

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Fred L. Fox, Referee

PARTIES TO DISPUTE:

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

THE WESTERN PACIFIC RAILROAD COMPANY

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood of Railway Clerks that incumbents of positions of Manifest Clerk in office of Superintendent of Transportation who are required to perform service on Sundays and on holidays specified in Rule 22 are entitled to and shall be paid at the rate of time and one-half for all such service performed and that all employes adversely affected by reason of failure of the Railroad so to compensate them shall be reimbursed for all monetary loss sustained.

EMPLOYEES' STATEMENT OF FACTS: Under date of December 15, 1941 positions of Manifest Clerk, hours 4:00 P. M., to Midnight and Midnight to 8:00 A. M., were advertised for bids in office of Superintendent of Transportation. The bulletin stated the positions would be assigned seven days per week.

The employes assigned to these positions have been paid at straight time rate for work performed on Sundays and holidays.

None of the employes assigned has requested in writing that he be allowed to work his assignment continuously instead of being given one day off in seven.

POSITION OF EMPLOYES: There is in evidence an agreement between the parties bearing an effective date of October 1, 1930 from which the following rule is cited:

"Rule 22. 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 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 employes necessary to the continuous operation of the Railroad and who are assigned regularly to such service shall 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 shall be paid at the rate of time and one-half time; when such assigned day off duty is not Sunday, work on Sunday shall be paid for at straight-time rate.

"When employes request in writing that they be allowed to work their assignments continuously instead of being given one day off in seven, or when it is impossible for the Railroad to provide relief on

"San Francisco, Calif.
December 16, 1941

Mr. J. P. Quigley
Supt. Trans. & Telegraph

Dear Sir:

Please consider this as my bid for the position of Manifest Clerk as posted in your bulletin of Dec. 15, 1941, File B-010. Rate of pay to be \$5.69 per day on a 7 day assignment, hours to be 4 P. M. to 12 midnight.

My date of seniority is October 5, 1936. I am familiar with the manifest records and can operate a typewriter.

Yours truly,

(Sgd.) W. W. Callow"

It will be noted that each of these applicants specified that he was bidding on a seven-day assignment at \$5.69 per day and in placing his bid certainly signified in writing that he desired to work his assignment continuously, instead of being off one day in seven as permitted in the second paragraph of Rule 22. Furthermore, inasmuch as these are the only two positions in the office of Superintendent of Transportation assigned on a seven-day-per-week basis, making it impossible to create a six-day relief position, it is clearly apparent that it was "impossible for the railroad to provide relief."

Employees challenged the fact that Rule 22 permits creation of seven-day positions of this character, contending that they are not necessary to the continuous operation of the railroad. During the national emergency, the railroad is operated primarily and to the exclusion of all other business, when necessary, for the army forces. The officers in charge of the San Francisco Port of Embarkation commanded the Carrier to install direct telephone communication with their headquarters and at all times, day and night, to have a competent clerk on duty to furnish information and take instructions concerning army traffic. It can not be denied that it is mandatory for the railroad to be operated continuously for the armed forces and their commands of necessity constitute a condition necessary to the operation of the railroad.

Carrier contends:

- (1) The two positions are necessary to the continuous operation of the railroad.
- (2) The employees, by their bids, requested that they be allowed to work their assignments continuously instead of being given one day off in seven.
- (3) It was impossible for the railroad to provide relief.
- (4) Straight rate, instead of time and one-half, is proper compensation on Sundays and holidays for these positions.

OPINION OF BOARD: The parties to this dispute agree that it should be determined through an interpretation of Rule 22 of the current agreement, effective October 1, 1930, and its application to the factual situation here involved. That rule reads:

"Rule 22. 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 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 Railroad and who

are assigned regularly to such service shall 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 shall be paid at the rate of time and one-half time; when such assigned day off duty is not Sunday, work on Sunday shall be paid for at straight-time rate.

"When employees request in writing that they be allowed to work their assignments continuously instead of being given one day off in seven, or when it is impossible for the Railroad to provide relief on continuous seven-day assignments, payment at straight-time rates instead of time and one-half, shall apply to the assigned hours of such employees.

"Employees who work regular seven-day assignments at straight-time rates will be given as much time off duty on one day each week as circumstances will permit, without deduction in pay. This provision will be interpreted liberally by the Railroad."

Immediately following Pearl Harbor, December 7, 1941, officers in command of the San Francisco Port of Embarkation insisted that the Carrier maintain in its office of Superintendent of Transportation, at all times during each 24-hour period, at least one employee who would be able to give information and receive instructions concerning movements of army traffic. It appears that up to that time such an employee had been kept on duty during the day shift only, from Monday to Saturday, inclusive, of each week, and for a few hours on Sundays and holidays. Whether this schedule as to the day shift was changed does not appear from the record, although it is said that the two positions involved in this dispute were the only seven-day positions working in that office, which leaves the inference that no change was made as to the day shift. Therefore, if continuous seven-day service was maintained during the day shift, it could only be by overtime work, or the use of a relief clerk on Sundays and holidays.

Be that as it may, the Carrier promptly complied with the demand aforesaid, at least to the extent of providing for the evening and night shifts. It seems to be the understanding of the parties that the work in question was that usually performed by manifest clerks. On December 15, 1941, the Carrier bulletined the two positions as follows:

"Bids will be accepted up to and including December 20th, 1941, for the following positions:

"Manifest Clerk, hours 4 P. M. to midnight, 7 days a week assignment, rate of pay \$5.69 per day.

Qualifications: Applicants must have a thorough knowledge of manifest reports and capable of using a typewriter.

"Manifest Clerk, hours midnight to 8 A. M., 7 days a week assignment, rate of pay \$5.69 per day.

Qualifications: applicants must have thorough knowledge of manifest reports and capable of using a typewriter."

