

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Howard A. Johnson, Referee

PARTIES TO DISPUTE:

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

**CHICAGO, BURLINGTON & QUINCY RAILROAD
COMPANY**

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

(1) That Sunday operation of the Timber Treating Plant at Sheridan, Wyoming, is not necessary to the continuous operation of the Carrier as that term is used in Rule 36 of current agreement, effective July 1, 1942, and

(2) That the Treating Engineers, Locomotive Operators and Tankmen regularly assigned or required to work on Sunday, July 5, 1942, or on any Sunday thereafter, be compensated at the rate of time and one-half for all Sunday work performed.

EMPLOYEES' STATEMENT OF FACTS: On July 1, 1942, the following—Rule 36—became effective:

“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 at the rate of time and one-half, except that employees necessary to the continuous operation of the railroad and who are regularly assigned to such service will be assigned one regular day off duty in seven (7), Sunday, if possible, and if required to work on such regular assigned 7th day off duty will be paid at the rate of time and one-half; when such assigned day off duty is not Sunday, work on Sunday will be paid for at straight time rate.”

Subsequent to July 1, 1942, employees other than those mentioned in Statement of Claim, such as Derrick Crews and Tiemen working at the Timber Preservation Plant at Sheridan, Wyoming have been paid at the rate of time and one-half for Sunday work performed.

POSITION OF EMPLOYEES: The work of the employees in question at the Timber Preservation Plant at Sheridan, Wyoming is of a character not necessary to the continuous operation of the Carrier in the accepted meaning of that term as used in Rule 36. To further substantiate the employees' position in this respect we refer your Honorable Board to Employees' Exhibit No. 1 from which you will note that since January 1, 1932, the plant has worked sometimes as low as four days per week and has also been completely shut down at times. Employees' Exhibit No. 2 indicates agreement reached covering shut-downs and how seniority rights would apply during such periods.

of the National Mediation Board. The Management could not agree to a rule which necessitated relief programs and consequent additional employees when the pressure of the manpower situation was so aggravated. The creation of unnecessary jobs would have been contrary to the interests of our Nation at war. The Mediator suggested Rule 36 be adopted with suspension of its effect on Sunday work of occupants of seven-day positions until a propitious time after the war when relief programs could be agreed upon. The Mediator's suggestion was accepted. Article 3, Paragraph (b) of side Mediation Agreement dated May 20, 1942, quoted in the Management's Statement of Facts, was consummated.

Article 3 (b) has precedence over Rule 36. It is not limited to "employees necessary to continuous operation of the railroad." It states in unequivocal language, "occupants of seven (7) day positions, or those working in their places when absent, shall for the purposes of this rule be treated as though they were the relief employees." Relief employees are paid straight time for basic-day hours of service, such as that which gives rise to this controversy. The inclusion of Rule 36 in the agreement was contingent upon acceptance by the organization of Article 3 (b). The organization is now seeking immediate application of Rule 36, which would have the effect of vitiating Article 3 (b). This is improper, because the one provision owes its existence to the other.

It is the position of the Management:

1. That Sunday operation of the wood preserving plant at Sheridan is necessary to the continuous operation of the railroad.
2. That the treating engineers, locomotive operators and retort man (tank man) are employees necessary to the continuous operation of the railroad.
3. That the evidence found in Exhibits Nos. 1, 2 and 3, together with the fact that the plant operation necessitating the services of these employees has been on a continuous twenty-four hour day, seven-day week, basis since sometime prior to the effective date of the current agreement (July 1, 1942) substantiates their necessity as it is related to continuous operation of the railroad, and
4. In any event, until agreement is reached as provided for in Article 3 (b), straight time pay under that Article takes precedence over Rule 36.

In the light of the facts, evidence and circumstances recited herein, an award sustaining the contentions of the employees cannot be justified.

OPINION OF BOARD: The Organization contends that the employees in question should be paid time and one-half for Sunday work under Rule 36, as not within the excepted group of "employees necessary to the continuous operation of the railroad," who under the same Rule would be entitled only to straight time for Sunday work.

The Carrier meets the claim with two contentions. The first is that, pending the establishment of regular relief programs by conference between the General Chairman and the Assistant to the Executive Vice President, the effect of Rule 36 was suspended by Article III (b) of the Memorandum of Agreement entered into between the Organization and the Carrier on May 20, 1942, concurrent with the new agreement of which Rule 36 is a part. The Carrier's second contention is that in any event the employees are necessary to the continuous operation of the railroad and thus are entitled only to straight time for Sunday work under Rule 36.

Prior to the effective date of the new rules on July 1, 1942, Rule 24 of the Rules Governing Timber Treating and Lumber Yard Employees provided for straight time rate of pay as follows:

"Positions regularly assigned to work seven (7) days each week shall be paid straight time rate on Sundays and holidays; when incumbent of such position lays off on Sunday or holidays, substitute shall receive straight time rate for the day's work."

Present Rule 36 provides that the pay for work performed on Sundays and holidays shall be at the rate of time and one-half "except that employees necessary to the continuous operation of the railroad and who are regularly assigned to such service will be assigned one regular day off duty in seven (7), Sunday, if possible, and if required to work on such regular assigned seventh day off duty will be paid at the rate of time and one-half; when such assigned day off duty is not Sunday, work on Sunday will be paid for at straight time rate."

