

Award No. 1846
Docket No. CL-1755

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

John W. Yeager, Referee

PARTIES TO DISPUTE:

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

**GULF COAST LINES, INTERNATIONAL-GREAT NORTHERN
RAILROAD COMPANY, SAN ANTONIO, UVALDE & GULF
RAILROAD COMPANY, SUGARLAND RAILWAY COMPANY,
ASHERTON & GULF RAILWAY COMPANY**

(Guy A. Thompson, Trustee)

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

(a) Effective November 1, 1940, the correct rate of pay for the position of Rate Clerk in the Palestine, Texas Freight Station is \$7.34 per day with an annual assignment of 306 days. Also

(b) Claim that the Rate Clerk be paid an additional day's pay at the rate of time and one-half for each Sunday and holiday worked from November 1, 1940 until the correct rate of pay and assignment is made effective.

EMPLOYES' STATEMENT OF FACTS: The Rate Clerk at Palestine, Texas is assigned on a 365 day annual basis and is paid \$6.15 per day.

The work performed by the Rate Clerk on Sundays and holidays consists of making expense bills on freight to be delivered the following day; daily report of cars loaded, and report of cars loaded at Tucker.

All of the work that is now performed on Sunday was formerly done the following day.

Prior to August 2, 1936 this position had an annual assignment of 306 days. The 365 day annual assignment was then put into effect in order that the expense bills could be made on Sundays and holidays, thereby making possible earlier delivery of freight the following day. The making of the daily report of cars loaded and the report of cars loaded at Tucker have never been required on Sunday or holidays, being made the following day, however, the Rate Clerk, of his own accord, because of having plenty of time on Sundays and holidays, began making those reports on Sundays and holidays.

POSITION OF EMPLOYES: During our 1940 rules negotiations we endeavored to reduce all 365 day annual assignments to 306 day annual assignments without any reduction in the earnings of the positions. We were unable to reach an agreement to that effect, however the carrier did very readily recognize and agree that there are many 365 day annual

same at the conference on May 19 and 20, 1941, referred to above, the only matter having been discussed being with respect to the positions which the Organization proposed to change from a 365 day annual assignment to a 306 day annual assignment.

Attention of your Honorable Board is called to the fact that prior to August 1, 1936, the position was assigned on the basis of 306 days per year and that at the time the rate was converted from a monthly to a daily rate, divisor of 306 was used instead 365, therefore, the present rate of \$6.15 per day is the established daily rate for the position based on an assignment of 306 days per year. Since August 1, 1936, the assignment has been 365 days per annum, which includes Sundays and holidays and to agree to relieve the employe of Sunday and holiday work and change the rate so that the employe would receive, for 306 days, compensation equal to that he is receiving on the basis of 365 days would have the effect of obtaining a daily rate a second time by using the divisor of 306 and thus change the basic rate which has been agreed to as proper for the assignment of the employe on a 306 day per annum basis.

There was no intention whatever to increase the rates of pay in agreeing to relieve employes of Sunday and holiday work wherein their rates were obtained in the first place by converting the monthly rate to a daily rate by the use of the 306 day divisor.

It was recognized in the settlement of the Robstown case, heretofore referred to, that employes whose daily rates were established by dividing the yearly compensation by 365 and later reassigning the positions to 306 days that it had the effect of reducing the annual compensation of the employes which they had enjoyed prior to the conversion and which daily rates would have been established had they, at the time of the conversion, been assigned on a 306 day basis. Conversely, it can readily be seen that wherein an employe's daily rate was established by dividing his annual compensation by 306 and later changing his assignment to 365 days per annum and thereafter, in relieving him of the Sunday and holiday work, he would be in the same position that he was prior to the time that he was assigned on 365 day basis.

It was the contention of the employes that at the time the conversion was made from a monthly to a daily rate that there were a number of employes whose services were not required on Sundays and holidays and that the daily rate obtained by dividing the annual compensation by 365 days would have the effect of reducing the employes' compensation if their annual assignment was later reduced to 306 days without adjusting the daily rate on the basis of the changed assignment and it was the protection of the employes in such cases that the representatives of the employes indicated to the Carrier they had in mind at the time the letter of understanding, dated October 13, 1940, was signed by the General Manager and accepted by the General Chairman.

It is the contention of the Carrier that the duties performed by the position involved in this case are of such nature that it is necessary for the same to remain assigned so as to include Sundays and holidays and it is the further contention of the Carrier that your Honorable Board should dismiss this case for lack of jurisdiction inasmuch as the determination of positions assigned to Sunday and holiday work necessary to the continuous operation of the Carrier is subject for negotiation between the parties by agreement.

OPINION OF BOARD: This is a claim by the System Committee of Brotherhood that effective November 1, 1940 the position of Rate Clerk at Palestine, Texas Freight Station is entitled to pay for work on Sundays and holidays at time and one-half, whereas the carrier contends that for such time the pro rata rate of the position shall apply.

