

Award No. 1178

Docket No. CL-1201

**NATIONAL RAILROAD ADJUSTMENT BOARD  
THIRD DIVISION**

I. L. Sharfman, Referee

**PARTIES TO DISPUTE:**

**BROTHERHOOD OF RAILWAY AND STEAMSHIP CLERKS,  
FREIGHT HANDLERS, EXPRESS AND STATION EMPLOYES  
CHICAGO, MILWAUKEE, ST. PAUL AND PACIFIC  
RAILROAD COMPANY  
(LINES WEST OF MOBRIDGE)**

**STATEMENT OF CLAIM:** "Claim of the System Committee of the Brotherhood that Guy L. Kester, Clerk, Lewistown, Montana, was and is entitled to and shall now be paid a minimum of eight (8) hours at rate of time and one-half for each Sunday worked retroactive to March 6, 1938."

**JOINT STATEMENT OF FACTS:** "Clerk Guy L. Kester is the regularly assigned incumbent of position known as General Clerk at Lewistown, Montana, under bulletin reading:

"Butte, May 4, 1937

'Attention All Clerks:

'Bids will be received up to and including May 9th on the following position:

Position	General Clerk
Location	Lewistown, Montana
Rate of Pay	\$5.04 per day
Hours	7:30 A. M. to 12:00 Noon 1:00 P. M. to 4:30 P. M.
Assignment	Daily except Sundays and Legal Holidays
Permanent	

cc-HFL (General Chairman B. R. C.)

L. K. Sorenson  
Superintendent'

"On Sundays, Mr. Kester was notified or instructed to protect certain trains and paid for services rendered on those days at the rate of time and one-half for actual hours worked with a minimum of two hours.

"The organization and the carrier request the privilege of oral and other proper presentation at time hearing is held."

**POSITION OF EMPLOYES:** "Rule 15—

'Eight (8) consecutive hours' work, exclusive of the meal period, shall constitute a day's work, except as otherwise provided in Rules 16, 17 and 23.'

"Rule 21-a—

'Except as provided in paragraph (b) this rule, 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.'

"In further support of its position, the carrier refers to National Railroad Adjustment Board, Third Division, Award 930, which, in principle, sustains the practice on this property. In that case, the position was bulletined to work seven days a week, and assignee was notified to not work the seventh day. In the instant case, the assignment specifically provided it was for six days a week, and the assignee, in accordance with schedule rules, was notified to work on Sunday when his services were required on that day..

"Attention is invited to the Majority Findings of Award No. 314, with particular reference to that part reading:

**'They must be regularly assigned to such service as the carrier has included in its decision to install as necessary to its continuous operation.'**

and in Award No. 336, there is contained—

**'The point raised is that under the circumstances they were not regularly assigned to continuous operation. If their contention is correct, then they do not come within the single exception which is made to time and one-half payment for Sunday work.'**

**'The fact that work is necessary on Sunday does not of itself prove it is necessary in the continuous operation of the carrier. It is quite conceivable that work might be necessary on Sunday which could be entirely dispensed with on another day during the week. The rule says nothing specifically about necessary Sunday work, only that if an employe is necessary to the continuous operation of the carrier and regularly assigned to such service, i. e., to continuous operation, he may be worked on Sunday without penalty.'**

further stating—

**'If the carrier wishes to establish a seven-day position in continuous operation, it should be done by bulletin as a new one.'**

"Previous Awards of the Third Division have laid much stress on the plain provisions of Rule 23 requiring that, in order for the carrier to avail itself of the exception in the rule the employe must be 'regularly assigned to such service,' while the representatives of the employes are, in this case, taking a diametrically opposite position when, regardless of the fact that the employe in question was not 'regularly assigned to such service' nor was the position filled eight hours each day seven days a week, they insist it is a position within the exception in Rule 23.

"The carrier maintains

"(1) That General Clerk Kester was 'notified or called' to work on Sundays as contemplated by Rule 21-(a);

"(2) That it has fully complied with the plain wording and obvious intent of the rules involved,

"(3) That the claim as presented is an attempt to nullify Rule 21-(a) or restrict its application to 'emergency or unforeseen conditions,' which language obviously would have been included in the rule if it had been the intent to so restrict it."

