

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Norris C. Bakke, Referee

PARTIES TO DISPUTE:

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

MISSOURI PACIFIC RAILROAD COMPANY

STATEMENT OF CLAIM: Claim of the General Committee of the Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employes on the Missouri Pacific Railroad, that the Carrier violated the Clerks' Agreement:

1. When on Sunday, April 10, 1955, it moved Car Record Clerk H. F. Bauch, regularly assigned to a seven-day per week position, 8 A. M. to 4 P. M., Wednesday through Sunday, rest days, Monday and Tuesday, rate \$13.40 per day, from his position to the regularly assigned position of Car Record Clerk R. E. Cartmell, rate \$14.42 per day, hours 8 A. M. to 4 P. M., also a seven-day per week position, and blanked the Car Record Clerk position of Clerk H. F. Bauch, in lieu of utilizing Clerk R. E. Cartmell, the regular employe;

2. Clerk R. E. Cartmell shall be compensated by the Carrier for eight hours, Sunday, April 10, 1955, at the punitive rate of \$2.7037 per hour, amount \$21.63, account Carrier's action in violation of Rules 25 (b), Item 4, and 25 (f) and related rules of the Clerks' Agreement.

EMPLOYES' STATEMENT OF FACTS: On April 10, 1955, the Carrier maintained at its Kansas City State Line Local Freight Station, among other clerical positions subject to the scope and operation of the Clerks' Agreement, two Car Record Clerk positions, seven days per week, to wit:

Classification	Regularly Assigned Occupant	Rate	Assigned Hours	Rest Days
Car Record Clerk	H. F. Bauch	\$13.40	8 A. M.-4 P. M.	Monday-Tuesday
Car Record Clerk	R. E. Cartmell	\$14.42	8 A. M.-4 P. M.	Saturday-Sunday

Sunday, April 10, 1955, was a regularly assigned rest day of Clerk Cartmell and he is regularly relieved on his rest day by a regularly assigned Relief Clerk, which Relief Clerk position was vacant on April 10, 1955, and there was no available extra or furloughed Clerk to fill Clerk Cartmell's position, 8 A. M. to 4 P. M. on his rest day.

little or nothing to be done and the position could be dispensed with on such days.

But there is no guarantee with respect to a seven day position—or to a six day or five day position for that matter. The guarantee runs only to the employe, and no employe in this entire transaction had his work week reduced below five days of work and compensation. The fact that a seven day position is blanked occasionally does not change its status as a seven day position. See Awards 5589 and 6075.

The Carrier has faithfully carried out the purpose and intent of the 40-hour week provisions of the Agreement in this instance. It refrained from disturbing the claimant's rest day when it had no need for his services. The arrangement made to avoid calling him out was strictly in accord with Agreement provisions. That the arrangement also saved the Carrier a punitive day's pay was incidental to the situation and entirely proper; it was in accord with the Carrier's obligation to operate efficiently and economically. No employe suffered any loss.

The Carrier holds there is no Agreement requirement or authority for the payment of this claim.

(Exhibits not reproduced.)

OPINION OF BOARD: In his letter of July 20, 1955, Chief Personnel Officer of the Carrier, Mr. Short, says in part "It is not clear from the record in this case whether or not the Carrier complied with the provisions of Rule 9(c), but we are handling with those concerned to see that this is done in all cases."

We think it is clear from the record that Rule 9(c) was not complied with and the most generous attitude that this Board has expressed for such failure is found in Award 7227 wherein we said in part—

"The Board is of the opinion that the failure to give such notice creates a presumption that the agreement was violated and thereupon places the burden upon a Carrier of proving that its actions were not in contravention of the effective agreement."

While said Award 7227 was a denial award because the author of it felt "The Respondent here has met that burden and an affirmative award is not justified", we can reach no such conclusion here.

Carrier's sole defense in the instant case is its claimed right to invoke section 9(b) which possibly gave it the right to move Bauch from his position of Car Record Clerk and blanking his position on the date involved.

We think the record shows as a matter of fact that Bauch's position was not blanked but rather that he performed the work on both positions. Not that the failure to blank Bauch's position would be necessarily fatal to Carrier's case if it had a right to invoke Rule 9(b) but in our view its failure to comply with Rule 9(c) negates its right to invoke 9(b).

It will be noted from the language of 9(c) that it must be read in connection with 9(b) and in our mind compliance with 9(c) is a condition precedent to the invocation of 9(b). We do not agree with Carrier's argument that the Division Chairman's failure to protest constituted a waiver of receipt of the notice required by Rule 9(c).

Finally it may be noted that this referee is committed to the rule that giving such notice is essential. Award 8120.

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 Employee involved in this dispute are respectively Carrier and Employee 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: A. Ivan Tummon
Executive Secretary

Dated at Chicago, Illinois, this 27th day of February, 1958.