

Award No. 750
Docket No. CL-738

**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**

CHICAGO AND NORTH WESTERN RAILWAY COMPANY

STATEMENT OF CLAIM: "Claim of employes, U. S. Mail Department, Chicago Passenger Terminal, coming within the scope of clerks' agreement, for time and one-half when required to work on Sundays while their positions are blanked on their assigned relief day during the week, and for retroactive compensation from time the above request was first presented to the management, as of December 4, 1936."

STATEMENT OF FACTS: The following statement of facts was jointly certified by the parties: "For the work of handling U. S. mail in its Chicago Passenger Terminal, the railway company, as of the effective date of this claim, employed 121 men, working as follows:

	WORKING	OFF
Sunday	65	56
Monday	97	24
Tuesday	114	7
Wednesday	117	4
Thursday	118	3
Friday	117	4
Saturday	98	23

"Of the total of 121 employes, there were 65 assigned to work on Sunday, with one week day off as rest day. These 65 employes were and are paid at pro rata rate for Sunday service.

"Employes, by classes, not working on the various days of the week are as follows:

Off	Foreman	Checker	Sorter	Loader	Handler	Trucker	Total
Monday	1	1	5	4	3	10	24
Tuesday	0	0	2	3	0	2	7
Wednesday	0	0	0	0	0	4	4
Thursday	0	0	0	0	0	3	3
Friday	0	0	0	1	0	3	4
Saturday	0	1	1	3	1	17	23
Sunday	4	1	5	8	2	36	56

Total Force	5	3	13	19	6	75	121
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"Rule 40, clerks' agreement, provides:

'Work performed on Sundays and the following legal holidays—namely, New Year's Day, Washington's Birthday, Decoration Day,

regular assigning of relief clerks for positions that would be considered as necessary to the continuous operation of the service as provided for in rules agreement."

POSITION OF CARRIER: "It cannot successfully be argued that the handling of U. S. mail on railway trains is not necessary to the continuous operation of the railway. As a matter of fact, such service requires not only twenty-four hours per day, but 365 days per year. The organization in the U. S. Mail Department, as indicated in the joint statement of facts, has been substantially the same for many years, including a long period prior to the effectiveness of the National Agreement applicable to clerks and station employees, January 1, 1920.

"The provisions of rule 40, on which the employees are predicated their contention in this case, and as quoted in the joint statement of facts have also been in effect on this property for many years. However, at no time prior to the submission of the present case have the employees contended that under provisions of the rule employees assigned to the handling of U. S. mail in the Chicago Passenger Terminal, and who were employed in such work on Sundays and relieved some other day of the week, were entitled to rate and one-half compensation for service performed on Sundays.

"The present contention of the employees was not developed until subsequent to the issuance of this Board's Award 336, involving a dispute between the Brotherhood and the Southern Pacific Company (Pacific Lines), in the claim of certain employees in the West Oakland car shops of that railroad.

"It is the position of the railway company that compensating employees working on Sundays in the U. S. Mail Department at pro rata rate is proper, under provisions of rules applicable, and as agreed to between representatives of the brotherhood and the railway company.

"It is further the position of the railway company that the individuals, claimants in this case, are relieved of the performance of their assigned duties on other days of the week, and an employee assigned to perform the work which they would perform were they employed on such relief day."

OPINION OF BOARD: The proper construction of the Standard Sunday Rule has been repeatedly considered by this and other Boards particularly in this Division's Awards 314, 336, 540, 594 and 596 and Express Board of Adjustment No. 1, Decisions E-456 and E-669. In the instant case the whole matter has been re-argued and it is earnestly urged that the conclusions reached by those decisions are not in conformity with the intent of the Railroad Labor Board to which careful consideration has been given. As is well known, the rule was not the product of agreement between any of the parties but was one promulgated by the Railroad Labor Board intended to accomplish a minimization of Sunday work and provide for time and one-half for certain of it and straight time for other of it, the latter to be applicable to regularly assigned work necessary to continuous operation. Naturally, the framers of the rule could not envision and provide for detailed application to all conceivable situations. It was rather a declaration of principles and it is considered that Decisions 314 and 336 are not in conflict or inconsistent with the principles sought to be effected but simply spell out the detailed operation of the rule as applied to the cases presented; the other decisions after re-examining those two reaffirm the conclusions reached by them and further apply the rule to the situations presented in the cases involved in them. It cannot be gainsaid that they afford a workable, practicable basis of application of the intent of the rule. The rule is National in its operation and its application as indicated by these decisions should be well understood by now and probably is being generally observed throughout the country, so that, were the questions presented regarded even as close, it would be in the interest of repose not to disturb this settled construction. Indeed in the instant case the carrier somewhat inconsistently

asserts, most vigorously—and the organization as vigorously denies—that it is complying with the rule as construed and it is undisputed that it is actually doing so in the adjoining baggage department.

The substance of the decisions as to the construction of the exception permitting pro rata pay for Sunday work is that the positions to which it is applicable:

- (a) Must be ones worked seven days per week.
- (b) That there must be a regularly assigned incumbent of the position.
- (c) That such incumbent must be accorded one regular day off in seven.
- (d) That to be a position in continuous operation it is essential that the day off be filled by a regularly assigned employee.

It would be a contradiction in terms to say that a position was in continuous operation if on the incumbent's day off the position could be unfilled. Those conclusions are reaffirmed.

Under agreements permitting the employment of extra men the relief could be by an extra man, but, of course, if the off day of the seven day assignment is Sunday and the relief is worked by an extra man, he would be entitled to time and one-half since he holds no regular assignment and hence would be subject to the first part of the rule. Under seniority principles generally applicable there is an obligation to create as many full time positions as possible in order to permit of the exercise of seniority and so if the relief was performed by a regular assignee, even though it fell on Sunday it would be subject to the exception and pay only straight time. Naturally, if the day off of the 7 day assignment is a week day, it is immaterial by whom the position is filled, so long as it actually is filled.

The facts in the instant case are in hopeless disagreement. A joint statement of facts was agreed to by the superintendent and division chairman which conceded that none of the positions involved was filled on the off day. This the carrier now denies claiming the admission only went to payroll designation and it asserts that, with a few admitted exceptions, all the positions were regularly relieved on the off day and as the case was closed filed an exhibit purporting to show (with the exceptions admitted) that each of the positions was relieved on the off day. The organization insists that the alleged relief is only putative or nominal, not actual.

As has been held before the relief must be real, actual, not merely asserted by the designation of someone as supposed to be relief when that one might in fact be engaged on his own regular work even though it might be of the same character as the others.

The operation—mail handling—is of a type that undoubtedly would have several continuous operation positions yet it definitely appears that there are at least several Sunday working positions whose relief day is not filled and yet all are paid pro rata rate for Sunday.

On each occasion where an employe worked on Sunday and his position was not actually filled on the off day, he is entitled to time and one-half for the Sunday.

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 employes involved in this dispute are respectively carrier and employes 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 the carrier violated the provisions of Rule 40 of the current agreement.

AWARD

Claim sustained to extent indicated by opinion.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: H. A. Johnson
Secretary

Dated at Chicago, Illinois, this 9th day of November, 1938.