In other words, whereas all Sunday and holidays work had theretofore been paid for at the straight time rate, Rule 36 of the new agreement provided for time and one-half for all Sunday and holiday work, with the sole exception of "employees necessary to the continuous operation of the railroad and who are regularly assigned to such service."

As to such necessary employee, and not to employees in general, the rule provides:

- (1) that he shall be assigned "one regular day off duty" in each seven;
- (2) that his day off shall be Sunday if possible;
- (3) that if required to work on his regular day off, he shall be paid time and one-half, whatever day of the week it may be; and
- (4) that if his regular day off is not Sunday, straight time shall be paid for work on Sunday, which is only one of his regular six days of work.

While the purpose of the rule is to allow a seventh day off, Sunday if possible, it recognizes the facts that some employees must work on Sunday if the Carrier's transportation facilities are to be kept running on that day, and that for such employees some other day must take the place of Sunday for relief purposes. It therefore provides that if Sunday is one of the regular six work days of an employee, he shall receive only straight pay for working on that day, and that, conversely, since some other day is his regular day off, he should receive time and a half pay if required to work on that day. He is thus put upon exactly the same basis as the employee whose day off is Sunday and who is required to work on that day.

It must be emphasized that the exception and all four clauses of it are new, and that by the express provisions of the rule all four clauses refer only to **employees necessary to the continuous operation of the railroad**. The new exception, therefore, necessitated arrangements for the relief of only those **necessary employees**. Being a new provision, the relief programs had to be worked out, which it was recognized could not be done by July 1, 1942, the effective date of the new agreement. Obviously, it was only the new requirement that made the relief program necessary, and the requirement did not extend to any but the "employees necessary to the continuous operation of the railroad," who were therefore on a seven day basis requiring relief.

Since Article III (b) of the Memorandum of Agreement refers only to the relief, it affects only that part of Rule 36 relating to relief, and only the employees for whom Rule 36 requires relief, namely, the employees necessary to continuous operation. They are obviously the only "regular occupants of seven-day positions" and the only employees for whom Rule 36 requires "relief employees."

Article III (b) provides that "until regular relief programs are agreed upon, the **regular occupants of seven-day positions**" (or in their absence those working in their places) "shall for the purpose of this rule be treated as **though they were the relief employees.**" Thus, its only effect is that, pending the working out of the relief programs, the Organization and its members cannot complain because relief employees are not working in place of the regular occupants of the seven-day positions under Rule 36, for until then the regular occupants "shall for the purposes of this rule be treated as though they were relief employees."

Consequently in all other respects Rule 36 is in full operation and, if the employees in question are not employees necessary to the continuous operation of the railroad, they must under the rule be paid time and a half for Sunday work; there can be no serious question as to that.

The Carrier contends that, while it has not in the past ordinarily been necessary to run the timber treating plants seven days a week, it is now necessary; first, because due to increased traffic its need for replacement ties is so great that if the present plant facilities and crew are to produce the ties, the employees in question must be worked seven days a week; and second, because, on account of Order No. 7 of the Office of Defense Transportation requiring that tank cars be unloaded promptly, it is necessary to work those employees in question on Sundays.

But the question is not whether the Sunday work is necessary to comply with Defense requirements or whether it is necessary to keep the Carrier's System operating in general; the question is whether the Sunday work is necessary to keep the System operating for the actual transportation of persons and property **on Sunday**. While no award has yet decided whether these or similar employees are within the classification of employees necessary to continuous operation of the railroad on Sunday, there are several awards which define the general meaning of the term.

In Award No. 314 this Division said: "The question really is what work is necessary to meet the public demand for **actual transportation on Sundays or holidays**, or, in other words, what work is necessary for the continuous operation of trains." It repeated that exact language in Award 1614.

In Award No. 336 this Division said, "The fact that work is necessary on Sunday does not of itself prove that it is necessary in the continuous operation of the Carrier."

In Award No. 2272, where the same contention was made as here that Order No. 7 of the Office of Defense Transportation made the work necessary, this Division said: "If that were true, it still did not make it necessary to the continuous operation of the Carrier, as that phrase has been interpreted by this Division." In other words, Sunday work may be made necessary by various contingencies, such as O. D. T. orders, wrecks, and other circumstances under which it may be necessary if the operations in general are to be conducted with the greatest possible efficiency, economy and continuity. But the parties to the Agreement did not agree that Sunday and holiday work which might be necessary on those various accounts should be compensated at straight time, but only such work as was necessary in order to keep transportation actually operating on Sundays and holidays, as distinguished from ordinary week days. It is clear, therefore, that the Sunday employment of the employees in question is not necessary to the continuous operation of the Carrier as that term is used in Rule 36 of the Agreement.

The claim is governed by the awards cited above and must be sustained in full.

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 Agreement as contended in both claims.

AWARD

Claims 1 and 2 sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: H. A. Johnson
Secretary

Dated at Chicago, Illinois, this 2nd day of February, 1944.