

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 WESTERN PACIFIC RAILROAD COMPANY

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

(a) Mr. W. B. Long, Roundhouse Clerk at Oroville, California was improperly compensated for service performed from 12:00 Midnight to 8:00 A. M. Sunday when this time was shown on the payroll as time worked on Saturday and allowed at the straight time rate, commencing January 18, 1947.

(b) Mr. W. B. Long shall now be compensated for this service at the rate of time and one-half for Sunday, January 19, 1947, and for all subsequent Sundays he was so used.

(c) Mr. Long was improperly required to take the period 12:00 Midnight to 8:00 A. M. Monday as his day of rest.

(d) Mr. Long shall now be compensated for 8 hours at straight time rates account not being permitted to work his regular assignment on Monday, January 20, 1947, and for each subsequent Monday he was not permitted to work in accordance with his assignment.

EMPLOYEES' STATEMENT OF FACTS: Clerks' Circular No. 361 of the Mechanical Department, dated May 11, 1944, reads in part as follows: "Bids will be received in this office until 8:00 A. M. Tuesday, May 16, 1944, for the position of Timekeeper and Roundhouse Clerk at Oroville, salary \$7.62 per day, six day assignment. Applicant will be required to work Sundays until further notice. Hours of service—12:00 Midnight to 8:00 A. M." Clerks' Circular No. 363 of May 16, 1944, assigned Mr. W. B. Long to this position.

Mr. Long worked this position seven days per week until January 18, 1947, when, in accordance with the stipulation in Circular 361, the Carrier attempted to abolish the Sunday work by discontinuing the shift working 12:00 Midnight to 8:00 A. M., Monday. Mr. Long continued to work 12:00 Midnight to 8:00 A. M. each Sunday.

Under date of December 23, 1946, the Superintendent of Motive Power issued the following instructions:

"Subject: Payment of Overtime Shop Crafts.

Effective January 1, 1947, you are hereby instructed to discontinue the practice of allowing payment of time and one-half to

Long was regularly assigned to work six consecutive days per week, Monday through Saturday, on the third shift position of roundhouse clerk at Oroville from 12 o'clock midnight to 8:00 A. M. and Carrier reiterates that the period from 12 o'clock midnight Saturday to 8:00 A. M. Sunday was Long's regular Saturday shift.

It is Carrier's contention that the schedule has been properly applied in this instance and that there is no justification for the allowance of the claim.

(Exhibits not reproduced.)

OPINION OF BOARD: Claimant was the occupant of a position designated as Timekeeper and Roundhouse Clerk at Oroville, California, assigned 12:00 Midnight to 8:00 A. M., six days per week with Sunday off. From May 16, 1944, to January 18, 1947, Claimant worked seven days per week. On January 18, 1947, Carrier purported to abolish the Sunday work by discontinuing the work period commencing at 12:00 Midnight to 8:00 A. M. Monday. Claimant contends that the Sunday work period of his assignment begins at 12:00 Midnight and ends at 8:00 A. M. Sunday. The claim is based on the contention that the Carrier actually abolished the Monday rather than the Sunday work.

We think the question before us must be decided by the language of the starting time rule and the reasonable intendments thereof. The applicable portion of this rule provides:

"Where three consecutive shifts are worked covering the 24-hour period, one shift relieving the other, no shift shall have a starting or ending time after 12 o'clock midnight and before 6:00 A. M."

Rule 16, Current Agreement.

Consequently, the first shift of a calendar day under this rule must begin not earlier than 6:00 A. M. or later than 8:00 A. M. The second shift must begin not earlier than 2:00 P. M. or later than 4:00 P. M. The third shift must begin, therefore, not earlier than 10:00 P. M. or later than 12:00 P. M. In other words, the Carrier may fix the beginning of the work day at any time between 6:00 A. M. and 8:00 A. M. and when it is so fixed, the second shift of that day will commence 8 hours later and the third shift will commence 16 hours later. Consequently, if the first shift on Sundays begins at 8:00 A. M., the second shift begins at 4:00 P. M. and the third shift at 12:00 Midnight. This is in accord with the interpretation made by the Carrier in the present case. Clearly, if the Sunday work day cannot begin before 6:00 A. M., the rest period, when Sunday is assigned as the day of rest, must be subsequent to that hour.

The Organization argues, however, that their contention is in accord with the practice followed prior to January 18, 1947. The record does show that the Carrier applied the Agreement in the manner for which the Carrier now contends prior to that date. We point out, however, that such practice, if we may call it such, was in direct violation of Rule 16 and the intendments of that rule. The continued violation of the rule does not change the rule as we have often said. The acquiescence of the parties to the violation might operate as an estoppel insofar as the collection of penalties is concerned, but it is not a bar to the enforcement of the Agreement as made by either party to it. The Carrier saw fit to make a correct application of the Agreement on January 18, 1947. This could have been done, possibly, to avoid anticipated claims because of its previous misapplication. In any event, the Carrier has a right to put into effect the intendments of the controlling Agreement which the Organization itself could have demanded to be done. Where rules conflict with former practices, such practices are abrogated and the rules become the controlling guide. Under the rules of the present Agreement, the Sunday work of the third shift commences at 12:00 Midnight and ends at 8:00 A. M. Monday. This is the period which Claimant is required to take as his day of rest when Sunday is assigned as his rest day.

FINDINGS: The Third Division of the Adjustment Board upon the whole record and all the evidence, finds and holds:

That both parties to this dispute waived oral hearing thereon;

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

The Agreement was not violated.

AWARD

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: A. I. Tummon
Acting Secretary

Dated at Chicago, Illinois, this 29th day of July, 1949.