Award No. 2557
Docket No. MW-2589

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Curtis G. Shake, Referee

PARTIES TO DISPUTE:

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES

KANSAS CITY TERMINAL RAILWAY COMPANY

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

(a) That the Carrier incorrectly paid M. C. Cripps, Union Station Maintainer, for work performed on January 4 and 11, 1943; and

(b) That M. C. Cripps be paid the difference between what he received at straight time rate and what he was entitled to receive at the rate of time and one-half time for eight hours on each of the above dates.

EMPLOYES' STATEMENT OF FACTS: M. C. Cripps held a regular bulletined position as station maintainer. The bulletin advertising the position to which he was assigned provided for an assignment of 8 hours per day—3:30 P. M. to 12:00 midnight—30 minutes for lunch—6 days per week —Monday being assigned as his day off. The rate of pay for this position was $200.60 per month.

On completion of his assignment at 12:00 midnight on Sunday, January 3 and Sunday, January 10, 1943, M. C. Cripps was instructed and required by the Carrier to report for work at 8:00 A. M. on Monday, January 4 and Monday, January 11, 1943. The claimant complied with instructions and did perform work—8 hours each day—on his regular days off, Monday, January 4 and Monday, January 11, 1943.

For service rendered on these dates claimant received pay at the straight time rate whereas he was entitled under Rule 33 to be paid at the rate of time and one-half when notified or called to perform work not continuous with the regular day's work period.

The claim for M. C. Cripps was handled as provided for in the agreement up to and including the highest officer designated to handle same and the Carrier declined to allow the claim. The Employes' representative made request upon the Carrier to submit the claim as an unadjusted dispute to the Third Division, National Railroad Adjustment Board, and the Carrier declined to do so.

There is an agreement in effect between the parties which is hereby made a part of this Statement of Facts.

POSITION OF EMPLOYES: It is the Employes' position that the Carrier violated the provision of Rule 33, which reads as follows:

> "Employes notified or called to perform work not continuous with the regular daily work period, will be allowed a minimum of three

In cases where there is an honest difference of opinion regarding some rule or practice under an agreement we are not averse to joining in a submission to the National Railroad Adjustment Board. In these cases, however, no such situation exists or could exist. As you well know, Mr. Wilson, yourself and your Committee tried to procure a seventh day rule. Failing to do so you called in your Mr. Crook. Still failing to get the rule, you asked for the assistance of the National Mediation Board. In the settlement of the case you finally gave up on your proposed seventh day rule and accepted the present Sunday Rule. Despite all this, however, now you hope to persuade the Adjustment Board to hand you something you could not obtain in mediation.

We are frank to state that we do not appreciate this way of doing business, and we would not think of joining you in these submissions thereby putting them in the category of legitimate claims based on merit, which they are not.

Yours truly,

(Signed) P. C. Voorhees"

Rule 33, which the Organization claims is applicable in this case, is purely an "Overtime And Call" rule and is numbered in that category in the Agreement. It has no pertinence to seventh day work. Rule 33 is quoted as follows:

"Rule 33. Employes notified or called to perform work not continuous with the regular daily work period, will be allowed a minimum of three hours for two hours' work or less. If held on duty in excess of two hours, rate and one-half will be allowed on the minute basis."

In view of the information in the Superintendent's letter of May 4, 1943, quoted above, showing that the Organization's representatives themselves did not consider Rule 33 a seventh day rule inasmuch as they presented such a rule along with their proposed Sunday and Holiday rule, it is quite evident that there is no basis for their claim. The Carrier, therefore, requests that the Employes' claim in this case, both Sections (a) and (b), be denied.

OPINION OF BOARD: During the period here involved approximately twenty persons were employed as Station Maintainers in and about the Union Station at Kansas City. The employes of the class to which the claimant belonged worked eight hours per day, six days per week and were paid $200.60 per month. The claimant's hours were from 3:30 P. M. until 12:00 midnight, with 30 minutes for lunch. Monday was his regularly assigned day off. Other employes worked for a like period but at different hours and had different days off. The claimant was ordered to work on the days-off position of a fellow employe on Monday, January 4 and Monday, January 11, 1943, for which he was paid at the pro rata rate. He asserts that he was entitled to rate and one-half for this service.

