularly assigned and others not. The carrier quite definitely states: "The employees necessary to the continuous operation of the carrier are regularly assigned with one day off each week," etc., and its printed argument is based on that premise. But in the same breath it says that they are "covered by class two of the Agreement, which includes truckers, not guaranteed six days' work per week." The same appears in the exhibit attached to the printed brief which adds that they are not even entitled to an eight-hour day after entering service.

The rule itself recognizes that the exception extends only to men who are assigned a six-day, for it provides they must be awarded a day off. All these benefits of regular assignments do not flow to members of the freight handlers gangs, who were used according to the carrier and declined the payment of the penalty which, we take it, they are now seeking. It might be argued that the very reason that the rule does not embrace them in its exception is because they don't enjoy regular work and have little assurance in the way of guarantees. But it is unnecessary to do so as the rule is perfectly clear. Such unassigned men, by its plain provisions are entitled to time and one-half for Sunday service, based on the rules affecting their hours.

If all the employees were of this classification it would be futile to pursue our findings any further. They would not be entitled to any benefit under Rule 33, which provides that "Employees will not be required to suspend work during assigned hours for the purpose of absorbing overtime," for the simple reason that they have no assigned hours.

But if regularly assigned men were used, there is still another matter which we must take into consideration before the question of necessity for continuous operation affects their rights. They must be regularly assigned to **such service** as the carrier has included in its decision to install as necessary to its continuous operation. The record is silent as to the nature of the assignments of the men employed, but we suppose we are justified in stating that if they did not regularly cover just such service they too would be entitled to penal overtime, if their regularly assigned assignments included another character of work.

This brings us to the final element which we assume exists. Was the work at the Utica Transfer of such a character that it was necessary to the continuous operation of the carrier within the meaning which should be ascribed to the rule?

In a certain sense it might be said that any and all work required of employees is necessary to the continuous operation of the carrier in its service to the public. The company serves none but the public in its operation as a

common carrier and the omission from the rule of the words "in its service to the public" is of no apparent consequence in its construction. It is senseless to suppose that it would ever delegate work to any employee if it considered his efforts unnecessary. So it might be contended, as it may have been, that any service rendered the public on Sundays was necessary or it wouldn't have been undertaken. Such an interpretation of the rule would render it meaningless and encourage such action as it was ostensibly enacted to avert. Obviously, the parties in negotiating it must have meant that there was some Sunday work which was necessary and some which was not. We are called upon to decide into which category the Sunday transfer work at Utica must fall.

The framing of the rule in its final form was the result of years of negotiation. Labor had sought a six-day week with limited hours and a full day of rest, to be Sunday, if possible, and the National Railway Administration and the United States Railroad Labor Board were usually sympathetic to such suggestions. But it was plain that the public taste and need for Sunday transportation must continue to be satisfied. There were, on the other hand, certain sorts of service to which the patrons of the carrier were unaccustomed and which they were not entitled to demand. One of these, to come directly to the point, was the transfer of L. C. L. shipments on the Sabbath Day. While at times this was so handled on a time and one-half basis on the New York Central and other railways, such was not the usual practice nor could they be required to engage in it under the terms of the uniform bills of lading.

Prior to June 17, 1935, stations for transfer of freight were operated separately at West Albany and Utica on a regular six-day basis. These stations were then consolidated, and new facilities were installed at Utica at a considerable cost. The carrier decided, without agreement with the employees, to break the L. C. L. westbound freight at Utica and work it there regularly for the first time on Sundays. Since then, as to such freight, there has been a seven-day operation. The men who had previously been paid time and one-half for identical work were thereafter allowed straight time, the carrier declaring the movement necessary to its continuous operation. Its action was promptly protested. The assistant general manager responded that it was taken "to hold business on the line." In the carrier's position and argument it is stated that the management was advised by its Traffic Department that the public demanded such service comparable to that of other roads; that after the expenditures mentioned, it provided additional fast schedule train service to expedite the movement of New York and New England freight, connections being established with through trains at De Witt and Gardenville to meet the aforesaid demand.

The Brotherhood does not ask that the transfer be eliminated but, claiming that it was not necessary to the continuous operation of the carrier as the rule contemplated, that those regularly assigned to the work or required to do it be paid in conformity to the general rule. The carrier states that no interpretation of the rule is indicated, but forthwith files a lengthy brief devoted to that purpose. Manifestly, we must determine whether the work was necessary for continuous operation. By its argument 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.

The rule was adopted verbatim from Decision 1621 of the U. S. Railroad Labor Board. It was like that earlier provided for the Signalmen. Such being the case, it is proper to look into the suggestions of the Labor Board for the definition which its acceptance would imply. The Board in that and other decisions treated the word "necessary" as indispensable, absolutely essential, and absolutely necessary. Both the New York Central and the Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employees were parties to the case which resulted in Decision 1621.

This interpretation has been followed in effect by awards of arbitration in four different submissions, in one of which, known as the Granton Transfer Case, U. S. Mediation Board GC–248 Arb., award dated February 10, 1931, the present parties were opposed. In each of these the transfer of freight was involved, in some at final and others at intermediate terminals, a circumstance which cannot, as we see it, control the principle. The facts were substantially

similar to those before us. All were bitterly contested and exhaustively argued. In each of these arbitrations the claims of the employees were allowed.

