

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Livingston Smith, Referee

PARTIES TO DISPUTE:

**BROTHERHOOD OF RAILWAY AND STEAMSHIP CLERKS,
FREIGHT HANDLERS, EXPRESS AND STATION EMPLOYES
CHICAGO, MILWAUKEE, ST. PAUL & PACIFIC RAILROAD
COMPANY**

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

1) The Carrier violated the rules of the current Clerks' Agreement when it failed to compensate Employees E. A. Welu and N. J. Jennings as provided for in Rule 34 (d) when they were called to perform work on Sunday.

2) The Carrier shall compensate Employee E. A. Welu the difference between what he was paid on Sunday, November 9, 1952 and 5 hours and 20 minutes at the time and one-half rate.

3) The Carrier shall compensate Employee N. J. Jennings the difference between what he was paid on Sunday, November 23, 1952 and 5 hours and 20 minutes at the time and one-half rate.

JOINT STATEMENT OF FACTS: Employee E. A. Welu is regularly assigned to Position No. 140, Yard Clerk, at Dubuque, Iowa, from 9:00 A. M. to 6:00 P. M. The position is a 7-day position with rest days of Thursday and Friday. Employee Welu's seniority date is December 18, 1950.

Employee N. J. Jennings is assigned to Relief Position No. 9 with rest days of Tuesday and Wednesday. On Sundays and the day involved in this claim he works from 11:30 A. M. to 7:30 P. M. Employee Jennings' seniority date is September 17, 1946.

On Sunday, November 9, 1952, Employee E. A. Welu received a call at his home at 8:30 P. M. to report to work for the purpose of servicing and installing heaters in two cars of bananas, working from 8:45 P. M. to 9:15 P. M.

Time card for the Sunday call was submitted by Employee Welu for 5 hours and 20 minutes at the rate of time and one-half. Three hours at the straight time rate of pay was allowed and paid Employee Welu for the Sunday call.

On Sunday, November 23, 1952, Employee N. J. Jennings received a call at his home at 7:30 A. M. to report for work for the purpose of servicing and installing heaters in six cars of bananas, working from 7:45 A. M. to 9:00 A. M.

Time card for the Sunday call was submitted by Employee Jennings for 5 hours and 20 minutes at the rate of time and one-half. Three hours at

The third and fourth sentences of Rule 34 (d) were added to the rule by agreement between the parties as result of disposition of another dispute involving two calls on Sunday. In other words, the third and last sentences of Rule 34 (d) were not added to the rule by reason of the 40 Hour Week Agreement but by reason of a "side" agreement between the parties in connection with another matter and that portion of the rule has nothing to do with the instant dispute.

That your Honorable Board may know that the position the Carrier now takes in this case is consistent with its position since Rule 31 (d) (now Rule 34 (d)) came into existence on January 16th, 1946, we should like to direct attention to the fact that the Carrier's Circular No. 3, dated January 15th, 1946, and addressed to Department Heads and others having under their supervision employees covered by the Clerks' Agreement and containing instructions and advice as to the application of the new agreement to take effect January 16th, 1946, contains the following paragraph with regard to Rule 31(d):

"Rule 31 (d) provides that an employee, other than one performing work on a position necessary to the continuous operation of the railroad, as defined in Rule 33, called to perform work on Sundays or one of the seven holidays, will be paid a minimum of 5 hours and 20 minutes at the rate of time and one-half for four hours work or less and if required to perform in excess of four hours work on such days, the employee will be allowed a minimum of 8 hours at the time and one-half rate."

It will be noted that on January 15th, 1946, which was immediately after the negotiations had been completed, the Carrier clearly stated that the provisions of Rule 31 (d) did not apply to an employee performing work on a position necessary to the continuous operation of the railroad, meaning one having Sunday as one of his work days.

Of course, as the 40 Hour Week Agreement, by the provisions of Article II, Section 1 (j) titled "Sunday Work" eliminated the requirement for Rule 33, that rule was eliminated from the Schedule effective September 1, 1949 and there naturally followed the elimination of the last sentence of Rule 31 (d) because of its reference to Rule 33, which was to be eliminated. However, all changes in schedule rules, because of the provisions of the 40 Hour Week Agreement, were made in conformity therewith. Therefore, as provided in Article II, Section 3 (c) reading: "Existing provisions relating to calls shall remain unchanged", there should not now be any change in the application of the call rule to work performed on Sunday by employees who have Sunday as one of their assigned work days. In other words, as those employees who had Sunday as one of their assigned work days prior to September 1, 1949 were paid under the provisions of Rule 31 (a) (a minimum of 3 hours at the pro rata rate for 2 hours' work or less) when called outside of their assigned hours on Sunday, and as that arrangement has continued without change up to the present time, as provided by Article II, Section 3 (c) of the 40 Hour Week Agreement, the employees' request by the claim which they have presented in this case, for a change in the application of the call rule—as it pertains to employees called to perform work outside of their assigned hours on Sunday, is not proper and we therefore respectfully request that the claim be declined.

