

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**

NORTHERN PACIFIC RAILWAY COMPANY

STATEMENT OF CLAIM: "Claim of J. R. Davis, refrigerator inspector at Auburn, for time and one-half rate for service performed on Sunday, September 6, 13, 20, 27, and October 4 and 11, 1936."

STATEMENT OF FACTS: The following statement of facts was jointly certified by the parties:

"Mr. Davis was assigned to the position of refrigerator inspector at Auburn yard office. The duties of this position consisted of performing necessary work in connection with cars containing perishable shipments, as well as general yard clerk's work, including the checking and carding of trains, checking cars and other work incident to the movement of trains. Mr. Davis was assigned to work from Tuesday to Sunday, inclusive, and had his day of rest on Monday. When he was not on duty on Monday his position was not filled, but his work was taken care of by other yard office employees who were on duty."

POSITION OF EMPLOYES: "It is the contention of the Employees that an employe assigned to work on Sunday must be paid time and one-half, except where the position is in continuous existence.

"Rule 69, Clerks' Agreement, reads as follows:

'Rule 69. Work performed on Sundays and the following legal holidays—namely, New Year's Day, Washington's Birthday, Decoration Day, Fourth of July, Labor Day, Thanksgiving Day, and Christmas (provided when any of the above holidays fall on Sunday, the day observed by the State, Nation, or by proclamation shall be considered the holiday), shall be paid at the rate of time and one-half, except that employes necessary to the continuous operation of the carrier and who are regularly assigned to such service will be assigned one regular day off duty in seven, Sunday if possible, and if required to work on such regularly assigned seventh day off duty will be paid at the rate of time and one-half time; when such assigned day off duty is not Sunday, work on Sunday will be paid for at straight time rate.'

"The history of this rule has been clearly and fully set forth in Docket CL-264, Award 336, and need not be repeated in this case.

"Obviously, the rule intended to do away with any Sunday work that is not absolutely necessary to continuous operation of the Carrier, determined by filling the position every day in the week.

Northern Pacific Railway Company and have our schedule revised to conform with the decision of the Labor Board.

In accordance with these instructions I submitted to the employes represented by our organization the question of asking for the application of Rules in Decision 1621, issued by the Labor Board, effective as of March 1st, 1923. In my communications to them regarding these rules I called their particular attention to the provisions of Rule 64 of Decision 1621, a rule similar to rule 69 of our agreement, I pointed out to them the effect the rule in Decision 1621 might have on employes now occupying what are termed seven day positions. They were advised that employes occupying such positions might, in the future, be relieved one day in seven, not necessarily Sunday, which would result in their earnings being reduced to some extent.

In the many replies received and decisions rendered by our various lodges, I was instructed to take the matter up with the Management of the Northern Pacific Railway Company and if possible secure the rules of Decision 1621 as written and have these rules incorporated into our existing agreement by eliminating corresponding rules now in effect.

The consensus of opinion was to the effect that we should urge the management to exercise the call rule as much as consistent rather than indulge in the employment of relief clerks when the call rule could be used to advantage. The opinions expressed were to the effect that should our present seven day position employes have their assignments reduced to six and the day of rest granted be other than Sunday or holidays they would feel dissatisfied to some extent. However, where relief clerks are necessary for the efficient and economic operation there would be no objections entertained.

In compliance with the wishes of the employes represented by our organization I would urge that the following revisions be made in our agreement effective as of May 15th, 1923, to continue in effect as provided for in the agreement dated August 15th, 1922, Agreement between the Northern Pacific Railway Company and The Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employes.

Rule 61: Substitute Rule 57 of Decision 1621 for Rule 61.

Rule 63: Revise Rule 58 of Decision 1621 to read—'Except as provided in Rule 64,' instead of Rule 59,—and substitute Rule 58 of Decision 1621 as revised for our Rule 63.

Rule 69: Substitute Rule 64 of Decision 1621 for Rule 69.

Rule 70: Eliminate this rule which is in line with Rule 65 of Decision 1621.

It is my personal desire, should you concur with me that these revisions should be made, that we endeavor to continue the agreement in effect for a period of at least one year. However I am not authorized to make this a part of the agreement, but I will use my influence to this end.

Yours truly,

(Signed) J. F. Murray,
General Chairman, B. R. C., N. P. Ry."

OPINION OF BOARD: As will be seen by the position of the parties, the controversy involves; first, the construction of the standard Sunday rule; second, a contention on the part of the carrier that, even if the employes' contention is correct as to the general application of the rule, there is a special understanding on this road contrary to the employes' contention.

