Award No. 561
Docket No. CL-569

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Frank M. Swacker, Referee

PARTIES TO DISPUTE:

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

PERE MARQUETTE RAILWAY COMPANY

STATEMENT OF CLAIM: "Claim of A. Wolf, C. Christiansen and F. Sana, Clerks, Rockwell Street Yards, Chicago, for wage losses sustained through violation of agreement rules on May 30, 1936, as hereinafter outlined."

STATEMENT OF FACTS: May 30, 1936, Decoration Day, was a legal holiday as specified in Rule 38 of the Clerks' Agreement.

The carrier's Rockwell Street Yards are continuously operated twenty-four hours per day, each day of the year.

The carrier maintains and has maintained for years, in its Rockwell Street Yards, three clerical positions classified as Yard Clerks and rated as $6.27 per day each.

The first trick position is and was regularly assigned with hours of 7:00 A. M. to 3:00 P. M., daily. Clerk A. Wolf, the regularly assigned incumbent, was assigned to work daily, Tuesday to Sunday, each week, with Monday as his regular assigned day of rest. On May 30, 1936, Clerk A. Wolf was relieved at the expiration of six hours duty and paid six-eighths of the daily rate of $6.27 at time and one-half rate.

The second trick position is and was assigned with hours of 8:00 A. M. to 4:00 P. M., daily. Clerk J. Bock, the regularly assigned incumbent, was assigned to work daily Wednesday to Monday, each week, with Tuesday as his regular assigned day of rest.

On May 30, 1936, Clerk J. Bock was instructed by the carrier to relieve the Yard Master, thereby creating a vacancy on his regular position. Clerk F. Sana, was assigned by the carrier to fill the vacancy of the position of Clerk Bock on May 30, 1936, but was relieved at the expiration of seven hours' duty and paid seven-eighths of the daily rate of $6.27 at time and one-half rate.

The third trick position is and was regularly assigned with hours of 4:00 P. M. to 12:00 Midnight, daily. Clerk C. Christiansen, the regular assigned incumbent, was assigned to work daily Thursday to Tuesday each week, with Wednesday as his regularly assigned day of rest. On May 30, 1936, Clerk C. Christiansen was relieved at the expiration of six hours' duty and paid six-eighths of the daily rate of $6.27 at time and one-half rate.

The last trick position was occupied by a relief employe and is not involved.

". . . To consistently avail itself of the exception it would be compelled to work the positions as distinct entities all week. We cannot see how an employe could be regularly assigned to a position in service in continuous operation unless the position itself is continuous. . . ."

The carrier relies in the instant case upon Rule 33 of the Clerks' Agreement, reading as follows:

"Rule 33. Except as provided in Rule 34, employes notified or called to perform work not continuous with, before, or after the regular work period or on Sundays and specified holidays shall be allowed a minimum of three (3) hours for two (2) hours work or less, and if held on duty in excess of two (2) hours, time and one half will be allowed on the minute basis."

Employes contend that Rule 33 is not applicable for the very clear and significant reason that neither of these three claimant employes was "notified or called" to work on May 30, 1936. They were regularly assigned to work the eight hours specified and stipulated in the Statement of Facts.

The carrier did not on May 30th, 1936, nor prior thereto, abolish their regularly assigned positions so that it would be either necessary or permissible to "notify or call" these employes to work under Rule 33.

Rule 33 is not an exception to the exception to Rule 38.

POSITION OF CARRIER: The position of the carrier is that these employes have, over a period of at least ten (10) years, been paid on a minute basis under the "Called Rule" and that they have never heretofore been paid for a minimum of eight (8) hours for a full day's work under Rule 23 for services performed on Sundays or holidays. This course of past practice, or dealing, in the payment of these clerks has established very firmly the understanding between these employes and this carrier ever since the current schedule became effective on May 19, 1927, or a little better than ten (10) years ago.

The practice during a period of at least ten (10) years has been to not work these clerks on holidays for the full eight (8) hours, but they are called to work the number of hours that have been necessary for the continuous operation of the carrier and are then relieved for the remainder of the day and were paid for the number of hours worked at the rate of time and one-half.

It is respectfully submitted that the course of dealings between the employes and this carrier over a period of at least the last ten (10) years should be controlling and that the award herein should be in favor of the carrier and against the position that the employes have taken.

OPINION OF BOARD: The Rules here involved are clear. The carrier relies on that portion of Rules 39 reading:

"Nothing herein shall be construed to permit the reduction of days for the employes covered by this rule below six per week, excepting that this number may be reduced in a week in which holidays occur by the number of such holidays."

