

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Levi M. Hall, Referee

PARTIES TO DISPUTE:

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

**THE NEW YORK, NEW HAVEN AND HARTFORD
RAILROAD COMPANY**

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

(a) Carrier violated the amended rules of the working Agreement which bears an effective date of Sept. 1, 1949, also, the Memorandum of Agreement effective May 1, 1954 dated Feb. 7, 1955 revising Rule 56-A, relating to paid holidays and had failed to compensate relief clerk W. Cavanaugh at the proper rate for services performed on his Holiday, Nov. 24, 1956, and,

(b) Carrier should now be directed by your Board to pay Relief Clerk W. Cavanaugh, an additional one and one-half days' pay for services performed as Station Baggage Master at New Haven, Conn., on that day.

EMPLOYEES' STATEMENT OF FACTS: Mr. William Cavanaugh is the regularly assigned occupant of Relief Position "A" Saturday through Wednesday, with Thursday and Friday as assigned days of rest. He was awarded this position on April 24th, 1956 under Vacancy Notice No. 10-V-36, and in carrying out his assignment he relieves the following position:

RELIEF POSITION "A"

SATURDAY	7:45 A. M. to 3:45 P. M.	Station Baggage Master		
SUNDAY	7:45 A. M. to 3:45 P. M.	Asst "	"	"
MONDAY	7:45 A. M. to 3:45 P. M.	" "	"	"
TUESDAY	3:45 P. M. to 11:45 P. M.	" "	"	"
WEDNESDAY	3:45 P. M. to 11:45 P. M.	" "	"	"

Mr. Cavanaugh receives the same daily rate of pay as is received by the occupants of the positions he relieves except on Saturday when he receives the daily equivalent of the monthly rate of the Station Baggage Master or \$19.53 per day. The monthly rate of the Station Baggage Master was \$424.82 when this claim started.

"Note: The expressions '**positions**' and **work**' used in this Rule 49 refer to service, duties, or operations * * * and not to the work week of individual employees." (Emphasis ours.)

On page 2 of Mr. Farquharson's letter (Exhibit "F") he refers to Rule 55-B "Service on Rest Days" and Rule 57—"Notified or Called."

These rules have no application in the instant claim. Claimant did not work on a rest day, nor was he on a call basis.

Carrier states, without fear of contradiction, that it has always been the custom and practice on this Property that whenever an employe covered the position of another employe, either on a temporary basis or as a regular assignment, he would assume **all** of the conditions of the position covered, with the sole exception that if the position covered was lower rated than his own he would receive the higher rate. General Chairman Farquharson has been a staunch advocate of the theory that custom and practice of long standing acquires the status of a written rule.

Insofar as the holiday for the position of Baggage-master is concerned, this position worked on the holiday and the incumbent thereof was paid in accordance with the special agreement (Exhibit "D"). There is no requirement that the Carrier pay for the same holiday on two dates on the same position.

If the contention of the organization were to control we would have a rather ridiculous situation wherein a Baggage-master, who worked on a legal holiday and received straight time pay (\$19.53), would be relieved on one of his rest days (not a holiday) by a subordinate employe who would receive two and one half times the Baggage-master's rate.

Carrier's decision of June 10, 1957 on this claim is attached as Exhibit "G" and is to be considered as a part of our Position.

For all of the reasons as stated above it is our contention that this claim is without merit and should be denied.

All of the facts and argument contained herein are known by the Employees.

(Exhibits not reproduced.)

OPINION OF BOARD: The record before us discloses that the instant Claim was on June 10, 1957, denied in a decision by Carrier's highest designated officer on the property and it was not until May 23, 1958, over eleven (11) months later that the Petitioner instituted proceedings before this Board. Section 1(c) of Article V of the National Agreement of August 21, 1954, to which the Brotherhood and Carrier are parties provides that "All claims or grievances involved in a decision by the highest designated officer shall be barred unless **within nine (9) months from the date of said officer's decision proceedings are instituted** by the employe or his duly authorized representative. . . ." (Emphasis ours.)

