

Award No. 2536

Docket No. CL-2573

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Bruce Blake, Referee

PARTIES TO DISPUTE:

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

KANSAS CITY TERMINAL RAILWAY COMPANY

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood that all Mail and Baggage Handlers be paid for work performed on calendar Sundays at the rate of time and one-half time retroactive to October 1, 1942.

EMPLOYES' STATEMENT OF FACTS: The dispute between the parties concerns the application of the provisions of Rule 43 of an Agreement governing hours of service and working conditions revised and effective as of October 1, 1942, reading:

"RULE 43. SUNDAY AND HOLIDAY WORK. 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 carrier and who are regularly assigned to such service will 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 will be paid at the rate of time and one-half time; when such assigned day off duty is not Sunday, work on Sunday will be paid for at straight time rate.

"The Company will identify or designate all positions necessary to the continuous operation of the railroad and will post such information on the bulletin board. Positions necessary to continuous operation will be filled seven days each week, including weeks in which holidays occur, when it is possible for the Carrier to do so."

The first paragraph of Rule 43 was promulgated by the United States Railroad Labor Board in its Decision No. 1621, effective March 1, 1923. It was incorporated in subsequent Agreements between the parties which became effective March 1, 1924, and February 17, 1936, and is commonly referred to as the "standard" Sunday and Holiday Rule, having been included in most Agreements between the Brotherhood and Carriers. Disputes concerning the interpretation and application of the Rule have been passed upon by the United States Railroad Labor Board, Boards of Arbitration, Express Board of Adjustment No. 1 and by the Third Division.

OPINION OF BOARD: Prior to October 1, 1942, the agreement between the organization and the carrier contained the standard Sunday and holiday rule, providing for payment at time and one-half rate for work performed on such days excepting, however, work performed by employees holding positions "necessary to the continuous operation of the carrier." Under the exception it was provided that employees holding positions "necessary for continuous operation" should have one regular day off in seven and should be paid at straight time rate for Sunday work.

Construing the standard rule, this Division has repeatedly laid down the elements that go with a position "necessary to the continuous operation of the carrier." These elements are:

- (a) The position must be worked seven days a week.
- (b) There must be a regularly assigned incumbent to it.
- (c) The incumbent must be assigned one regular day off in seven.
- (d) The incumbent's day off must be filled by a regularly assigned employee.

See Awards Nos. 336, 750, 1635.

With the assistance of a mediator the parties entered into the current agreement—effective October 1, 1942. In this agreement there was added to, and made a part of, the standard Sunday and holiday rule, the following:

"The Company will identify or designate all positions necessary to the continuous operation of the railroad and will post such information on the bulletin board. Positions necessary to continuous operation will be filled seven days each week, including weeks in which holidays occur, when it is possible for the Carrier to do so." Rule 43.

Purporting to comply with this provision the carrier, on November 2, 1942, posted the following notice:

"There are 7 Mail and Baggage Handler positions on the first tour which the Carrier at this time considers necessary to continuous operation. All positions regularly assigned to work on SUNDAY in excess of 7 will be paid at the overtime rate.

"There are 58 Mail and Baggage Handler positions on the second tour which the Carrier at this time considers necessary to continuous operation. All positions regularly assigned to work on SUNDAY in excess of 58 will be paid at the overtime rate.

"There are 78 Mail and Baggage Handler positions on the third tour which the Carrier at this time considers necessary to continuous operation. All positions regularly assigned to work on SUNDAY in excess of 78 will be paid at the overtime rate."

Obviously this notice does not conform to the letter nor the spirit of the rule. Nor does it meet the requirements laid down in the awards to which we have referred. The carrier has merely designated the **number** of such positions "necessary to continuous operation." The carrier gives several reasons in attempting to justify this as a compliance with the rule, among which are: (1) that the designation complies with the rule as construed by the Mediator; (2) that the employees participated in the distribution of assignments in accordance with their seniority rights; (3) that, during the negotiation leading up to the execution of the agreement, the organization proposed a rule dealing with the subject matter; (4) that the employees on the positions in question are assigned in groups. First. What the Mediator may have said about the rule and what would constitute compliance with it is of no moment—particularly since the language is plain and unambiguous. In

any event, the carrier was charged with knowledge of the awards of this Division dealing with subject matter of the rule; and it should have known that compliance with the rule would be measured in the light of the principles laid down in those decisions. Second. The employees acquiesced in the carrier's interpretation under protest; and the organization initiated this dispute promptly—January 14, 1943. Neither it nor the employees are estopped to challenge the carrier's interpretation and action. Third. During the negotiations the organization proposed a rule, dealing with the subject, which would have drastically restricted managerial powers over assignments to positions established as "necessary to continuous operation." The provisions of the rule as accepted, however, were expressed in the rule proposed. The carrier simply accepted a part of the proposed rule and rejected the rest. The fact that the organization wanted more does not serve to diminish the force and effect of what it got. Fourth. In designating the positions we do not think the rule requires the carrier to define the duties attendant upon each position. We do think it requires that the positions in controversy, which are necessary to the continuous operation, be designated by numbers; that an incumbent be assigned to each position; that the incumbent of each position be assigned one designated day off in seven; that the day off be filled by a regularly assigned employee.

The organization's claim for reparation cannot be allowed as made. This aspect (reparation) of the claim will be remanded for further negotiations on the property. In their negotiations the parties are to be guided by the principles laid down in the awards we have cited. For the purpose of ascertaining the amount of reparation a position is not to be considered "necessary to continuous operation" unless the elements set up in those awards have been applied to it.

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 carrier violated the agreement.

AWARD

Claim sustained to the extent indicated in the opinion.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: H. A. Johnson
Secretary

Dated at Chicago, Illinois, this 26th day of April, 1944.

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

INTERPRETATION NO. 1 TO AWARD NO. 2536
DOCKET CL-2573

NAME OF ORGANIZATION: Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employees.

NAME OF CARRIER: Kansas City Terminal Railway Company.

Upon application of the representatives of the employees involved in the above award, that this Division interpret the same in the light of the dispute between the parties as to its meaning and application, as provided for in Section 3, First (m), of the Railway Labor Act, approved June 21, 1934, the following interpretation is made:

The controversy which has arisen involves two issues that are to be determined by the following language of the Award:

"In designating the positions we do not think the rule requires the Carrier to define the duties attendant upon each position. We do think it requires that the positions in controversy, which are necessary to the continuous operation, be designated by numbers; that an incumbent be assigned to each position; that the incumbent of each position be assigned one designated day off in seven; that the day off be filled by a regularly assigned employee."

The notices posted by the Carrier on June 22 and 23, 1944, establishing the positions, obviously meet the requirement specified.

The practice of the Carrier in making assignments for relief work on off days of employees holding regular positions (as indicated on page 7 of Exhibit 5, attached to Mr. Harrison's letter of June 13, 1945) does not comply with the direction intended by the language underscored in the foregoing quotation from the Award. The direction, no doubt, should have been more definite. It does not, however, admit of blanking the position on the incumbent's off day, nor the assignment of the work appertaining to the position to, or the distribution of such work among employees holding regular positions.

It was intended that, for every six of the regular positions, there should be a relief employee (one holding no other regular position) assigned to the work of each of such six positions on the off day of the regular incumbent.

Referee Bruce Blake, who sat with the Division as a Member when Award No. 2536 was adopted, also participated with the Division in making this Interpretation.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: H. A. Johnson
Secretary

Dated at Chicago, Illinois, this 26th day of November, 1945.