Award No. 5352
Docket No. CL-5374

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Angus Munro, 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 of Railway and Steamship Clerks, Freight Handlers, Express and Station Employes that:

1. The Carrier violated the Clerk's Agreement of January 15, 1947 and the Chicago Agreement of March 19, 1949, when on September 5, 1949, and all subsequent holidays it failed to afford the monthly rated employes covered by the scope of said Agreements the benefits of the holidays when such holidays fell on assigned rest days of employes affected, other than Sunday and that:

2. The Carrier shall now by an appropriate Order and Award be required to pay to the affected monthly rated employes such additional sums as they are entitled to for performing service in excess of the number of hours of service contemplated in the basic monthly rate.

EMPLOYES' STATEMENT OF FACTS: Prior to September 1, 1949, all monthly rated employes were based on a work month of 204 hours per month; 365 calendar days, minus 52 Sundays and 7 holidays, 306 work days per year, 8 hours per day, 2448 hours per year divided by 12 months, 204 hours per month. The formula used being provided in Rule 35, of the Agreement of January 15, 1947, which for ready reference is quoted herein

"RULE 35

Basis of Pay

(a) Employes covered by Rule 1, Groups 1, 2 and truckers and janitors in Group 3, of this agreement, heretofore paid on a monthly or any other basis, shall be paid on a monthly salary basis. Laborers covered by Rule 1, Group 3, of this agreement, shall be paid on an hourly basis. The conversion of present rates to a monthly or hourly basis shall not operate to establish a rate of pay either more or less favorable than now in effect.

(b) All rates of pay are based on three hundred and six (306) days' work per year (365 calendar days minus the 52 Sundays and 7 holidays). To determine the pro rata hourly rate, divide the monthly rate by 204 and the daily rate by 8; fractions less

as was denied by the Emergency Board and previously referred to in this submission.

In the foregoing circumstances and particularly because the claim as presented to the Board is not the claim which was presented to the Carrier and discussed on the property, the Carrier holds that the case is not properly before the Board and, therefore, must be dismissed.

(Exhibits not reproduced.)

OPINION OF BOARD: Although part one (1) of the claim herein is broad enough to include the situation where a holiday falls on a rest day with its companion rest day does not include a Sunday, this opinion refers only to that situation where the holiday falls on the second rest day and the first rest day is also a Sunday. This view is in keeping with such portion of the claim in that the allegation refers to a holiday falling upon a rest day subsequent to a rest day which is also a Sunday.

Prior to September, 1949 whenever a holiday fell upon a rest day other than a Sunday, the principle set out in Rule 34 (a) of the 1947 Schedule was followed.

The Chicago Agreement of March, 1949 stated with reference to pay for holidays the existing provisions were to remain unchanged. This Agreement was binding upon the parties hereto and pursuant to the same, said parties negotiated a Schedule effective as of September 1, 1949. This latter Schedule and in particular Rule 34 (b) changed Rule 34 (a) of the 1947 Schedule and Rule 34 (b) was omitted. The parties did not reach an agreement with reference to Rule 35; however, as previously stated the Chicago Agreement covering the subject matter concerned with such rule was binding. This is set out in Art. 2, Sec. 2 (b) of such Agreement.

Coming now to the facts in the case before the Board, Petitioner alleged Carrier violated the last above mentioned rule and Art. 2, Sec. 3 (d) of the Chicago Agreement in that it refused to pay certain employes compensation at punitive rates for work performed on a day immediately subsequent to a holiday described in Rule 34 (b), 1949 Schedule, and where such holiday occurred on a rest day other than a Sunday, to wit: September 5, 1949, same being Labor Day.

As previously pointed out, the payment of punitive rates for work performed on a day subsequent to a rest day when same fell on a day other than Sunday and when the rest day was a holiday was based upon a custom or practice of doing equity to those employes whose rest day did not fall on Sunday. Thus it will be seen this custom or practice was tied to and dependent on Rule 34 of the 1941 Schedule and Rule 34 (a) of the 1947 Schedule. However, Rule 34 (b) of the 1949 Schedule changed all this. But Complainant urges by reason of Art. 2, Sec. 3 (d) of the Chicago Agreement the custom or above referred to practice continued. The Board will note 3 (d) refers to "provisions" which we think means a written statement and not an oral or verbal understanding from which a practice has developed. Nor does Decision No. 22 of the Forty Hour Week Committee aid in determining the question in that Carrier points out a different rule was involved and Petitioner points out nothing in such Decision should bind them. We think inasmuch as the 1949 Schedule changed the 1947 Schedule, the dependent practice was thereby abrogated (see Award 2436).

Petitioner pointed out by reason of Carrier's operations being seasonal in character, a sustaining Award would to some degree offset the loss sustained by not working the short month of February. The answer to such argument is that the Schedule makes no reference to seasonal operations.

Since the time worked during the week was not in excess of 40 hours, no employe performed his duties in excess of the number of hours comprehended in the monthly 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 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

That the Schedule was not violated in that situation where the holiday falls on the second rest day and the first rest day is also a Sunday.

AWARD

Claim denied as per Opinion and Findings.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: A. I. Tummon
Acting Secretary

Dated at Chicago, Illinois, this 27th day of April, 1951.