

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Joseph L. Miller, Referee

PARTIES TO DISPUTE:

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

DULUTH, MISSABE AND IRON RANGE RAILWAY COMPANY

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

(a) The Carrier violated the Clerk's Agreement, when it paid at straight time rates for all Sunday work performed David P. Weatherby, Waino J. Hill and John Thatcher, from April 16, 1941 to May 24, 1945.

(b) That David P. Weatherby, Waino J. Hill and John Thatcher shall now be made whole for the wage loss suffered as a result of the violation and paid at time and one-half rate for all services rendered on Sundays from April 16, 1941 to May 24, 1945.

EMPLOYES' STATEMENT OF FACTS: On April 16, 1941, the Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employees and the Duluth, Missabe and Iron Range Railway Company entered into an agreement from which the following rule thereof reads:

"RULE 34"

"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 for 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 (1) regular day off duty in seven, 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."

This is the standard Sunday and Holiday rule and provides that employees coming under the agreement shall be paid at time and one-half rates for all Sunday and Holiday work performed except that employees necessary to the continuous operation of the railway may be given one regularly assigned day off each week and worked on Sunday at straight time rate.

David P. Weatherby, Car Clerk at Endion Depot was assigned to work six days per week, his regular day off being Saturday. On Saturday the

"The very purpose of the rule was to change the practice existing at or prior to the time it became effective."

Referee Carter further stated,

"We quite agree that if the pertinent part of the contract was indefinite or ambiguous the mutual interpretation which the parties placed upon it would be strong evidence of what the parties intended when they made it."

As to the rule questioned in this submission, attention need only be called to the fact that your Honorable Board has already been called upon to interpret this rule on several occasions, and that in Award No. 314 a quite forceful dissenting opinion was filed by the Railroad members. These awards quite clearly indicate to the Carrier that the wording of the rule in question is indefinite and ambiguous allowing of an honest difference of opinion to its meaning.

That the Carrier and the employees were both of the opinion that Sundays under the circumstances could be paid at pro rata rates is evidenced by the fact that all employees were so paid and until May 24, 1945 no protest of any kind was made.

Employees possibly will argue that Award No. 314 issued by your Honorable Board under date of October 9, 1936 definitely settled the issue and that the Carrier should have been aware of this decision and been governed accordingly. To the Carrier this cannot be used as an argument since it would likewise be true as to the employees who also failed to discover this interpretation. In fact, it definitely appears that both parties, through ignorance, placed the wrong interpretation on the rule in question. Furthermore, in this regard it is definitely the opinion of the Carrier that an award made for one Carrier is not in any way binding on another.

Briefly, summing up its position, the Carrier respectfully requests that the claim be denied for the following reasons:

(1) The interpretation of Rule 34 under which employees were paid pro rata rates for Sunday work was the honest conviction of the Carrier.

(2) The interpretation and basis of pay was accepted without protest by both the Clerks' Organization and the employees affected until May 24, 1945.

(3) That the wording of the rule is ambiguous and susceptible of an honest difference of opinion.

(4) That your Honorable Board in many awards, some of which are quoted here, has definitely recognized that retroactive claims are definitely barred by such things as "sleeping on one's rights, acquiescence in interpretations of rules, estoppel, laches, etc."

(Exhibits not reproduced.)

OPINION OF BOARD: The Carrier in this case admittedly violated Rule 34 of its Agreement by failing to pay David P. Weatherby, Waino J. Hill and John Thatcher the time and one-half rate for their Sunday work between April 16, 1941 and May 24, 1945.

The Carrier asks us to relieve it of the back pay claimed because (a) neither the Carrier nor apparently the employees knew the claimant employees were entitled to a premium rate for Sunday work during the period of the claim, and (b) the Organization was tardy in filing the claims.

If the meaning of Rule 34 was ever in doubt, this Board had clearly interpreted it many times before the violation before us occurred. We cannot excuse the Carrier on that score.

Nor is the tardy filing sufficient reason for dismissal in this case, where the claimant employees actually performed the Sunday work.

We believe that such belated action constitutes poor labor relations on the Organization's part, but we cannot let such a general opinion influence our finding in this case.

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 Rule 34 of the Agreement.

AWARD

Claim (a and b) sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: H. A. Johnson
Secretary

Dated at Chicago, Illinois, this 5th day of November, 1947.