

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Francis J. Robertson, Referee

PARTIES TO DISPUTE:

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

TERMINAL RAILROAD ASSOCIATION OF ST. LOUIS

STATEMENT OF CLAIM: Claim of the Terminal Board of Adjustment, Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employees, that the Carrier violated the Clerks' Agreement:

(1) When the Carrier failed to change the assigned day of rest of Yard Clerk Clarence A. Jones, from Friday to Sunday, who was the senior employee in a multiple of less than six, being relieved by extra, furloughed or unassigned employees.

(2) That Yard Clerk Jones be compensated the difference between the pro rata and punitive rates of his position for all Sundays worked from December 22, 1947, until the date he was assigned Sunday as his day of rest.

EMPLOYEES' STATEMENT OF FACTS: Under date of April 10, 1948, due to the fact that there is no properly constituted Local Protective Committee in District No. 38 (Yard Department, Madison Yard, Yard Clerk Jones filed claim with the General Chairman, which attached is Employees' Exhibit "A".

On April 15, 1948 the General Chairman wrote Mr. G. E. Greendorner, Agent Yard Department Madison Yards, filing claim in behalf of Yard Clerk Jones and copy of this letter is attached as Employee's Exhibit "B". No reply being received, Mr. Greendorner was traced on May 4, 1948 and copy of this letter is attached as Employee's Exhibit "C". No reply from Mr. G. E. Greendorner prompted letter to next highest officer, Mr. Hy. Miller, Jr., Superintendent, dated May 18, 1948, copy of which is attached as Employee's Exhibit "E".

Mr. Miller's reply dated May 20, 1948, in which he agrees with the contention of the organization and offers to pay the claim from the date filed, is attached as Employee's Exhibit "E".

Mr. Greendorner's reply dated May 19, 1948 and received May 22, 1948, after receipt of Mr. Miller's letter, is attached as Employee's Exhibit "F".

The date of November 25, 1947 was used in filing this claim, as this was the first date the Organization notified the Carrier of our position in respect to the employees holding continuous service positions being relieved by extra or furloughed employees in District No. 34, but to make our position secure, we later amended our claim to read from December 22, 1947, and we attach as Exhibit "G" copy of letter written by Mr. Wicks December 22, 1947 to the Heads of All Departments of the Carrier with respect to relief positions, directing attention to the first paragraph, page 2 thereof, which refers to the matter in question.

provisions of the current contract; consequently, there is no reason why we should pay any claims until violations are called to our attention. You received a copy of the letter of December 22, 1947, referred to, and are as much responsible for failure to pay Mr. Jones the proper rate as Agent Greendonner is. As you well know, the Third Division of the National Railroad Adjustment Board has repeatedly ruled that claims are payable only from the date called to the attention of the carrier. See Awards Nos. 2784, 2811, 2856, 3038, 3136, 3430 and 3503."

The letter of December 22, 1947, to heads of departments, copy attached as Exhibit A, referred to by the General Chairman, outlined the proper method of assigning relief days and advertising relief positions under Rule 44 of the current agreement. Several disputes had arisen over the matter and, after a number of conferences with the employe representatives, the principles outlined in the instructions were agreed to.

POSITION OF CARRIER: The only question involved in this case is whether the organization shall be permitted to collect payment for a rule violation prior to the date on which claim is first made.

Upon receipt of the claim, we acknowledged the error and paid punitive rate for Sunday work until the relief day was properly assigned but denied claim for dates previous to the time it was filed. Claim was originally made for all Sundays from November 25, 1947 which was changed in the General Chairman's appeal to the Director of Personnel June 15, 1948, to December 22, 1947, the date of the letter to department heads, our Exhibit A.

The effective agreement was consummated by the Employes and the Carrier jointly and it is the responsibility of both parties to see that its provisions are carried out. The Employes, in Third Division Award 4039, recognized this responsibility by the following quotation from their reply to our submission in that case:

"In reference to the joint liability to police the agreement, we have accepted this liability, but the Carrier's Supervisors should also accept same, and in this dispute, the employes used were not subject to the agreement in question until they were assigned off their regular positions as red caps to fill the gatemen vacancies, and therefore, had no way of knowing they were not properly compensated."

In the instant case the Claimant was subject to all provisions of the agreement as he was regularly assigned to a clerical position included in Group 1 in the Scope of the agreement leaving their acceptance of their responsibility unqualified. By making the claim from December 22, 1947, they acknowledged that from that date forward they were aware or should have been aware of the proper application of the rule, yet after sitting idly by without protest for almost four months they are now endeavoring to collect penalty payment for that time.

The principle that claims for dates prior to the time presented to the Carrier are not valid has been repeatedly upheld not only by the Third but other Divisions of the National Railroad Adjustment Board as well. See First Division Awards 7205, 7239, 7893, 7926, 7932, 9038; Second Division Award 626; and Third Division Awards 2784, 2811, 2856, 3038, 3136, 3430, 3503 and 3518.

The laxity of the employes in making protest of a rule violation of which there was no reason why they should not have been aware precludes any favorable consideration of the claim prior to the time it was presented to the Carrier and the claim should be denied.

(Exhibits not reproduced.)

OPINION OF BOARD: Carrier and Employes had had a number of disputes concerning the applicability of Rule 44 (Rest Day Rule). After a

number of conferences, certain principles with respect to applying the Rule were agreed upon and on December 22, 1947 instructions were issued by Carrier to all Heads of Departments concerning proper application thereof. A copy of such instructions were furnished the General Chairman. Claimant was filling a regular assignment as Yard Clerk, a position necessary to continuous operation, with Friday as rest day. Under the Rule and the instructions, he was entitled to Sunday. Employees protested the assignment by letter dated April 15, 1948. Carrier allowed a claim for difference between pro rata pay and punitive pay for Sundays worked from that date until his rest day was changed to Sunday, refusing to pay for any Sundays prior to April 15, 1948 on the ground that the Organization is jointly responsible for the policing of the Agreement and therefore there is no reason why claims should be paid until violations are called to its attention.

From the above statement of facts, it is clear that the only issue presented insofar as a decision by this Board is concerned is whether or not the difference between pro rata and punitive rate for Sundays worked during the period from December 22, 1947 to April 15, 1948 should be allowed. Under the circumstances here present we think that it should.

This Board has held that responsibility for policing the Agreement is primarily that of the Carrier. In the instructions issued to Department Heads, Carrier indicated that it accepted this responsibility for it said, and we quote: "To the extent that relief is provided the occupants of regular positions by extra men, the senior of the regular men involved is entitled to Sunday as his assigned day of rest. Changes necessary to comply with this principle should be made at once." (Underscoring supplied.) Thus it will be seen that this claim could have been avoided had Carrier's own instructions been followed. In a proper case the silence of an employee over a period of time might be considered as an acquiescence by him in the assignment of another rest day even though he be entitled to Sunday and thus bar a claim for compensation. In this instance, however, the Employees made complaint within a reasonable period of time after the agreed upon application of the Rest Day Rule and we perceive of no reason why the Claimant should not have been offered or afforded Sunday as his rest day immediately after the issuance of the instructions above referred to or in lieu thereof be paid the difference between pro rata and punitive compensation for the Sundays worked.

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 Carrier violated the Agreement.

AWARD

Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: A. I. Tummon
Acting Secretary

Dated at Chicago, Illinois, this 19th day of July, 1949.