

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Norris C. Bakke, Referee

PARTIES TO DISPUTE:

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

HOUSTON BELT AND TERMINAL RAILWAY COMPANY

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

(a) The Carrier violated the Clerks' Agreement by refusing to reduce the annual assignment of the three Record Clerks to 306 days effective November 16, 1940, with the same monthly rate of pay. Also

(b) Claim that the Carrier be required to reduce the annual assignments to 306 days, retroactive to November 16, 1940, with the same monthly rates as paid for 365 days service. Also

(c) Claim that the Record Clerks be paid an additional day's pay at the rate of time and one-half for each Sunday and holiday from November 16, 1940, until the annual assignments are reduced to 306 days.

There is in evidence an agreement between the parties bearing effective date of November 16, 1940.

EMPLOYEES' STATEMENT OF FACTS: There are three Record Clerks in the Superintendent's Office with annual assignments of 365 days.

The duties of the positions are, as their titles indicate, confined exclusively to the posting of car records.

The work performed by these Record Clerks is the same work performed by the Car Record Clerk in Docket CL-1671, Award No. 1618—the recording of car movements **after** they have taken place.

POSITION OF EMPLOYEES: The employees quote the following from memorandum agreement that became effective November 16, 1940:

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

Prior to November 16, 1940, the carrier was free to maintain a 365 day annual assignment on any position, but, effective November 10, 1940, 365 day annual assignments were restricted solely to positions that are necessary to the continuous operation of the carrier—the carrier being required to reduce all other 365 day annual assignments to 306 days without any reduction in the monthly earnings of the positions.

OPINION OF BOARD: The main question here for resolution is: Are the three positions classified as Record Clerks in the Superintendent's office "necessary to the continuous operation of the carrier" as that term is used in the letter agreement of October 31, 1940, effective November 16, 1940? If that question is answered in the negative, a secondary question also remains for resolution. This secondary question is: Are these employees entitled, under Rule 47 as modified or amended by the letter agreement of October 31, 1940, to receive time and one-half rates for Sundays and holidays worked since November 16, 1940, or straight time rates?

The petitioner contends that these three positions are not "necessary to the continuous operation of the carrier" as that phrase is used in the applicable agreement, as interpreted in Award Nos. 1614 and 1628, in which this Board accepted as precedents the interpretations of Boards of Arbitration of that same language appearing in other collective agreements covering the same class of employees; and that it was there held that such phrase applied to labor and employees engaged "with the continuous operation of trains" (Award No. 1614).

The next contention of the petitioner is that the employees assigned to these positions are entitled to payments at the rate of time and one-half for performed on Sundays and holidays since November 16, 1940.

The Carrier, while now contending that these positions are necessary to the continuous operation of the Carrier, did not so contend while this dispute was being handled in conferences and by letter by the parties on the property. This is conclusively shown by the petitioner in his ex parte submission to this Board, is not disputed by the Carrier, and is further verified by Carrier's ex-parte submission and petitioner's Exhibit R-1. This Exhibit is Carrier's letter to the petitioner of May 31, 1941, wherein Carrier there contended that:

"Investigation made shows it is necessary for these positions to work on Sundays and holidays and present assignment is proper."

Carrier now, however, contends, "that the duties assigned to the record clerks are necessary to the continuous operation of the Carrier."

Another contention of the Carrier is that an agreement was reached between the parties on May 13, 1941, whereby "the three Record Clerks would continue on a 365-day assignment." Carrier also contends that the question of whether these employees should be paid at time and one-half or straight time rates, claim (c), has been settled by prior awards of this Board.

It is clear from the record of this case that these three record clerk positions do not require work or service which has to do "with the continuous operations of trains." The evidence shows that with the exception of 15 days, from January 16 to March 15, 1942, a period of about 60 days, the work performed on these positions was from 1 to 5 days behind, i. e., records of cars were not made on the day of their arrival or departure. This proves conclusively that the work performed on these positions was not necessary to the continuous operation of the carrier. They perform the same kind of work as the Record Clerk covered by Award No. 1618, wherein it was held that such work is not of that character. Further, the Carrier has agreed that the Chief Record Clerk who supervises these three Record Clerks, does not perform work necessary to the continuous operation of the carrier. Moreover, it is shown in the record that 6 other Record Clerk positions are not assigned to 365 days per year, the Carrier thereby recognizing that such work is not necessary to the continuous operation of the carrier.

The Board must hold that these three positions are not necessary to the continuous operation of the Carrier. Compare Award Nos. 1614, 1618 and

1628, the latter covering a dispute between the same parties as are here involved.

On the second question, viz., that these employees are entitled to time and one half rates instead of straight time rates for work performed on Sundays and holidays under Rule No. 47 as supplemented by the letter agreement of Oct. 31, 1940, we have a different situation. In Award No. 1614 where this same question was involved it was specifically held that the employees were not entitled to time and a half for Sundays and holidays. However before that award was announced (Nov. 27, 1941) the carrier in the instant case agreed with a number of the employees whose proper assignments were 306 days that Sundays and holidays would be paid for at the rate of time and one-half, which is clearly indicative of the construction placed upon the agreement and letter agreement of Oct. 31 by the parties themselves.

In addition, in Award 1846, made June 18, 1942, the Referee, after referring to the effect of the agreement, stated, "It follows then, that when such positions were so reduced, or when they should have been reduced, they were no longer properly employees (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 Referee is of the opinion that the observation in Award 1846 on the point is more in keeping with recognized railroad administration than is that announced in Award No. 1614, with due deference to its author; in other words when Sunday and holiday work ceased to be part of the regular duties of these employees, the ordinary rule of time and a half for overtime would apply, and undoubtedly this must have been the theory adopted by the carrier in this case in granting the time and a half in the situation mentioned.

However, the Carrier contends that as to the three employees here involved "the Carrier * * * understood that it was agreeable with the General Chairman for the three record clerks to remain on a 365-day assignment." Not only do the employees specifically deny this but we must agree with them that there is no such agreement in the record, and of course, whatever the "understanding" of the carrier was is not binding on the employees in the absence of agreement. According to the record it was not until April 3, 1942 that the Carrier claimed that these clerks "are necessary to the continuous operation of the Carrier."

The Board therefore holds that under Rule 47 as supplemented or modified by the letter agreement of October 31, 1940, and the granting of the time and one half to certain of the employees whose assignment had been reduced to 306 days that (a) these positions are not necessary to the continuous operation of the Carrier and (b) that these employees should be compensated at the rate of time and one half for work on Sundays and holidays.

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 the letter agreement of October 31, 1940 applies to these three positions of Record Clerk, and under it and Rule 47, they should be compensated for Sunday and holiday work at the rate of time and one-half since November 16, 1940.

AWARD

Claim (a), (b) and (c) sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: H. A. Johnson
Secretary

Dated at Chicago, Illinois, this 26th day of June, 1942.