The rights of the parties are fixed by the Union Station Maintenance Agreement effective May 24, 1941. We are advised that this is the first contract covering these employes since the Nationwide Mechanical Craft strike of 1922 and that this is the first case to reach this Board involving the matter in controversy. The rules with which we are most concerned are Rule 33:

"Employes notified or called to perform work not continuous with the regular daily work period, will be allowed a minimum of three hours for two hours' work or less. If held on duty in excess of two hours, rate and one-half will be allowed on the minute basis."

and Rule 36:

"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, (Pro-

vided when any of the above holidays fall on Sunday, the day observed by the State, Nation, or proclamation shall be considered the holiday) will be paid for at rate and one-half except that employes or those required to work in the place of such employes, who are regularly assigned to work on Sundays and holidays will be compensated on the same basis as on week days."

"The present practice of paying an additional day over the monthly rate at prorata rate for holidays worked shall be continued."

The claimant relies exclusively upon Rule 33. The carrier says, however, that Rule 36; the history of the negotiations resulting in the agreement; the manner in which the work covered thereby was performed; and the practices of the parties, both before and after the period here involved as disclosed by a joint check in evidence showing the method of paying the employes, conclusively establishes that Rule 33 has no application and that there is no contract provision entitling the claimant to the relief demanded.

Rule 33 is one of seven rules grouped under the heading of "OVERTIME AND CALLS." All of these rules recognize the principle of rate and one-half as the basis of compensation for overtime performed pursuant thereto. Rule 30 provides for overtime computed on the minute basis for "service continuous with the daily work period." Rule 33 supplements Rule 30 by extending the right to such pay to overtime "**not** continuous with the regular daily work period," with certain minimums. Read together, Rules 30 and 33 would seem to contemplate compensation for overtime at rate and one-half, whether such service was or was not continuous with the daily work period.

Since it is conceded that the claimant was regularly employed six days per week, including Sunday, with Monday off, it would seem that he comes within the express terms of Rule 33, entitling him to compensation at rate and one-half for work performed on January 4 and 11, which was not continuous with his regular daily work period. From the claimant's point of view his position was a six-day per week assignment and his off day constituted no part thereof. Support for our conclusion on this point is found in Award 56 of this Board.

From its title Rule 36 appears to relate exclusively to "**Sunday and holiday work.**" After providing, generally, that work performed on Sundays and certain enumerated holidays shall be paid for at rate and one-half it makes the following exception: "that employes or those required to work in the place of such employes, who are regularly assigned to work on Sundays and holidays will be compensated on the same basis as on week days." The application of the rule is further limited by its concluding sentence: "The present practice of paying an additional day over the monthly rate at prorata rate for holidays worked shall be continued." We find nothing in the context of Rule 36 to modify our interpretation of Rule 33.

The carrier urges, however, that in the negotiations that resulted in the agreement the organization proposed that language be added to Rule 36 which would have brought it clearly within the claimant's theory of the case, but that this proposal was rejected by the parties in favor of the rule as it now reads. It is further pointed out that the joint check before us reveals that during a long period of time, both prior to and since the execution of the agreement, the Maintainers, including the claimant, have uniformly acquiesced in a practice which harmonizes with the carrier's contentions.

These factors might be of importance if we were dealing with an ambiguous agreement; but there is no occasion for applying rules of construction when the meaning is clear. Much less is it permissible to resort to such rules to create an ambiguity. We are not unmindful that numerous awards of this Board may be found wherein importance has been attached to circumstances like those here relied upon by the carrier; but we venture to assert that in

every such instance the Board was confronted with an ambiguity which arose when an attempt was made to apply the terms of the agreement. It has many times been said that it is the duty of this Board to apply the agreement as it finds it, and that it is no part of its function to make contracts for the parties. In our opinion, the claimant brings himself within the clear and unambiguous terms of Rule 33. Having so concluded, we are not authorized to look behind the rule to the mediation proceedings for a different agreement or to the subsequent conduct of the parties for a modification of its terms.

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.

AWARD

Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: H. A. Johnson
Secretary

Dated at Chicago, Illinois, this 11th day of May, 1944.