The bulletined positions were bid for and assigned to Henry Aviles and W. W. Callow, in whose behalf the Brotherhood prosecutes this claim. In view of certain contentions, hereafter to be considered, the form of the bids is important, and, eliminating headings, they are here quoted:

"Please accept this as my bid for the position of manifest clerk midnight to 8 A. M., rate of pay \$5.69 per day, 7 day week assignment.

(Sgd.) Henry Aviles"

"Please consider this as my bid for the position of Manifest Clerk as posted in your bulletin of Dec. 15, 1941, File B-010. Rate of pay to be \$5.69 per day on a 7 day assignment, hours to be 4 P. M. to 12 midnight.

My date of seniority is October 5, 1936. I am familiar with the manifest records and can operate a typewriter.

Yours truly,

(Sgd.) W. W. Callow"

Rule 22 provides, affirmatively, that work performed on Sunday and certain specified holidays, shall be paid for at the rate of time and one-half, but there are three exceptions to this requirement. The first is that employees "necessary to the continuous operation of the railroad" and who are regularly assigned to such service, shall be assigned one regular day off duty in seven, Sunday if possible, and if required to work on such day shall be paid at the rate of time and one-half; but if such day off is not Sunday, and the employee works on Sunday, the pay therefor shall be at the straight time rate. The second is, that if the employee requests in writing that he be allowed to work his assignment continuously, instead of taking one day off in seven, his pay shall be at the straight time rate for all time worked. The third exception is that where it is impossible for the railroad to provide relief on continuous seven-day assignments, the pay of the person performing the work shall be at the straight time rate. As we understand the position of the Carrier, its defense to petitioner's claim is that the employees involved come within each of the three exceptions; but that a showing that they come within either thereof is sufficient to defeat the claim. It follows, we think, from a reading of the rule, that if the employees named come within neither of said exceptions, they are entitled to be paid at the time and one-half rate for Sunday and holiday work. This requires a separate handling of the Carrier's contentions.

The first is that the work of the employees in question "was necessary to the continuous operation of the railroad." A careful study of awards bearing upon the intended meaning of this phrase, leads us to the conclusion that, very definitely, it has come to be accepted as applying to work necessary to keep the trains running and the railroad in physical operation. As has been said more than once, giving to the phrase its broadest meaning, all who work for a railroad are presumed to be necessary to keep it in continuous operation, else they would not have been employed. No one seems to contend for this broad meaning. In case before us the Carrier says that the demand of the officers of the Port of Embarkation made it mandatory on it to employ the two manifest clerks, and to keep them, or some other person, in the stated position at all times; and that this alone makes them necessary to the continuous operation of the railroad. We do not believe this position can be sustained. These clerks had little, if anything, to do with the actual operation of the railroad. What they did was to keep track of shipments, and to inform shippers of the location and progress of shipments over the line. If they had any power to direct operations, the record fails to disclose it. It may be that what they did was important, from the standpoint of keeping shippers informed and satisfied, but it is not likely that their work contributed to or accelerated railroad operations to any appreciable degree. Failure to be in position to inform shippers of the location on the line, and progress, present and prospective, of shipments, does not, necessarily, affect the operation of the railroad. We are, therefore, of the opinion that, as the phrase has been understood to mean, and as it has been uniformly applied in previous awards, the position of manifest clerk, for the particular duty assigned, was not one "necessary to the continuous operation of the railroad."

The second contention is that the written application of the employees involved for the bulletined positions, was, in effect as to each of them, a "request in writing that they be allowed to work their assignments continuously instead of being given one day off in seven," and, therefore, under the rule, they are only entitled to pay at the straight time rate. We do not think the application should be so treated.

The bulletin and the applications are quoted above. The bulletin offered two seven-day positions at a specified daily wage, and requiring certain qualifications. The applications did nothing more than bid for the two jobs de-

scribed in the bulletin. There is not, we think, anything in either of the applications which estops either of the applicants from claiming that they only bid for the jobs, and that when they were assigned to them they became entitled to hold them subject to the provisions of Rule 22. Under certain conditions, they became entitled to one day off in seven, with overtime pay if worked on that day; in other circumstances, they could work their assignments continuously, and be paid at straight time rates; and in still another situation, they could be required to work their assignments continuously, and be paid at straight time rates. But these different situations were such as could only arise after the employment, and the bid for the job had nothing to do with what the bidder might elect to do after the job was assigned, unless there was some specific election in the bid itself. Of course the bid, and the assignment to the job, put it in the power of the Carrier to require that the assignment be worked continuously and at straight time rates, where it was impossible for the railroad to provide relief on continuous seven-day assignments, but, aside from its office in getting the job, we do not think it did anything more.

The third contention is that it was impossible for the railroad to provide relief on these continuous seven-day assignments. The Carrier has the burden of showing that such a condition existed, and that burden is not carried by the mere assertion that relief could not be furnished. On account of labor shortages, and for other reasons, it may have been difficult; or it may have been uneconomical; but these impediments do not establish impossibility. The Carrier might have made a clear showing that it was impossible to furnish this relief, but it has not done so. In passing, it may be said that apparently some one provided relief for the six-day manifest clerk day shift job in existence prior to December 7, 1941, assuming, as we do, that as to this shift the Carrier complied with the demand of Port Embarkation authorities.

On the whole, we are of the opinion that the Carrier has failed to bring the two positions in question within either of the exceptions mentioned in Rule 22 of the current agreement, and it follows that the claim will 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 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 Rule 22 of the current agreement, in not paying the employes mentioned in the claim and statements of facts for work performed on Sundays and holidays, at the rate of time and one-half.

AWARD

Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: H. A. Johnson
Secretary

Dated at Chicago, Illinois, this 13th day of August, 1943.