

Award No. 1214
Docket No. CL-1218

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

Harris L. Danner, Referee

PARTIES TO DISPUTE:

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

WABASH RAILWAY COMPANY

(Norman B. Pitcairn and Frank C. Nicodemus, Jr., Receivers.)

STATEMENT OF CLAIM: "Claim of the System Committee of the Brotherhood that the assigned incumbent or incumbents of position of Car Record Clerk, No. 58 local Freight office, Chicago, Illinois, were entitled to and shall now be paid one day at rate of time and one-half for all legal holidays, retroactive and including Decoration Day, May 31, 1937."

EMPLOYES' STATEMENT OF FACTS: "Position No. 58, Car Record Clerk, local freight office, Chicago, Illinois, was and is an established seven day assignment.

"The establishment and maintenance of said position on a seven day assignment basis was and is made to permit the Carrier to take advantage of and apply the provisions of Rule 8 (b) of the Schedule for Clerks, and thus obtain services of the incumbent of said position at pro rata rate.

"As proof of above stated fact, employees append hereto and by reference make a part hereof, Employees' Exhibits Nos. 1 and 2; same being true copies of Carrier's bulletin notices dated March 27, 1937 and March 3, 1939, respectively.

"On Decoration Day, May 31, 1937, and all legal holidays stipulated in Rule 8, subsequent to May 31, 1937, the Carrier by instructions required the incumbent of this position to lay off without pay. As proof of fact that incumbent of position was required to lay off on legal holidays, we append hereto and by reference make a part hereof, Employees' Exhibit No. 3, same being a true copy of letter addressed to local chairman, by Agent D. J. Carlos, declining claim filed in behalf of Clerk Edward Cridge on May 31, 1937 and July 5, 1937."

CARRIER'S STATEMENT OF FACTS: "A position designated as car record clerk is located in the local freight office at Chicago, Illinois, and is known as a seven-day position. The occupant thereof is regularly assigned to work full time on Sundays, but in accordance with the provisions of Rule 8, paragraph (a), of the Schedule for Clerks, is not required to work on the seven legal holidays enumerated in that rule.

"Therefore, the contention of the committee should be dismissed and the claim denied.

"The carrier affirmatively states that all matters referred to in the foregoing have been discussed with the committee and made a part of the particular question in dispute.

"Oral hearing is requested."

There is in evidence an agreement between the parties bearing effective date of August 1, 1929.

OPINION OF BOARD: It will be necessary to first dispose of the question of whether or not the Board has jurisdiction of this claim. The carrier contends that the Board does not have jurisdiction for the reason that the statement of the claim is not specific and is too general to sustain any award herein.

The record reveals that this is a dispute involving the interpretation or application of certain rules of the current agreement between the parties in that it affects the earnings of an employe occupying the position of car record clerk No. 58 in the local freight office at Chicago. This claim consists of a dispute within the jurisdiction of this Board as contemplated by the Railway Labor Act, and comes within the jurisdiction of this Board.

We therefore will consider and decide this claim upon its merits.

This decision will involve the interpretation and the meaning of Rule No. 2 (f) and Rule 8, and the sixth paragraph of Subdivision (b), Rule 11, these rules in order being as follows:

"2 (f). Nothing herein shall be construed to permit the reduction of days for employes covered by these rules below six (6) per week, except that this number may be reduced in a week in which holidays occur by the number of such holidays."

"8 (a). Only such Clerks as shall be required to perform the business of the Company shall be required to work on Sundays or the Legal Holidays, namely:

New Year's Day
Washington's Birthday
Decoration Day
July 4
Labor Day
Thanksgiving Day
Christmas Day.

"8 (b). 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 regularly assigned to work full time on Sundays and employes called to fill their places on such regular assignment will be compensated at the pro rata rate of the position."

"11 (b). (Paragraph Six) Promotion shall be based on seniority fitness and ability, except as provided for in Paragraph (g) of Rule 1. Fitness and ability being sufficient, seniority shall prevail, the immediate supervising officer to be the judge."

The carrier admits that the position designated as car record clerk in the local freight office at Chicago is known as a 7-day position and is assigned to work full time on Sundays, but by reason of the provisions of Paragraph (a) of rule 8, is not required to work on the seven legal holidays enumerated in that rule.

Rule 2 (f) appears under that part of the rules denominated "Basis of Day's Work."

As we understand it, these are general rules, and that where there is a special rule applying to positions assigned on a 7-day basis, a special rule will take precedence over the general rules.

The record discloses that the position of car record clerk at the local freight office in Chicago is a "7-day assignment" so there is no doubt but what the position in question is a position guaranteeing the occupant seven day's work per week. Rule 2 (f) provides for a guarantee of six days per week.

Inasmuch as this was a seven day assignment, it seems logical that if one of the clerks required to perform the business of the company is required to work on Sundays and legal holidays, that, therefore, Rule 8 is the applicable rule in this matter and takes precedence over the general rule 2 (f).

In support of this view, attention has been called to Award No. 561. The language in the rule construed in Award 561 differs from the language contained in Rule 8 hereinbefore set out. However, these rules are analogous and it seems clear that both rules were intended to apply to positions necessary for the continuous operation of the carrier.

Inasmuch as it is conceded that this was a seven-day position, it must necessarily follow that it is a position created in order that the business of the carrier could be continuous. This interpretation is reasonable when viewed in the light of the understanding of the parties when the agreement was made.

The interpretation placed on the agreement by the contracting parties at the time the agreement is made is different from attempting to interpret the contract by acquiescence of some of the employees in the interpretation placed on the contract by the employer.

We call attention to the letter of General Superintendent J. T. Jones, a copy of which was furnished to the General Chairman of the Brotherhood:

"In negotiating the revised clerks' schedule Rule 8, Sunday and holiday work, it was the intent of both sides of the table to deal with continuous service positions working seven days per week and to provide for payment at pro rata rate for employees regularly assigned to such positions and for extra clerks called to take the places of such regularly assigned clerks."

The carrier also contends that there is an established practice with respect to requiring occupants of 7-day positions to lay off on the holidays enumerated in Rule 8. The employees claim there was no such established practice and that the collective bargaining agreement could not be abrogated in this manner.

They make it clear that they do not claim compensation prior to the time of the filing of the claim. The record discloses that while the position of car record clerk has not been worked on holidays for several years, the record also shows that occupants of other 7-day positions in the Chicago terminal were not required to lay off on holidays.

The fact that there has been an attempt to change the rules does not of itself show an acquiescence in the interpretation placed on it by the carrier, but rather shows that there has been a dispute and that there is a desire or an attempt to clarify the matter in dispute.

As a general rule, the interpretation placed on a contract by the parties themselves, as shown by their conduct and actions, is binding on the parties. However, we do not believe such a rule could be applied to the kind of contract before us. The above rule as to interpretation is the rule meant for

individuals. Here is a contract between the employer and the Brotherhood; a collective agreement made by a majority of the Brotherhood, and which binds the entire craft. To say that the act of the employer and one employee in interpreting a contract would bind all the members of the Brotherhood would be carrying the rule too far, and would have the effect of abrogating collective bargaining. A few employees cannot by their conduct or statements, or in any manner acquiesce in a course of conduct, statements or other action of their employer and thus vary in any way the contract between the carrier and the Brotherhood.

Facts and rules considered, the claim of the petitioner should be sustained.

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 carrier did not correctly apply the current agreement and Rule 8 (b) sustains claim.

AWARD

Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: H. A. Johnson
Secretary

Dated at Chicago, Illinois, this 28th day of October, 1940.