**OPINION OF BOARD:** The factual situation involved in this proceeding is simple and not in dispute. In the Joint Statement of Facts appears the following: "Clerk Guy L. Kester is the regularly assigned incumbent of position known as General Clerk at Lewiston, Montana," under a bulletin which, among other things, described the assignment as "Daily except Sundays and Legal Holidays." The joint statement then continues: "On Sundays, Mr. Kester was notified or instructed to protect certain trains and paid for services rendered those days at the rate of time and one-half for actual hours

worked with a minimum of two hours." The claimant now seeks payment for "a minimum of eight (8) hours at rate of time and one-half for each Sunday worked." The claim as submitted is based primarily upon the fact shown of record that during the period involved—March 6, 1938 to July 27, 1939—the claimant worked on the position each and every Sunday, beginning at 1:00 P. M. and continuing, apparently, for three hours. The claim is a valid one only if supported by the rules of the Agreement, or, in case of doubt as to the meaning of the relevant rules, by the established practice thereunder.

The claimant was paid under the provisions of Rule 21, captioned Notified or Called,—the only rule in the Agreement specifying concretely the basis of overtime payments—which provides, in its bearing upon the situation here involved, that "employees notified or called to perform work . . . 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." In so far as this rule is controlling, there was obviously no violation of the Agreement.

The employees rely, however, in the last analysis, upon Rule 15, captioned Hours of Service, which provides that "eight (8) consecutive hours' work, exclusive of the meal period, shall constitute a day's work," and more directly, upon Rule 23, captioned Sunday and Holiday Work. The gist of their position is that the regular performance of Sunday work transformed the assignment as bulletined into a seven-day assignment in point of fact, whereby, under Rule 23 as amplified by Rule 15, the claimant was entitled to eight hours' pay at time and one-half regardless of the number of hours he actually worked. We must, therefore, analyze the provisions of Rule 23 and the relationship thereto of the provisions of Rule 15.

Rule 23 first provides that work performed on Sundays and certain legal holidays specifically named "shall be paid at the rate of time and one-half." Obviously the only addition made to the provisions of Rule 21 in this part of the rule is to specify the holidays covered thereby. Rule 23 then provides, in terms of an exception to the first declaration, that "employees necessary to the continuous operation of the Railroad 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 regular assigned seventh day off duty "will be paid at the rate of time and one-half time." Obviously the chief purpose of this part of the rule is to provide for one day off in seven in circumstances involving the continuous operation of the road. It makes possible, through the employment of relief men on the seventh day off duty, the payment of straight time on such day, whether it be a Sunday or a weekday; and it requires the carrier to pay at the rate of time and one-half, on weekdays as well as on Sundays, when the regularly assigned employee works on his seventh day off duty. In the second part of the rule, as in the first, it is merely provided that the employee will be paid at the rate of time and one-half; in neither connection, it must be held, does the rule provide that a full day's payment will necessarily be made at the rate of time and one-half, with whatever degree of regularity the Sunday work may be required.

This construction is further supported—conclusively, it would seem, as far as this particular agreement is concerned—by the fact that Rule 15, which establishes eight hours as a measure of a day's work, expressly excepts the situations covered not only by Rule 16 (Intermittent Service) and Rule 17 (Reporting and Not Used), but by Rule 23 (Sunday and Holiday Work), which has just been subjected to analysis. This express exception would be rendered meaningless and of no effect under the construction placed upon Rule 23 on behalf of the claimant.

And if there were still any doubt as to the meaning of the relevant rules, in their interrelationships, the established practice under these rules would strongly support the position of the carrier. The record contains a list of 71 positions on this property in connection with which Sunday work has been

required and paid for on the call basis. In many instances this work, of varying amounts, has been required each and every Sunday, as in this proceeding in a very considerable number of them the arrangement has been in effect for periods of as long as ten years or more; and yet this is the first case in which complaint has been made and a minimum of eight hours' pay at time and one-half has been requested. In these circumstances the conclusion is further strengthened that the carrier has been applying the rules in conformity with both the intent and understanding of the parties.

**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 the evidence of record does not disclose any violation of the Agreement.

#### AWARD

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD  
By Order of Third Division

ATTEST: H. A. Johnson  
Secretary

Dated at Chicago, Illinois, this 7th day of August, 1940.