

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Adolph E. Wenke, Referee.

PARTIES TO DISPUTE:

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

TERMINAL RAILROAD ASSOCIATION OF ST. LOUIS

STATEMENT OF CLAIM: Claim of the System Board of Adjustment, Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employees, that the Carrier violated rules of agreement, effective April 1, 1945—

1. When on Tuesday, January 27, 1948 Management required Roy Rice, a 6-day per week employe, regularly assigned as a Mail and Baggage Handler on Job 37-1 in the St. Louis Mail and Baggage Department to suspend work on his regular position and perform the work of Delbert Stephans, Mail and Baggage Handler on Job 37-8, a 7-Day per week position and was designated by the Management as necessary to its continuous operation.

2. That George C. Shaw, regular incumbent of position of Mail and Baggage Handler designated as Job 37-9, who was off on his designated rest day, Tuesday, January 27, 1948, be compensated for wage loss sustained account not called to fill vacancy caused by Stephans' absence on Job 37-8, namely, one day's pay at punitive rate, amount \$13.63, attached to position of Job 37-8.

EMPLOYEES' STATEMENT OF FACTS: On September 24, 1946, formal notice was served upon the Carrier pursuant to the provisions of the current agreement, effective April 1, 1945, and of the Railway Labor Act, requesting a change in Rule 40, captioned "Notified or Called" and Rule 44, captioned "Sunday and Holiday Work". Following negotiations and failure to compose the Employees' request in direct conferences, mediation was invoked. The Employees' request was not composed in mediation and on July 31, 1947, the President, pursuant to Section 10 of the Railway Labor Act, created an Emergency Board to investigate and report its findings with respect to the dispute.

On August 19, 1947, the Emergency Board made its report to the President and it was subsequently accepted by both the Employees and the Management, as evidenced by a Memorandum dated St. Louis, October 16, 1947. (Employees' Exhibit "A".)

Insofar as the instant case is concerned, this Memorandum Agreement extended the provisions of Rule 44, captioned "Sunday and Holiday Work" to employes in the Mail and Baggage Department of the Carrier at St. Louis. In applying the provisions of this Memorandum Agreement, Manage-

by any right to the work, which he was not, he still would have no claim because he had not made himself available for the work.

The claim is not supported by any rules of the agreement and has no basis in equity. What the organization is asking us to do is to pay a man a day's pay who was at home without any means of notification when we assigned a so-called six-day man to fill a vacancy on a so-called seven-day or continuous service job made vacant by the regular incumbent failing to report for his assignment without giving any notice whatsoever.

(Exhibits not reproduced.)

OPINION OF BOARD: The System Board of Adjustment of the Brotherhood makes this claim in behalf of George C. Shaw, the regular incumbent of the position of Mail and Baggage Handler in Carrier's St. Louis Mail and Baggage Department designated as Job 37-9. It asks that Claimant be compensated for wage loss he suffered by not being called to fill the temporary vacancy on Job 37-8 on January 27, 1948, when the regular incumbent thereof was absent from duty and asks that his wage loss be allowed on an over-time basis.

The record shows that on Tuesday, January 27, 1948, Delbert Stephans, the regular incumbent of Job 37-8, failed to report for work. Job 37-8 is that of a Mail and Baggage Handler in the Carrier's St. Louis Mail and Baggage Department and designated by it as a seven-day position, that is, one necessary to its continuous operation, with Monday as the assigned day off. Claimant, the regular incumbent of Job 37-9 which is that of a Mail and Baggage Handler in the Carrier's St. Louis Mail and Baggage Department, was off duty on January 27, 1948, as that was his regular day off. Job 37-9 is that of a Mail and Baggage Handler in the Carrier's St. Louis Mail and Baggage Department and designated by it as a seven-day position, that is, one necessary to its continuous operation. However, Carrier did not use Claimant to fill the temporary vacancy on Job 37-8 on January 27, 1948, caused by the absence of Stephans, but used Roce Rice, a six-day per week employe for that purpose, blanking Rice's position on that day.

Rule 44 of the parties' Agreement, as of the time effective, provides:

"SUNDAY AND HOLIDAY WORK. 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 at the rate of time and one-half, except that employes necessary to the continuous operation of the carrier and who are regularly assigned to such service, will be assigned one regular day off duty in seven, Sunday if possible, and if required to work on such regularly assigned seventh day off duty will be paid at the rate of time and one-half time; when such assigned day off duty is not Sunday, work on Sunday will be paid for at straight time rate."

Under this rule Carrier may not blank a seven-day position in part or in whole but is required to fill it on each and every day. See Awards 2783, 3049, 3376, 3746, and 3814 of this Division. It cannot fill a temporary vacancy in a regular seven-day position, that is, one necessary to its continuous operation, with an employe regularly assigned to a six-day position, that is, a position not necessary to its continuous operation. See Awards 336 and 3770 of this Division. Such temporary vacancy should first be filled by extra, relief, or furloughed men and, if none are available, then a regular man who is off duty but available should be called and used to do the work. See Awards 2282, 2695, 3271, 3770, and 4179 of this Division.

Carrier says there were no extra or furloughed men available and as Claimant did not report on the job or have a telephone available whereby he could have been called he was not available to perform the work. There is no evidence that Carrier ever attempted to get in touch with Claimant. Even

so, this Division has often held that the penalty for the violaion of an agreement is the important thing in order that the provisions thereof be kept and violations thereof discouraged and that the claim on behalf of an individual is merely an incident which is of no concern to the Carrier. See Awards 1646, 2277, 2282, 2346, 3890, 4022, 4103, and 4390 of this Division.

However, under our awards the penalty rate for work lost because it was given to someone not entitled to it is the rate that the regular occupant of the position would have received had he worked his position. See Awards 3049, 3193, 3271, 3376, 3745, 3770, 4103, 4244, and 4467 of this Division. In this case that would have been the regular rate of the position.

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 but on a pro rata basis.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: A. I. Tummon
Acting Secretary

Dated at Chicago, Illinois, this 12th day of September, 1949.