

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Edward F. Carter, Referee

PARTIES TO DISPUTE:

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

THE ERIE RAILROAD COMPANY

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood that the Carrier violated the Clerks' Agreement at Chicago, Illinois, when it permitted a junior employee to work and be paid penalty rate of pay in preference to a senior employee who had reported and was available for such work; and

That Carrier shall compensate employee J. L. Hall at rate of time and one-half for October 17th, 24th, and 31st, 1945, dates on which Hall, a senior employee was denied the right and opportunity to work.

EMPLOYES' STATEMENT OF FACTS: Employee J. L. Hall is a regular assigned Roster "B" employee having a checker position obtained on Assignment Bulletin No. 308 of October 10, 1945, with Wednesday as his regular assigned rest day. About the time the position was awarded to Hall, Local Chairman Slaughter contacted the Agent and requested that the assigned rest day of Wednesday be changed to Sunday, as under Rule 30 it is provided that Sunday will be the rest day, if possible, and it was possible in this instance as there was plenty of work to be performed on Wednesday. The Agent refused to change the rest day, and employee Hall did not work on Sunday. On Wednesdays, October 17th, 24th and 31st, Hall reported out at the Freight House for any available extra work. The Carrier refused to assign him to work. On October 17th, the Carrier assigned a junior employee, Wm. Cowin, and paid him at time and one-half rate as it was his seventh day or rest day. Cowin, a junior employee also having Wednesday as his assigned rest day was given preference for employment, and the seniority rights of Hall were entirely ignored.

On Wednesday, October 24th, four (4) junior checkers were used and Hall was denied the right to work. On Wednesday, October 31st, six (6) junior checkers were used and Hall was again denied the right to work. In each instance it was the seventh or rest day for these junior employees, the Carrier giving preference for employment to such junior employees and ignoring the seniority rights of Hall, entirely.

Effective December 1, 1945, Sunday became the regular assigned rest day of all regularly assigned employees.

POSITION OF EMPLOYES: There is in effect between the parties an Agreement bearing effective date of July 1, 1945, which contains the following rules:

tional forces are not available at rate of time and one-half, emergency forces may be employed at pro rata rate."

Under this new memorandum of agreement all regular assigned forces subject to Rule 23 now have Sunday as regular assigned day of rest. Additional forces may be worked and paid pro rata on Sundays and are paid time and one-half when they work seven continuous days.

Hall remained on the same checker assignment and after December 1, 1945 when his day of rest was changed to Sunday, he decided to work his assigned six (6) days, Monday through Saturday, and also reported for overtime work on Sunday, for which he was paid at rate of time and one-half for Sunday work.

Hall in his statement made November 1, 1945 (quoted on page 5), had said:

"I have not worked on Sundays for years and do not intend to work on Sundays on this assignment."

A check made some time ago showed that during period February 17th to April 21st, 1946, inclusive, Hall worked every Sunday on an overtime basis.

This claim should be denied for the following reasons:

Memorandum of Agreement No. 1, dated December 1, 1943 and printed on page 50 of agreement December 1, 1943 was applicable and Hall's position was bulletined and assigned in accord therewith.

Hall voluntarily made application for the position and was assigned to work six days per week, including Sunday, with regular day of rest on Wednesdays. He had an obligation under the rules to work on Sunday and had no preferred rights to Wednesday work as that was his assigned day of rest.

OPINION OF BOARD: Claimant was regularly assigned to a Checker position with Wednesday as his regularly assigned rest day. An attempt was made to have the assigned rest day changed from Wednesday to Sunday, which the Carrier refused to do. It appears that Claimant remained uncooperative and refused to work his Sunday assignment. For this, he was disciplined. He did, however, appear for work on Wednesdays, October 17th, 24th and 31st, 1945. On Wednesday, October 17, 1945, the Carrier assigned a junior employee to perform the work of Claimant's position and paid him time and one-half as it was the junior employee's rest day. On October 24th and 31st, a similar situation arose except that the record shows that the junior employee filling Claimant's position was not working on his rest day.

It appears that a number of unassigned employees were being used to perform work which the regularly assigned employees were unable to handle, which was in accordance with the Agreement. It is not disputed that Claimant was senior to all of these unassigned employees.

It appears to us that the conduct of Claimant in refusing to protect his Sunday assignment is of no controlling importance here. He was disciplined for that violation of his agreement and has paid off his obligation to the Carrier for the breach. This case will be considered, therefore, as if he had complied with his Sunday assignment.

It is evident that Carrier did not have enough employees to perform the work on October 17, 1945, without using some on their rest days at the time and one-half rate. We have said that when such a situation arises, the duty evolves upon the Carrier to take notice of seniority rights. Award 2341. If there had been unassigned employees available who had not worked six days of the week, there can be no doubt that they could perform the work at the pro rata rate of pay under the Agreement. But where the regularly assigned and available extra employees have been used and it becomes necessary to call an employee on his rest day at the penalty rate, the senior avail-

able employe is entitled to the work. Claimant was the senior available employe on October 17, 1945, and was entitled to the work.

The claim will be sustained for October 17, 1945. The claims for loss of work on October 24 and 31, 1945, are denied.

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 to the extent shown by the Opinion.

AWARD

Claim sustained for October 17, 1945.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: H. A. Johnson
Secretary

Dated at Chicago, Illinois, this 21st day of March, 1947.