All data contained herein has been presented to the employees.

(Exhibits not reproduced.)

OPINION OF BOARD: The instant claim concerns the interpretation and application of Rule 34 (a) and (d) of the effective agreement, bearing date of September 1, 1949, and reading as follows:

"(a) Employees notified or called to perform work, either before or after, but not continuous with their regular work period

shall be allowed a minimum of three hours at pro rata rate for two hours' work or less and, if held on duty in excess of two hours, time and one-half shall be allowed on the minute basis."

"(d) Employees notified or called to perform work on Sunday or on one of the seven (7) holidays specified in Rule 35 (b) will be allowed five hours and twenty minutes (5' 20") at the rate of time and one-half for four (4) hours' work or less. * * *

Claimant E. L. Welu was a regularly assigned Clerk, 9 A. M.-6 P. M., Saturday through Wednesday, with Thursday and Friday as rest days. Claimant N. J. Jennings held a regularly assigned relief position as Clerk, 11:30 A. M. to 7:30 P. M., Thursday through Monday, with Tuesday and Wednesday as rest days. The claim here concerns work performed on Sunday. In the case of Claimant Welu the work was performed after his regularly assigned hours, namely 8:45 P. M. to 9:15 P. M. Claimant Jennings performed work prior to his assigned hours, namely 7:45 A. M. to 9:00 A. M. The Respondent compensated each of the claimants for 3 hours, pro rata rate, under 34 (a). Claimants seek compensation for 5 hours 20 minutes, overtime rate, under 34 (d), less the amount so paid.

Petitioners assert that paragraph (d) of Rule 34 contains an exception to paragraph (a) thereof and as such constitutes in effect a special provision taking precedence over the general provisions of paragraph (a). It was pointed out that this rule was rewritten, modified and amended when placed in the current agreement, with omission of the clause making the rule inapplicable to "employees necessary to the continuous operation of the railroad."

The Respondent took the position that Rule 34 (d) was applicable only to work performed on Sunday, when Sunday was an assigned rest day, as provided in Rule 33 (b).

It is further argued that if Sunday calls, when made outside of assigned hours on an assigned Sunday, are compensable at the punitive rate under 34 (d), it would in effect require payment for all Sunday work, even within assigned hours, to also be paid for at the punitive rate. Likewise it is pointed out that under Decision 14 of the National 40 Hour Week Agreement Committee all call rules were to remain unchanged.

The above ruling (Decision 14) of the National 40 Hour Week Committee also took into consideration that the parties might mutually agree to change the call rules. This was done here as a comparison of a prior agreement having an effective date of January 16, 1946, with the presently effective agreement, will reveal. The sentence reading:

"The provisions of this paragraph do not apply in connection with employees necessary to the continuous operation of the railroad as referred to in Rule 33."

was omitted from the presently effective agreement. Under the old agreement the said rules, while bearing different numbers, are none the less identical except for that change.

The present Rule 33 (b) pertains to Service on Rest Days. The present Rule 34 in its entirety pertains to being "Notified or Called," and the compensation to be paid if so called. It is thus in effect a special rule. Innumerable awards of this Division hold that a special rule supersedes a general rule. If the parties had desired to make the operation of Rule 34 subject to the provisions of Rule 33 they could have done so by including such a provision. This they did not do.

The Respondent's contention that a sustaining award will have the effect of authorizing punitive pay for work performed on regularly assigned hours of a Sunday assignment is without merit. This argument if presented would

fall in face of the fact that rate rules establish the compensation for all assignments, regular or otherwise.

If an employe is regularly assigned to perform work on a holiday he is paid at the punitive rate. Under the Carrier's contention, an employe thus regularly assigned but called upon to render service outside of his assigned hours on a holiday would be paid on a different basis and under another rule.

Rule 84 (d) makes reference to Sunday and seven (7) holidays. They are thus integrated into the rule. They cannot be severed or separated but must be applied on the same basis.

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 Carrier violated the agreement.

AWARD

Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: (Sgd.) A. Ivan Tummon
Secretary

Dated at Chicago, Illinois, this 28th day of November, 1955.