

NATIONAL RAILROAD ADJUSTMENT BOARD

Third Division

Robert G. Corwin, Referee

PARTIES TO DISPUTE:

**BROTHERHOOD OF RAILWAY AND STEAMSHIP CLERKS, FREIGHT
HANDLERS, EXPRESS AND STATION EMPLOYES
SOUTHERN PACIFIC COMPANY (PACIFIC LINES)**

DISPUTE:—

"Claim of employees at West Oakland Car Shops, Western Division, who were assigned to positions of Material Clerk (sometimes referred to as Time Clerk) from September 16, 1927, to June 15, 1930, and the position of Shop Clerk, from September 16, 1927, to the present time, that they should be paid for time lost on week-days and at rate of time and one-half for services performed on any and all Sundays, between the dates as shown above."

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. (See Award No. 332.)

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

The case being deadlocked, Robert G. Corwin was appointed Referee to sit with the Division as a member thereof.

Prior to January 1926 it had been the practice of the carrier to assign a material and shop clerk regularly employed six days a week to Sunday work in the shop offices and adjoining yards at West Oakland. This work was alternated from week to week and the men engaged were paid time and a half for their service. In the month mentioned, without agreement, the work was assigned to a material clerk at straight time. This action being protested, a temporary arrangement was effected, which the employees notified the carrier in August 1926 they wished to terminate as they claimed it a violation of their rules. Thereupon, the carrier assigned one material and one shop clerk to the service with Wednesday and Thursday off, respectively. On such off days no relief men were called to perform their duties, but they were delegated in part at least, to another material and shop clerk, there being two of each at the passenger and freight shops and yards.

The men so assigned now claim time and a half for their Sunday work because of an alleged violation of the Sunday rule. While the submission is somewhat confused by other contentions, the issue for adjustment now seems to have reduced itself to this one question. The carrier frankly admits that its purpose was to avoid overtime payments and says that under the arrangement it can operate satisfactorily. The employees assert that unless relief men were used on the off-week days the rule referred to has been violated and that they are entitled to additional payment for Sunday service and compensation at the regular rate for the week days on which they did not work.

The first part of the claim requires a construction of Rule 25 of the Clerks' Schedule, which, with an immaterial omission, reads as follows:

"*Sunday and holiday work period.*—Work performed on Sundays and the following legal holidays * * * shall be paid at 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 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; when such assigned day off duty is not Sunday, work on Sunday will be paid for at the straight-time rate."

In order to properly interpret this rule it is helpful to know something of its history. For many years the employees had sought to eliminate all Sunday railway work insofar as possible, and had even asked that whatever Sunday work was performed should be paid for at the higher rate. The United States Railroad Administration and the United States Railroad Labor Board felt that this would impose too great a burden on the carrier and the public. A certain amount of Sunday freight and passenger transportation had always existed, the men performing it being paid the regular rates. The public demanded and had the right to expect such Sunday traffic. There was, on the other hand, much work connected with the operation of the railways which could be quite well accomplished during the days of the week exclusive of Sunday, such, for instance, as the maintenance of ways. A distinction or demarcation came to be recognized between what were termed six-day and seven-day workers (Interpretation No. 3, Decision 2687, U. S. Railroad Labor Board). The Signalmen and others finally secured some partial relief and a rule similar to Rule 25, quoted above, was promulgated in their behalf. For a time it was considered that so many of the employees included in the Brotherhood of Railway Clerks were necessary in seven-day operation—ticket sellers, train callers, etc.—that the rule was not extended to them until 1923. During that year it became a part of the Southern Pacific Clerks' Schedule.

In a sense it might be said that every railway employee is essential to its continuous operation, otherwise he wouldn't be hired. But it is evident when we take the intent of the rule into consideration that it must be given a less extended application. It will be conceded, we think, that the words "continuous operation" mean a constant movement of service, a daily flow of transportation. They may not imply an incessant operation of trains and other facilities, but such a continuous operation as business will economically justify. And so, we take it, it was intended that employees who were essential to such continuous daily operation might be worked on regular assignments to such service, and to such extent on Sundays as was unavoidable, at straight time rates.

The rule, of course, includes not only men who work on trains but also those whose employment is a necessary incident to train movement. The claimants herein performed work in connection with the temporary repair of engines and cars just as indispensable as the service of the trainmen, and it is not disputed that Sunday service of such a nature was required.

The point raised is that under the circumstances they were not regularly assigned to continuous operation. If their contention is correct, then they do not come within the single exception which is made to time and one-half payment for Sunday work. Can it be maintained that because their Sunday labor was necessary it was necessary to the continuous operation of the carrier and that they were regularly assigned to such service within the meaning of the rule?