In conflict with these authorities the carrier cites a later award rendered by the Board of Arbitration, U. S. Mediation Board GC–755 Arb., in a dispute arising on the N. C. & St. L. Railway. The majority of the Board there, after noting the foregoing awards, made no considerable effort to distinguish them, in reaching its decision.

As between these cases we are inclined to follow the former, not only because they constitute the weight of authority, but because they seem to be better considered and based on better reasoning. An effort is made to show that they differ from the instant dispute in that their findings were induced by an emphasis placed on the carrier's struggle to meet competition, whereas here it is said that schedules were re-arranged, additional service supplied, new business secured, etc. But it is fair to infer that those elements also existed in every instance.

In arguing their cases to the Labor Board the carriers maintained that they should not be penalized unless the Sunday business might be curtailed nor when the work could not be avoided. That, we think, perhaps presents a proper solution of our problem. There are certain services which railways have rendered so long that they have become practically indispensable. The men necessary to furnish such service, ticket agents, announcers, etc., may be employed with impunity under the rule. There are other services, like the handling of this freight, which can be deferred and performed on Monday without violating any obligation owed the public. If to meet competition the carrier elects to render better service it may do so, paying the price that its competitors must meet under the self same rule. To quote from the decisions referred to, such for instance as the well chosen wording appearing on page thirty-eight of the record, would lend strength to our conclusion. We consider the cases precedents which we should not overrule unless we believe them manifestly erroneous.

It was urged that the business of railroading mustn't become static and that what was not necessary in the horse and buggy days may be most necessary now. This is unquestionably correct, but it can never justify an unaccepted modification of a rule nor a disregard of interpretations given the rule under the ordinary processes of the law. The remedy, if parties can't agree, lies elsewhere.

If the claimants were regularly assigned to Sunday work not necessary in the continuous operation of the carrier and to such continuous service, but at the same time were regularly assigned another day of rest, their redress cannot, in our opinion, be extended to compensation under Rule 33 for services not rendered on the day of their relief, such day not being included in their assignment.

AWARD

Claim allowed for additional half time for Sunday work and denied for day assigned off duty. Time to be computed on the basis of the rules governing overtime pay for regularly assigned and hourly paid men, as applicable.

NATIONAL RAILROAD ADJUSTMENT BOARD,
By Order of Third Division.

Attest: H. A. JOHNSON,
Secretary.

Dated at Chicago, Ill., this 9th day of October 1936.

DISSENT

The claim in this dispute, though including an allegation that Rule 33 relating to suspension of work during assigned hours for the purpose of absorbing overtime was involved, was based primarily on an alleged violation of Rule 32 (c), the Sunday and holiday rule, which provides for pay at the rate of time and one-half thereon, "except that employes necessary to the continuous operation of the carrier and who are regularly assigned to such service will be assigned one regular day off duty in seven, Sunday if possible, and if required to work on such regularly assigned seventh day off duty will be paid at the

rate of time and one-half time; when such such assigned day off duty is not Sunday, work on Sunday will be paid for at straight-time rate."

The carrier showed that the public demanded of the railroad's traffic department such service on their less-than-carload freight as required the provision of additional train service and of necessary improvements at the Utica Transfer Station at an expenditure of $96,000.00, which admitted the movement of such transfer freight from New York and New England points on fast scheduled trains connecting with through trains at De Witt and Gardenville, thereby meeting the public demand: thereupon the Utica Transfer Station had been placed in daily operation including Sunday and holidays and the employees who were regularly assigned to the operation of this transfer were given one regular day off duty in seven, Sunday if possible.

This operation of the transfer as one element of the service provided to meet the public demand was necessary for the continuous operation of the carrier. It was shown that unless the transfer was thus operated there would have been a delay of 24 hours on the westbound freight, which included that for which the additional train service and transfer facilities were furnished.

The Sunday and Holiday Rule, having the same wording as Rule 32 (c), was first promulgated for this class of employes included in this dispute in a decision, No. 1621, February 28, 1923, by the United States Railroad Labor Board in which the following statement relating to this rule was made:

> "The Sunday and holiday rule herein promulgated is similar to that recently handed down in favor of the signalmen. It simply recognizes the justice of the principle that every employee is entitled to one day off duty in seven. In practice, that day will and should ordinarily be Sunday, but work necessary to the continuous operation of the carrier *in its service to the public* may be done on Sunday without the payment of punitive overtime by the carrier's assignment of some other day of rest to those engaged in such indispensable Sunday work. In such circumstances as an employee is required to work on his regularly assigned day off duty he will receive time and one-half. This rule is designed to guarantee to the employee so far as possible one day of rest in seven without undue expense or inconvenience to the carrier. It recognizes the rights and necessities of the carrier, the employee, and the public." [Italics ours.]