The committee urges that the matter is controlled by Rule 47 of the Agreement, which Agreement was concluded on November 1, 1940, and a letter from the General Manager of the carrier to the General Chairman of the Brotherhood dated October 13, 1940, which the Committee insists has become a part of the Agreement, although it is antecedent to the Agreement.

Rule 47 is as follows:

"Work performed on Sundays 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 for at the rate of time and one-half except that employes regularly assigned to work full time on Sundays and the seven designated holidays, and men called to fill their places on such regular assignment will be compensated at the pro rata rate of the position."

The body of the letter of October 13, 1940 is as follows:

"With reference to agreement regarding the 365 day assigned positions not necessary to the continuous operation of the carrier.

It is agreed that all 365 day assignments, not necessary to the continuous operation of the carrier, will be reduced to 306 day assignment and the daily rate will be adjusted so that the earnings will be the same as received for 365 days.

This understanding shall remain in effect until changed in accordance with the terminating rule of the Agreement."

The Committee points to Rule 71 as evidence that the letter of October 13, 1940 became a part of the Agreement which was consummated on November 1, 1940.

Rule 71 is in part as follows:

"(a) This agreement shall be effective November 1, 1940 superseding all other rules, agreements and understandings prior to October 13, 1940 in conflict herewith, and shall continue in effect one year, and thereafter until it is changed as provided herein or under provisions of the Railway Labor Act."

It will be noted that under Rule 47, in all positions assigned for 365 days a year, the employes were to be paid for Sundays and holidays on the regular daily pro rata basis, but that those which were assigned otherwise where the employe was called to duty on Sundays and or holidays they were to receive time and one-half for such days.

It will also be noted that in the absence of the letter there was and is no restriction upon the right of assignment of positions for 365 days per year.

The letter of October 13, 1940, as pointed out in the presentations here, was written during the negotiations leading up to the Agreement of November 1, 1940. At the time the letter was written it is obvious that the General Manager had in mind some Agreement. He had in mind the then existing Agreement or the one that was in prospect. We cannot be so certain from the letter itself what Agreement he had in mind at the time but the sequence of events makes it clear beyond doubt that the carrier by Rule 71 intended to include the letter as a part of the Agreement, or at least not to abrogate, but to preserve it as an existing Agreement between the contracting parties. There was nothing else to which the date of October 13,

1940 could reasonably have referred. By reference and by adoption the letter became a part of the November 1, 1940 Agreement.

By the Agreement or Agreements the carrier bound itself to reduce all 365 day assignments to 306 day assignments except those **necessary to the continuous operation of the carrier.**

It follows then that when such positions were so reduced, or when they should have been reduced, they were no longer properly **employees regularly** assigned to work full time on Sundays and the seven designated holidays within the meaning of Rule 47, and, in consequence, if called to work on Sundays and holidays the occupants of such positions were entitled to time and one-half for such time worked.

This leads to the question of whether or not the duties of the position of Rate Clerk in question were such that, within the meaning of the letter of October 13, 1940, they were necessary to be performed on Sundays and holidays to the continuous operation of this carrier.

It is clear from the record that work in this position on Sundays and holidays contributed to efficiency in operation and expedition in the transportation functioning.

We could philosophize here at length on the value of days for rest and recreation but shall refrain from doing so and express only the evident view that the employees were seeking to preserve for themselves the customarily accepted days of rest, except in those situations wherein imperative duties were required to keep the trains running. The letter of October 13, 1940 accords them that right subject to the exceptions in Rule 47, and provided that the penalty provision of the same rule is applied.

The question may well be asked, would the continuous operation of this carrier be interrupted if the occupant of this position did not work on Sundays and holidays? It is only claimed that delivery of shipments would be delayed.

In certain Arbitration Awards and previous Awards of this Division it has been held that convenience and expediency do not amount to necessity. In certain of them, which will not be enumerated here, it is held that the term must be strictly construed, and in like and analogous situations the work of the position was held not to be necessary to continuous operation.

We accept as controlling here the conclusions arrived at in the previous Awards on the question of whether or not the occupant of the position here involved was performing work necessary to continuous operation of the carrier. We hold that he was not.

It necessarily follows that, to give effect to the herein declared meaning of the Rule 47 and the October 13, 1940 letter, which we hold was by reference and adoption made a part of the Agreement of November 1, 1940, we must find that the Rate Clerk in question at Palestine, Texas, is entitled to time and one-half for work on Sundays and holidays worked from November 1, 1940 to the date of corrective assignment.

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 employees involved in this dispute are respectively carrier and employees 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 claim (a) is sustained and the Rate Clerk in question is entitled to time and one-half for Sundays and holidays from November 1, 1940 to the effective date of corrected assignment.

AWARD

Claim sustained in conformity with Opinion and Findings.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: H. A. Johnson
Secretary

Dated at Chicago, Illinois, this 18th day of June, 1942.