It must be regarded as settled now by a long line of decisions, among others by this division, awards 314, 336, and 540; by the Express Board of Adjustment No. 1, decisions E-456 and E-669; and Pennsylvania RR-Long

Island Railroad Telegraph and Signal System Board of Adjustment decision 211.

The design of the rule was threefold:

- (1) To eliminate as far as possible unnecessary Sunday work.
- (2) To provide a basis of time and one-half pay for work done on Sunday with the exception next noted.
- (3) To provide pro-rata payment for positions necessary to be worked on Sunday in the continuous operation of the carrier, provided the incumbent of the position was accorded one day of rest in seven.

The first half of the rule, which simply provides payment of time and one-half for Sunday work, is scarcely open to controversy; it is general in its scope, limited only by the exception which follows. In other words, in all cases but those falling directly within the exception time and one-half must be paid for Sunday work. In past controversies surrounding the construction of the exception, the decisions hold that the positions to which it is applicable:

- (a) Must be ones worked seven days per week.
- (b) That there must be a regularly assigned incumbent of the position.
- (c) That such incumbent must be accorded one day off in seven.
- (d) That to be a position in continuous operation it is essential that the day off be filled.

The decisions have concluded that if relief can be dispensed with on the day off of the regular incumbent of the position, it is self-evident that the position cannot be one in continuous operation. In other words, that would be a contradiction in terms to call it a seven-day position and yet blank it on one day.

Although these cases were elaborately argued, nothing additional was presented to that which was before the Board in the foregoing decisions, and consequently there appears to be no reason to depart from this established construction.

However, on the question as to whether there can be claimed to be a special interpretation agreed to between this carrier and the organization, removing the foregoing applications of the rule in some respects, there is considerable conflict. For the carrier it is asserted that such special understanding is incorporated by the letter, carrier's Exhibit "A," quoted in its position, from General Chairman J. F. Murray, to General Manager C. L. Nichols, dated May 1, 1923. It claims that the fourth paragraph of this letter constitutes an interpretation to the effect that it is not essential to the application of the exception in the rule that the off day of the incumbent of the position must be filled. The Board finds it impossible to read any such construction into this paragraph. It is true that Mr. Murray appeared to be under the impression that the "call rule" might be exercised in lieu of relief (and preferred to have that done). But this is in no sense an admission that the position may be entirely blanked on the off day. But even the use of the call rule would be inconsistent with the construction of the rule as heretofore announced, and this Board has expressly held, in Award No. 561, that that may not be done.

In view of the language used by Mr. Murray in the preceding paragraph of his letter that he desired to "secure the rules of decision 1621 as written" it is more probable that he simply misconceived the meaning of the rule than that he intended deliberately to agree upon a modification of it and that the carrier shared this misconception. In any event, they both appear to have acted upon the assumption that the call rule might be used on the off day to

call the incumbent of the assignment for less than the full day, and in fact the claimant was called on his relief day in each but one (September 14th) of the weeks covered by this claim and he was paid time and one-half for the time he worked on such day. This practice even had it been an agreed interpretation of the rule would be utterly inconsistent with one of the main purposes and repugnant to an express condition of the exception to the rule, that is that the employes falling within it shall have one day's rest in seven. Consequently the claim for September 6, 20, 27, October 4 and 11, 1936, cannot be sustained.

It is further argued for the carrier that practice concerning "blanking" the relief day has established the interpretation claimed by it. It has repeatedly been held that practice alone is of little moment. Here there is merely the bald assertion to the effect that the practice has been to blank positions on off days. The facts, however, show that the carrier has from the introduction of the rule continuously differentiated certain positions in the yards in question as between six and seven day positions, which is inconsistent with the general statement. It was in the carrier's power to produce the records in its possession which would establish the alleged practice, but it did not do so. The Board, therefore, concludes that there is insufficient evidence to show any special or different interpretation of this standard Sunday rule insofar as this issue is concerned, and accordingly concludes that the claim is sustained as to Sunday, September 13th, 1936, but denied for the other days for the reason above indicated.

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 employe involved in this dispute are respectively carrier and employe 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 J. R. Davis, refrigerator inspector at Auburn, is entitled to time and one-half rate for services performed on Sunday, September 13, 1936.

AWARD

Claim sustained as to time and one-half for Sunday, September 13, 1936, otherwise denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: H. A. Johnson
Secretary

Dated at Chicago, Ill., this 24th day of March, 1938.