In the first place, this Rule obviously does not contemplate reduction for a fractional part of the holiday, but only for the whole day. However, it has no application, in any event, since it would be a contradiction in terms to say that a position, upon which the carrier gets the benefit of straight time for Sundays under Rule 38, where regularly assigned employes necessary to the continuous operation of the carrier are involved, could be blanked in whole or in part; to hold otherwise concerning these particular positions would entitle the employes to compensation at time and a half for all Sundays during the year. Furthermore, there is no evidence of the actual application of the Call Rule; but, as previously pointed out, the positions must be filled the full day in order for the carrier to obtain the benefit of the exception in Rule 38.

The argument of past practice is inapposite. This argument is frequently put forth and it appears there is not a very clear understanding as indicated by the Dissenting Opinion in Award 456, in which is set forth a brief excerpt from a standard writer on contracts to the effect that the interpretation given a contract by the parties themselves, as shown by their conduct and statements, will be adopted by the court. This excerpt is taken in complete disregard of its context. The Rule in question can only be utilized when the contract is ambiguous. Here there is no such ambiguity—the mere fact that there is a dispute about the matter does not conclusively demonstrate ambiguity. The party advancing an erroneous interpretation may do so in the best of faith and still be quite wrong, and his course has no tendency to demonstrate ambiguity. Again the Rule has scant application to the relation of master and servant for obvious reasons. Further, it is the conduct of the parties. The parties are the carrier and the organization, but the conduct sought to be relied on by the former is that of three individual employes represented by the latter. Manifestly, three employes are not capable of changing by their conduct or any other way the contract between the carrier and the organization. This is not to say, however, that conduct on the part of the carrier may not be extremely important evidence when offered by the other side because of their relations, although, of course, it is always open to explanation on the carrier side by a showing of mistake unless there is definite evidence of intention; nor is it to say that it may not be offered by either party as proof of a novation in the contract but that requires additional evidence more definitely establishing such intention.

It is clear that under the Rules, the claimants were entitled to the full eight (8) hours of their assignment at time and a half on account of the holiday.

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 Rules 23 and 38 govern, as indicated in above opinion.

AWARD

Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: H. A. Johnson
Secretary

Dated at Chicago, Illinois, this 11th day of January, 1938.

DISSENT

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The ultimate issue in this dispute is the question of whether or not employes holding assignments in accordance with Rule 38 may be relieved from work on any portion of a holiday and be compensated at overtime rate for only the portion worked, or the corollary of that statement, i.e., whether or

not the carrier is required to continue at work for the full 8 hours of a holiday employes assigned according to Rule 38 and compensate them accordingly.

The purpose of the Director General of Railroads in respect to service on Sundays and holidays had been instituted in orders issued by him and carried out in later decisions and in agreements subsequently entered into. Rule 38 in this agreement conformed to the rule laid down by the United States Railroad Labor Board in its Decision No. 1621 which carried out the original intent and purpose of the Director General of Railroads.

The latter included in his "Interpretation of This Order" in Supplement No. 13 to General Order No. 27 his intentions by that order to "go far towards eliminating Sunday and holiday work where ever practical and toward reducing such work where is cannot be eliminated to the fewest number of hours."

The employes involved in this dispute were necessary to the continuous operation of the carrier and assigned in accordance with Rule 38, the positions being filled for the full working periods each day of the week, Sunday included. The relief from service on a portion of a day occurred only on a holiday, and to the extent that work thereon was required compensation for the hours worked was at the punitive rate of time and one-half.

Aside from the persuasive evidence of the continuous practice of ten preceding years as indicating the correct application and interpretation of the agreement, it must be evident that a decision sustaining this claim diverts the purpose of the rule here in dispute from its original intent, and that in so doing, rather than reducing work for such employes to the fewest number of hours on a holiday, the award requires that either they be laid off entirely on the holiday or that they be kept on duty full eight hours thereon and compensated accordingly. That is, under this award, in order to carry out the original purpose of this rule to reduce service by employes on a holiday to the fewest number of hours it would be necessary for the carrier to do so as a gratuity to such employes as may be required for only a few minutes or hours on a holiday. The result of this award is in controversion of the original purpose of the rule and is clearly in error.

C. C. COOK
R. H. ALLISON
J. G. TORIAN
A. H. JONES
GEO. H. DUGAN