It has been urged, consequently, that this claim is barred and cannot be considered by us on its merits and this Board has no jurisdiction to hear the same. Obviously, the Rule was passed for the protection of the Carrier but could not be invoked by the Carrier until nine months had passed after a decision by the highest officer of the Carrier on the prop-

erty. In the instant case, Carrier in its submission to this Board did not raise the procedural question but the entire discussion was directed to the merits of the claim. The "limitation" was one established by an Agreement of the parties. The Carrier, not having urged it, is deemed to have waived it and it cannot be raised for the first time here. It is analogous to a statute of limitations in a civil proceeding in a court of law where the universal rule is: "The bar of the Statute of Limitations is an affirmative defense and must be pleaded by demurrer or answer."

Though different conclusions in similar situations have been reached in awards rendered by this Division, the sounder position is found succinctly stated in Award 9578 (Johnson):—

"Thus awards which hold that procedural limitations in contracts are jurisdictional and limit the jurisdiction of this Board seem erroneous. Such provisions limit, not the Board but the parties, and like other contractual provisions, whether procedural or substantive, are waived unless invoked by a party himself, or by his representative in the litigation, and not by the tribunal or its members. This applies to all contracts, including ordinary union agreements as well as the special Chicago Agreement of August 21, 1954."

Passing to a consideration of this matter on the merits: It is the contention of the Petitioner that the Claimant, William Cavanaugh, is the regularly assigned occupant of a Relief Position, Saturday through Wednesday with Thursday and Friday as assigned days of rest, and contends this was a daily rated position. On four days he relieves employes occupying daily rated positions and receives their same rate of pay except on Saturday when he receives the daily equivalent of the monthly rate of the Station Baggage Master. The pertinent sections of the Memorandum Agreement effective May 1, 1954, governing holidays are, as follows:

RULE 56-A

HOLIDAYS

Rule 1, Group 1, 2 and 3 Employes

Section 1. Effective May 1, 1954, each regularly assigned hourly and daily rated employe shall receive eight hours' pay at the pro rata hourly rate of the position to which assigned for each of the following enumerated holidays when such holiday falls on a work day of the work week of the individual employe:

New Year's Day	Labor Day
Washington's Birthday	Thanksgiving Day
Decoration Day	Christmas
Fourth of July	

Whenever any of the above holidays falls on Sunday the day observed by the State, Nation or by proclamation shall be considered the holiday.

* * * *

"Rule 1, Group 1 and 2 Employees — Effective 2-22-50:**Rule 1, Group 3 Employees — Effective 2-1-55:**

Section 3. When one of the following holidays; namely, New Year's Day, Washington's Birthday, Decoration Day, Fourth of July, Labor Day, Thanksgiving Day or Christmas falls on a regular assigned day off duty, the following work day of a regular assignment will be considered the holiday for that assignment."

Thanksgiving Day, November 22, 1956, was a rest day for the Claimant. His first work day after that was on Saturday, November 24th, the day he was assigned to relieve the Station Baggage Master, a monthly rated position. It is the contention of the Petitioner that Claimant holding a regularly assigned daily rated position was covered by the above Sections of Rule 56A and is entitled to an additional day's pay at the punitive rate for services performed on Saturday, November 24 (his Thanksgiving Day) the Station Baggage Master's position being an excepted one under the Agreement.

It is the position of the Carrier that the regular assignment of Station Baggage Master is a monthly rated position, not an excepted one, and that holiday compensation is comprehended in the rate of pay, including pay for such service as may be required on holidays. Carrier further maintains that Claimant in accepting this position assumed all of the conditions of the positions filled, including the increased rate of pay.

The position of Station Baggage Master is a monthly rated Group 2 position and as such, is not subject to the holiday provision of Rule 56. For four days the Claimant fills daily rated positions. He bid for the Relief Position knowing that the Station Baggage Master was a monthly rated position. His accepting this Relief Position did not effect the transfer of the monthly rated position of Station Baggage Master to a daily rated position. Claimant assumed all of the conditions of the position he filled and consequently cannot now claim "holiday" pay under Rule 56.

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 Agreement has not been violated.

AWARD

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 23rd day of January 1963.