Award No. 4897
Docket No. CL-5006

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Jay S. Parker, Referee

PARTIES TO DISPUTE:

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

KANSAS CITY TERMINAL RAILWAY COMPANY

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

(a) The Carrier violated Rule 43 in December, 1948 when it advanced the date previously adopted for the commencement of straight time pay for employes required to work week-day rest days account of the Christmas fail rush, and;

(b) The Carrier pay all employes at the rate of time and one-half for week-day rest days worked during the period December 4, 1948, to December 9, 1948, inclusive.

EMPLOYES' STATEMENT OF FACTS: There is an agreement in effect between the parties effective October 1, 1942, which was amended by Memorandum Agreement signed September 13, 1946, which amendments were effective October 1, 1946. Copies of the Agreement of October 1, 1942, and amendment of September 13, 1946, have been filed with the National Railroad Adjustment Board and by reference are made a part of this submission and statement of facts.

Rules 38 and 43 of the Agreement as amended to become effective October 1, 1946, read as follows:

"RULE 38—NOTIFIED OR CALLED.

"Except as provided in Rule 39, employes notified or called to perform work not continuous with, before or after the regular work period, shall be allowed a minimum of three (3) hours for two (2) hours of work or less and if held on duty in excess of two (2) hours, time and one-half will be allowed on the minute basis.

"Employes notified or called to perform work on Sundays, assigned weekly day off and holidays, shall be paid a minimum of eight (8) hours at time and one-half except as provided in the last paragraph of Rule 43."

"RULE 43—SUNDAY, HOLIDAY AND DAY OFF WORK.

"Work performed on Sundays and the following legal holidays, namely, New Year's Day, Washington's Birthday, Decoration Day,

OPINION OF BOARD: This claim seeks to recover the difference between straight time and time and one-half for all Mail and Baggage Department employes required by the Carrier to work on their rest days on account of the 1948 Christmas rush period.

Rule 43 of the contract in force and effect on all dates in question is essential to a proper understanding of the complete factual situation involved in the dispute and should be quoted in toto. It reads:

> "SUNDAY, HOLIDAY AND DAY OFF 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 these holidays occur on Sunday, the day observed by the State, Nation or by proclamation shall be considered the holiday) shall be paid for at rate and one-half.
>
> "Employes covered by this Agreement, except extra employes shall be assigned one regular day off duty each week, Sunday if the requirements of the service permit.
>
> "Work performed by employes on the regularly assigned day off duty and work performed by extra employes on the seventh consecutive day (unless such days fall on Sundays or holidays as above described) shall be paid for at pro rata. The provisions of the preceding sentence of this paragraph apply when employes are assigned to work such days during the normal Christmas and Easter rush periods."

The claim requires interpretation and application of the third paragraph of the rule just quoted and in particular that portion thereof which provides:

> "The provisions of the preceding sentence of this paragraph apply when employes are assigned to work such days **during the normal Christmas** and Easter **rush periods.**" (emphasis supplied)

In the interest of both clarity and brevity, it should be said the parties agree the rule contemplates and permits the Carrier to require employes to work their regularly assigned days off at their pro rata wage during a portion of the Christmas holiday season and that the only question in controversy between them is as to what is meant by the phrase, "the normal Christmas . . . rush periods," as used therein. The Petitioner contends it means the two weeks' period just prior to Christmas day while the Carrier insists it means the three weeks' period immediately preceding such day.

So far as the instant claim is concerned and undisputed and all important facts are that early in December 1948 the Carrier gave notice to the employes that due to the Christmas rush they would be required to work their regular day off commencing with December 6th. They worked pursuant to the notice and were paid straight time. Those who worked from the 4th to the 6th were also paid at that rate. The Petitioner insists they should not have been noticed or required to work at such rate until December 10, hence it claims the extra rate for all those who worked during that period of time.

No useful purpose will be served by setting forth in this Opinion the conflicting facts revealed by the record. It suffices to say that after a careful examination of all the evidence adduced by the parties in support of their respective positions we have little difficulty in concluding the record falls far short of establishing that they had any express understanding or agreement at the time the Agreement was negotiated as to what would constitute the "normal Christmas rush periods." It is certain it cannot be said the terms of the paragraph in controversy reveal any express or implied agreement of that nature.

In the absence of any agreement, express or implied, it then becomes our duty to search the record for the purpose of ascertaining whether such para-

graph has been so interpreted and applied by the parties as to warrant us in holding they are bound by the construction given to its terms subsequent to its effective date.

The Petitioner contends that since the rule itself contains no specific date, the fact the Carrier did not notice or require employes in the Mail and Baggage Department to work at the straight time rate until December 10 in the years 1946 and 1947 compels that conclusion. We doubt whether, with a rule so recently effective, two years' action of that character justifies any such conclusion, particularly where—as here—the record discloses that like employes in the Carrier's other departments, namely the Freight, Yard, Car and Mechanical Clerks, who come within the scope of the same rule, were required to work at the pro rata rate for each of those years commencing with December 4th.

The Petitioner points out that Mail and Baggage employes do strenuous work and the Carrier concedes that in 1946 and 1947 the foremen of that department allowed the employes therein to have their rest days as long as possible on that account. We find nothing in the rule indicating that any employe coming within its scope is excepted from its terms. Nor do we believe the Carrier's statement can be construed as an admission that it had so interpreted and applied the rule with respect to employes in the Mail and Baggage Department.

The same careful examination of the record to which we have heretofore referred discloses beyond question that the Christmas mail started earlier in 1948 than it did in 1946 and 1947, also that its volume was much heavier. This of course means that the Christmas rush period for that year also commenced earlier. The record is entirely silent as to when the Christmas rush period commenced in the year preceding 1946.

Under such conditions and circumstances, and others heretofore related, we are impelled to hold the Petitioner has not maintained the burden of establishing that the normal Christmas rush period had not started on December 6, 1948, the date on which employes were notified and required to work their regularly assigned rest days under the provisions of Rule 43 of the Agreement.

The conclusion just announced does not mean this claim is to be denied in its entirety. Heretofore we have indicated that notwithstanding the exception to Rule 43 was put into force and effect by the Carrier on December 6th, it nevertheless paid the employes who worked their rest days on December 4th and 5th on a straight time basis. The Petitioner asserts the Carrier issued instructions to its timekeeping force to do so. Otherwise little is to be found in the record which deals with the subject. Be that as it may, we find no denial by the Carrier respecting this phase of the claim. The Carrier was bound by its notices which, so far as the record shows, were directed to the 1st, 2nd, and 3rd tours. In each the date for the commencement of straight time work under the rule was fixed for Monday, December 6. Therefore under the rule the employes affected, who worked their regularly assigned rest days on December 4th and 5th, would be entitled to pay at the rate of time and one-half. It is ordered that those who did so work and received pro rata time only be paid the difference in rate.

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 employe 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 did not violate the Agreement by fixing December 6, 1948, as the date for commencement of the normal 1948 Christmas rush period; that

it did violate that Agreement in failing to pay all employes who worked their regularly assigned rest days on December 4 and 5, 1948, at the rate of time and one-half.

AWARD

Claim denied in part and sustained in part as indicated in the Opinion.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: A. I. Tummon
Acting Secretary

Dated at Chicago, Illinois, this 27th day of June, 1950.