The record in this case conclusively shows that employees engaged on this transfer work at Utica were regularly assigned; they were first so designated in the statement of claim, and ex parte submission by the employees, in these words:

> "Claim * * * that all employees *regularly assigned* or required to work Sunday, June 23rd, 1935, or any Sunday thereafter, should be compensated at the rate of time and one half for all Sunday work performed; * * *" [Italics ours.]

This was supplemented by the employees' statement of facts in these words:

> "* * * Such of these employees as were *regularly assigned* to work Sundays were assigned one day off duty in seven, other than Sunday." [Italics ours.]

The above statements by the employees were confirmed by the position of the carrier which stated:

> "* * * *It is necessary to operate this transfer for the continuous operation of the carrier*, and the employes who are regularly assigned to such service are assigned one regular day off duty in seven, Sunday if possible."

The statement of the Labor Board in promulgating this rule plainly indicated that for this class of employees there was some service necessary to the continuous operation of the carrier and by their statement they expanded the requirement that "employees necessary to the continuous operation of the carrier" under the provisions of this rule would be "in its service to the public." The rule therefore specified in its exception, which admitted of pro rata pay on Sundays, but two requirements, viz: (a) that employees should be necessary to the continuous operation of the carrier, and (b) that they be regularly assigned to such service. The record in this case leaves no doubt that the employees

were regularly assigned to the service at this transfer station. The award dwells on that feature by saying: "The record is silent as to the nature of the assignments of the men employed, but we suppose we are justified in stating that if they did not regularly cover just such service they, too, would be entitled to penal overtime, if their regularly assigned assignments included another character of work," but proceeded to award additional one-half time pay for Sunday work to *regularly assigned* men as well as to hourly paid men.

That finding is to ignore the avowed purpose and the exhibited record of the institution of the service to the public which was provided, and the assignment regularly of employees at the Utica Transfer Station, all according to the Sunday and holiday rule which only permitted the carrier under its agreement with the employees to thus arrange its working force to permit of this continuous operation without doing violence to the intent of the agreement and the purpose of the rule to provide a Sunday day of rest except as respected those employees necessary to continuous operation of the carrier thus regularly assigned, as exhibited by the record in this case.

The award, in respect to the work at the Utica Transfer being of a character necessary to the continuous operation of the carrier in its service to the public, admits that in the negotiation of this rule it must be meant that there was some Sunday work which was necessary and some which was not. It then further relies upon a general conclusion not of record that transfer of less-than-carload shipments on the Sabbath Day is a sort of service to which patrons of the carrier were unaccustomed and which they were not entitled to demand. It further follows awards rendered by Boards of Arbitration in four cases quoted in the file; the record in the instant dispute clearly shows the circumstances as to revision and extension of train schedules, additional service supplied, new business secured, etc., was essentially different from the showing of the circumstances in the four cases covered by the former awards, notwithstanding which the instant award states that "it is fair to infer that the elements also existed in every instance."

The record in the file covering those four former awards contained no adequate description of the situations and the conditions relating to the circumstances presented in those disputes which would admit of such inference as there stated that the combined elements of additional train service, new transfer facilities, and regular assignment of employees therein existed in any of the previous cases.

It is evident that the assumption that patrons of the carrier must be accustomed to certain character of service in order to cause it to be classed as necessary to the continuous operation of the carrier, and that the transfer of less-than-carload shipments on the Sabbath Day is not service of that character, and that the inadequacy of the record of circumstances in the four former awards relied upon to show correct analogy with the circumstances of the instant dispute, provide an unsound foundation for an award which declares the service in the instant case to be not necessary to the continuous operation of the carrier.

The award is in error in its statement that "there are other services, like the handling of this freight which can be deferred and performed on Monday without violating any obligation owed the public." The suggestion from an Adjustment Board whose jurisdiction is limited to interpretation of contracts that a carrier should suspend or delay its service in order that an award emanating from the Board may have some basis of support is an erratic gratuitous finding without binding requirement and indicative of the fallacy leading to the award. If general statement as to the virtue of the need for handling freight on Sunday was justified it should at least have been taken from the record, in which event some consideration should have been given to the award by the Board of Arbitration on the N. C. & St. L. Ry. which was before the Division and definitely upheld the handling of less-than-carload freight on Sunday as a service necessary to the continuous operation of the carrier and within the provisions of the rule here involved; in fact, nothing in the record covering the four awards relied upon gives support to the finding that the handling of less-than-carload freight can be deferred from Sunday until Monday or that it was not necessary to the continuous operation of the carrier under circumstances of record in the instant dispute.

To establish that service necessary to the continuous operation of the carrier is that only to which patrons had been accustomed, and to say that the transfer

of less-than-carload shipments on the Sabbath Day was service to which patrons were not accustomed and therefore not entitled to demand, and to suggest that the handling of freight arriving at a transfer station on Sunday be deferred until Monday is not only to place unwarranted limitation upon the rules of the agreement that apply, but is to establish a standard for management and operation of the railway in respect to suspension or delay of service wholly unwarranted by a board without the authority or the competency to make such findings.

(s) C. C. COOK.

The undersigned concur in the above dissent:

(s) A. H. JONES.
(s) R. H. ALLISON.
(s) GEO. H. DUGAN.
(s) L. O. MURDOCK.