

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Frank M. Swacker, Referee

PARTIES TO DISPUTE:

**BROTHERHOOD OF RAILWAY AND STEAMSHIP
CLERKS, FREIGHT HANDLERS, EXPRESS
AND STATION EMPLOYES**

NORTHERN PACIFIC RAILWAY COMPANY

STATEMENT OF CLAIM: "Claim of C. F. Pickrell for time and one-half rate for service performed in Seattle yard on Sunday, September 13, 1936."

STATEMENT OF FACTS: The following statement of facts was jointly certified by the parties:

"Mr. Pickrell's seniority did not permit him to occupy a regular assignment and he was being used to perform extra and relief work in Seattle yard. Mr. L. C. Christensen, occupying position of weighmaster, had his day of rest on Sunday. On Sunday, September 13, 1936, Mr. Pickrell was used on Mr. Christensen's position. The work of this position consisted of weighing cars and performing general yard clerk's work including the checking and carding of trains, checking cars, and other work incident to the movement of trains."

POSITION OF EMPLOYEES: "Rule 69, Clerks' Agreement, reads as follows:

'Rule 69. Work performed on Sunday and the following legal holidays—namely, New Year's Day, Washington's Birthday, Decoration Day, Fourth of July, Labor Day, Thanksgiving Day, and Christmas (provided when any of the above holidays fall on Sunday, the day observed by the State, Nation, or by proclamation shall be considered the holiday), shall be paid 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 rate.'

"The services performed by Mr. Pickrell on September 13, 1936, were required by the Carrier because this was the established rest day of the regular incumbent of the position. The primary and affirmative provisions of Rule 69 require that Sunday work be paid for at the rate of time and one-half. The exception to the primary or affirmative provision of the rule provides that two conditions stipulated therein must be met before the exception is applicable. These exceptions are:

"(1) Employee must be shown to be necessary to the continuous operation of the carrier, and

because such an assignment was not made that the Railway Company be penalized by the payment of time and one-half rate for the service performed by Mr. Pickrell on Sunday, September 13th. Obviously their position is untenable.

"The application of a provision of an agreement for years to like conditions with the concurrence of the parties to such agreement, or without protest from either which amounts to concurrence, is competent evidence that both parties are agreed that such application is in conformity with the language and intent of the agreement. This is the situation that exists on the Northern Pacific Railway with relation to the proper application of amended Rule 69 to service performed by Mr. Pickrell on Sunday, September 13, 1936.

"The Employes' claim ignores the purpose of the rule and the fact that it was complied with by affording Mr. Christensen a day of rest. It is in conflict with the proper interpretation of the rule as expounded by the Northern Pacific Clerks' General Chairman and by Mr. Oliver. It is also in conflict with their position in cases covered by your Awards Nos. 105, 106 and 107, and in cases covered by Decisions Nos. 31 and 32 of the System Adjustment Board. It also ignores the fact that the rule has been applied on this Railway since May, 1923, under exactly the same conditions as it was applied in Mr. Pickrell's case."

OPINION OF BOARD: The parties are in agreement that C. F. Pickrell is an extra unassigned clerk; that he worked on Sunday, September 13, 1936, in the place of a regularly assigned clerk and that the service he performed was in connection with or incident to the movement of trains running every day of the week. It is also agreed that the service on the position in question was "necessary to the continuous operation of the carrier." The best evidence of this is the fact that the position is filled every day of the year, including Sundays and holidays.

The facts not being in dispute, the sole question then for determination is the application or interpretation of the Agreement.

It will be observed in this case the regular incumbent of the position was assigned Sunday off. The provision of the rule "who are regularly assigned to such service" applies to the regular incumbent or assignee of the position for six of the seven days; it does not relate to the party who may relieve on the day off.

Growing out of the principles involved in the seniority rules the carrier is obligated to make as many full time positions as possible as opposed to using furloughed or extra men. This results in the establishment of regular relief positions working six days per week. If, therefore, the incumbent of a regular relief position occupies the off day of a position in continuous operation, whether such off day be Sunday or any other day, such relief man receives only pro rata time.

It is not always possible to relieve a continuous operation position by a regularly assigned relief position. It is obvious that this is possible only in multiples of six. For example, if at a particular operation there were seven continuous operation positions, six of these could be filled by a regular relief assignment, but there would be one over which would have to be relieved in some other manner, generally by a furloughed or extra man. If such furloughed or extra man relieves the seven day position on a week day he is, of course, entitled only to straight time rate and the regular incumbent would be entitled only to straight time rate for the Sunday work; but if the seven day position has Sunday as the off day and it is filled by an extra or furloughed man, he then is subject to the first section of the Sunday rule, that is, he is entitled to time and one-half for such work. This is so because he has nothing to do with the exception to the rule; he is in no sense regularly assigned and as before pointed out this phrase relates to the regular incumbent and not to the extra man.

The exception relieves the carrier of payment for time and one-half to the regular incumbent of a seven day position if he works on Sunday. Therefore, the exception does not come into operation at all where the regular man has Sunday off, so far as he is concerned, but if the position is relieved by a regular relief man then the exception operates as to this regular relief man, because he is then regularly assigned.

Accordingly it is concluded that the claim herein should be sustained.

FINDINGS: The Third Division of the Adjustment Board, after giving the parties to this dispute due notice of hearing thereon, and upon the whole record and all the evidence, finds and holds:

That the carrier and the employe involved in this dispute are respectively carrier and employe within the meaning of the Railway Labor Act, as approved June 21, 1934;

That this Division of the Adjustment Board has jurisdiction over the dispute involved herein; and

That under the provisions of Rule 69 C. F. Pickrell was an extra un-assigned employe and, therefore, shall be paid time and one-half rate for Sunday, September 13, 1936.

AWARD

Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: H. A. Johnson
Secretary

Dated at Chicago, Illinois, this 24th day of March, 1938.