The other clerks in the shops and yards worked from Monday to Saturday inclusive. Such was their scope of duty. Sunday had nothing to do with it. They were six-day men and as such could not be considered employees "necessary to the continuous operation of the carrier and assigned to such service" any more than a section man who was awarded work for a day or two in the week. The obvious reason is that their tour of duty was broken. Now, Rule 25 provides in substance that the class of men which its exception embraces shall be assigned for seven days, one day off duty in seven to be assigned, Sunday if possible, time and a half to be paid the employee if worked on the regularly assigned seventh day of duty. That means, it seems to us, that if the benefit of the exception is sought by the carrier it must establish a seven day position, allowing a specified day off, whatever it may be. If such a position is created it must be kept filled in order to fulfill the requirement of a regular assignment to a position occupied by an employee necessary to the continuous operation. If an employee is assigned to duty from Thursday morning to Tuesday night, including Sunday, his tour of duty is broken fully as much as though it ran from Monday morning till Saturday night. While the rule speaks of

employees, when it provides for their regular assignment, this can only be to positions, out of which it plainly states they shall be assigned one day off out of seven.

The fact that work is necessary on Sunday does not of itself prove that it is necessary in the continuous operation of the carrier. It is quite conceivable that work might be necessary on Sunday which could be entirely dispensed with on another day during the week. The rule says nothing specifically about necessary Sunday work, only that if an employee is necessary to the continuous operation of the carrier and regularly assigned to such service, i. e., to continuous operation, he may be worked on Sunday without penalty. He is to have Sunday off if possible, if not, one other day out of his seven-day position.

Such a position is entirely different from a six-day position. The rule itself draws a distinction between service in continuous operation and service in non-continuous operation. The latter of course is service of a sort in which a break occurs. If the carrier wishes to establish a seven-day position in continuous operation, it should be done by bulletin as a new one. It does not appear from the record that such a seven-day position was so established. There had been six-day jobs and the management simply assigned two of them to work on Sunday with other days off. On those days it had the work done, in part perhaps, by other clerks from another yard. Those clerks held positions of their own, regularly assigned. If seven-day positions had been properly created, they couldn't fill them on their off days and handle them in connection with their own without holding two positions in different kinds of service, viz: six and seven day service. It would therefore seem that they would have to be filled on the off days by extra or relief men, to make the weekly cycle complete.

This, we think, the United States Railroad Labor Board held in the questions and answers contained in its decisions Nos. 2853 and 3341. Other decisions relating to seven-day assignments and the use of relief men are Interpretation No. 3 to Decision No. 2687, Decision No. 4054, and 3784.

In the instant case the carrier says that it did not assign extra men to the off days and that the rule did not require it to do so. As stated, we do not believe it established positions in continuous operation, only different six day assignments on which Sunday work calls for payment at time and a half under the general part of the rule. To consistently avail itself of the exception it would be compelled to work the positions as distinct entities all week. We cannot see how an employee could be regularly assigned to a position in service in continuous operation unless the position itself is continuous. That the rule requires one day out of seven to be assigned as an off day doesn't reduce the position to a six-day assignment. That off day must be filled by a suitable employee assigned to it in order to maintain the position in continuous operation.

We have indulged in such a lengthy analysis of the rule because we have not been able to find its complete interpretation in any decision or award. A dispute very similar in fact and in principle under an analogous Signalmen's rule was advanced to this Division in Docket No. SG-341, Award No. 278. But before it was adjusted by the Division it was settled, and the case was dismissed. It cannot therefore be regarded as a precedent. Decision No. 3930, Docket No. 4389, of the United States Railroad Labor Board, dated shortly subsequent to the promulgation of the rule, wherein it was construed by the authority which wrote and should have understood it, seems to squarely support the conclusion we have reached, although the opinion and award are brief. We have found nothing to the contrary and in view of our own interpretation of the rule feel constrained to follow the Labor Board.

Coming now to the second part of the claim, for regular time for the week days of the employees when off duty, the employees invoke Rule 22 to sustain the same. It provides that they shall not be required to suspend work during regular hours to absorb overtime. We are unable to find that they were required to suspend any work during the days of their regular assignments, nor that there was any suspension of regular hours to make up overtime to which they would have been otherwise entitled. It is possible that a relief man might have been assigned to do the Sunday work as he might have been required to work on an off week-day at straight pay. Sunday work was necessary, and if the carrier had created an all-week position, we would think it might reasonably exercise a discretion as to whether the man regularly assigned

to it with one day off should be required to work Sunday, without payment of time and a half, if the position is fully filled. On the other hand, if it wants a six day position, Sunday may be included if the penalty is paid. Rule 24, cited by the carrier, as we have recently held, is inapplicable.

AWARD

Claim sustained for time and a half payment for work on Sundays but denied for work not performed on week days off.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Attest: H. A. JOHNSON
Secretary

Dated at Chicago, Illinois, this 10th day of November, 1936.