

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

David R. Douglass, Referee

PARTIES TO DISPUTE:

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

RAILWAY EXPRESS AGENCY, INC.

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

(a) The agreement governing hours of service and working conditions between the Railway Express Agency and the Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employees effective October 1, 1940 was violated at the Chicago, Illinois operations when C. D. Zitela, et al, were paid at straight time rate for Sunday while on vacation instead of time and one-half times their regular rates; and

(b) He and all other employees adversely affected by Carrier's action shall now be compensated for the difference between the amounts they received for each Sunday, which was a part of their work week during vacation periods paid for at straight time rate—and the amounts they should have received for each of such Sundays calculated at the time and one-half times their regular rate of pay covering the period January 6 to August 31, 1949, inclusive.

(c) Carrier shall be required to make available to employee representatives the daily pay roll covering the Chicago, Illinois Agency terminals operation for the period in question in order that wage losses resulting to C. D. Zitela, et al, may be properly and accurately ascertained.

EMPLOYEES' STATEMENT OF FACTS: C. D. Zitela, et al, are the regular occupants of 6-day positions titled Foreman, Clerk, Carloader, Freight Router and positions having other titles at the Carrier's Polk Street and other terminal operations at Chicago, Illinois. For example, Bulletin No. 130 was posted at the Polk Street Terminal, April 1, 1948, advertising a 6-day position titled Freight Assorter in Group 15, Position X-137, hours of assignment 16:00-23:50 (4:00 P. M. to 11:50 P. M.), salary \$264.05 basic per month—with Saturday day of rest. There was a notation on the bulletin reading: "Punitive time on Sunday." (Exhibit "A").

C. D. Zitela made application for the position and it was awarded him by Notice No. 130 posted April 5, 1948. (Exhibit "B"). His work week assignment therefore became Sunday to Friday, inclusive, with a day other than Sunday as a day of rest with "punitive time for Sunday."

Both prior and subsequent to the periods when these employees took their vacations with pay the Carrier paid them for service performed on

OPINION OF BOARD: The basis of this claim is that Claimant Zitela and others "were paid at straight time rate for Sunday while on vacation instead of time and one-half times their regular rates."

Claimant Zitela was the regular occupant of position X-137, which position was bulletined on April 1, 1948 as Bulletin No. 130. The bulletin called for a six-day position with position X-137 to have Saturday as the rest day and punitive time on Sunday. This employee was paid at time and one-half for Sundays except during his vacation, at which time he was paid at straight time rate.

The claim is made on the theory that the Claimant's regular rate of pay for Sunday is at punitive time, as is shown by Bulletin No. 130.

The Carrier asserts that this claim is not properly before us because it was not properly handled on the property. The facts regarding the handling on the property are briefly as follows: The General Chairman, on June 6, 1949, wrote the Superintendent in which letter was stated, "We are informed that such employees when on vacation are paid at the straight time rate instead of time and one-half. If such are the facts, please be advised that such employees are and have been improperly paid. Time and one-half should be paid for such work performed on Sundays when an employee is on vacation." The Superintendent answered the General Chairman by letter of June 28, 1949, stating that the employees were not entitled to the time and one-half rate for Sundays when on vacation. On June 29, 1949, the General Chairman wrote the General Manager regarding these unnamed, but specified employees. The General Manager, by letter of June 30, 1949, took the position that such an employee was not entitled to the time and one-half rate.

In the course of the correspondence, on August 16, 1949, Claimant Zitela filed a claim with the agent. This claim was denied by the agent and Zitela gave notice that he would appeal.

On August 24, 1949, the General Chairman asked that the claim be amended to include the letters of Zitela and the agent and that they be made a part of "this file". This was agreed to by the General Manager on August 26, 1949.

Thus, we determine that the claim was initiated on June 6, 1949. The letter of that date, along with subsequent correspondence between the General Chairman and General Manager Hampshire, makes it clear to us that the management was properly informed as to the nature of the claim and who the claimants were. The Claimants were not named individually by setting out their proper names, but they were so described as to leave no doubt as to their identity by merely checking company records. Zitela, who took it upon himself to file a separate claim, was included in the claim of June 6, 1949, when General Manager Hampshire agreed to such consolidation of claims in his letter of August 26, 1949.

Coming to the merits of this claim, the question to be decided is whether the claimants are entitled to pay at time and one-half for Sundays when on vacation.

These claimants were given regular assignments, by bulletin, which included Sundays as a regular day for them to perform work. The regularly assigned rate of pay was listed as being at punitive rates for Sunday. In other words, for being assigned to Sunday work as a part of their weekly schedule these claimants regularly received pay at a higher rate for the Sunday work.

Many cases have held that in order to be entitled to the overtime rate, it being a penalty payment, that the work must actually be performed by the claimant. We believe that this does not preclude these claimants from being entitled to what they would have received as a part of their regular

assignment rate of pay. Although the bulletin specified that Sunday work should be paid for at punitive time, the practical effect is that it is a contract rate of pay. The claimants are regular entitled to be paid at punitive time for Sunday because they are regularly required to perform the work on Sunday.

The rule covering annual vacations, Rule 91, provides that an employee on vacation shall receive a certain number of "working days with pay", dependent upon amount of prior service. We believe that this means that the employee should receive, while on vacation, the amount of pay to which he would have been entitled for work of his regularly assigned hours and at the rate of pay to which he would have been entitled for said work, just as if he had actually been on the job and has done the work.

Under these particular circumstances we see no reason why the Company should not make available their daily payrolls covering the period from January 6, 1949, to August 31, 1949, for the purposes of a joint check by the Organization and the Company. The claims have been properly developed and the dates during which time the violations occurred are properly set out. A joint check, in such an instance, is not granting the employees access to records for the purpose of unearthing new claims, but rather for the purpose of guaranteeing that the effects of this opinion are properly carried out.

The Organization was not dilatory in progressing this claim to an extent that the rights of the Carrier were prejudiced in any way.

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 the Carrier violated the Agreement.

AWARD

Part (a) of claim sustained.

Part (b) of claim sustained.

Part (c) sustained in accordance with the Opinion and Findings.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: (Sgd.) A. Ivan Tummon
Acting Secretary

Dated at Chicago, Illinois, this 28th day of July, 1952.