

Award No. 1407

Docket No. CL-1461

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

Richard F. Mitchell, Referee

PARTIES TO DISPUTE:

**BROTHERHOOD OF RAILWAY AND STEAMSHIP CLERKS,
FREIGHT HANDLERS, EXPRESS AND STATION EMPLOYES
CHICAGO, ST. PAUL, MINNEAPOLIS & OMAHA RAILWAY
COMPANY**

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

"(1) The Carrier violated agreement rules when it failed and refused to compensate William S. Libby, Clerk, Mankato Local Freight Office, for eight hours or more at time and one-half rate, when worked on call basis on Holidays and Sundays (Assigned day of rest); such assignments commencing on Labor Day (Holiday) September 4th, 1939, and continuing, and that

"(2) The Carrier shall now compensate Clerk Libby for the difference between compensation allowed on call basis for time worked and compensation as claimed for eight hours at time and one-half rate on each Sunday and Holiday on which he was worked or will be worked, and that

"(3) The Carrier shall allow additional compensation to Clerk Libby at time and one-half rate for all time worked on such calls not within his week-day assigned hours."

There is in evidence an agreement between the parties bearing effective date of July 16, 1926.

EMPLOYEES' STATEMENT OF FACTS: "William S. Libby is the regularly assigned incumbent of Desk 5, Mankato Local Freight Office, with assigned hours from 10:00 A. M. to 7:00 P. M. with one hour meal period, daily except Sunday (Day of Rest).

"This position was not regularly assigned on Sundays and Holidays; being what is commonly referred to as a six day position.

"Commencing with Labor Day Eve, September 3rd, 1939, and on various subsequent Holiday Eves and Saturdays, Clerk Libby was instructed to be available for call on the following Holiday or Sunday to bill out transit hogs, no set time being assigned for this work.

"Below is quoted Clerk Libby's letter of April 5th, 1940, listing the first sixteen of such assignments from September 4th, 1939 to and including February 22nd, 1940, showing dates worked, number of hours worked and compensated for at time and one-half rate, and the starting and release time, four of which assignments extended beyond the regular assigned weekday hours of employe and position.

rule, he has been correctly compensated. He was not called or worked under the provisions of Rule 45 or the Memorandum Agreement dated August 2, 1939. We, therefore, ask your Board to deny the claim.

"If the Board should deny the request made by this Carrier that this claim be denied, then the Carrier would call to the attention of your Board the provisions of Rule 26, reading as follows:

'An employe who considers himself otherwise unjustly treated shall have the same right of hearing and appeal as provided above if written request is made to his immediate superior within seven days of the cause for complaint.'

and inasmuch as the Committee did not make claim within seven days of the date of any of these calls, we would ask that the Board deny the claim for that reason."

OPINION OF BOARD: The material facts in this case are not in dispute. William S. Libby is the regularly assigned incumbent of Desk 5, Mankato Local Freight Office, with assigned hours from 10:00 A. M. to 7:00 P. M. daily, except Sunday, with one hour meal period. His position is commonly referred to as a six-day position. Commencing with Labor Day Eve, September 3rd, 1939, and on down to February 23, 1940, Clerk Libby was instructed to be available for calls on the following holidays or Sundays to bill out transit hogs, no set time being assigned for such work. On 16 occasions during the period between September 4, 1939 and February 23, 1940 he was called and performed work, Carrier paying him in compliance with Rule 43. It is the contention of the Claimant that he should be paid a minimum of eight hours under the First Section of Rule 45 at time and one-half.

This Division has held that unless there is some provision in the Agreement Carrier cannot impose upon the employe the obligation when off duty of holding himself available for services at all times. This obligation would interfere seriously with the freedom of the employes, and fairness demands that it should not be done without additional compensation. See Award No. 1070. The question before us is under what rule of the Agreement is Libby entitled to be paid. On August 2, 1939 the employes and the carrier involved in this dispute entered into a written Memorandum Agreement, Section 3 of which is as follows:

"Employe (other than those indicated in Items 1 and 2) whose regular assignment is for six days a week and who are given a call regularly on Sundays and/or Holidays, will continue on a six-day assignment. They will be compensated for such calls at not less than five hours and twenty minutes at penalty rates under the provisions of Rule 45."

This Division is of the opinion that under the record in this case the Claimant holding a six-day assignment, he being called 16 times in the period between September and February, that he was given a call regularly on Sundays and holidays, and that he is entitled to compensation at the rate for such calls at not less than 5 hours and 20 minutes at penalty rates under the provisions of Rule 45 as provided by Section 3 of the Memorandum Agreement of August 2, 1939. Carrier cites Rule No. 26, but the Board finds that this rule is inapplicable to a claim of this kind. See Award No. 1060, Docket CL-1181, and Award No. 1403, Docket CL-1423.

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 Carrier violated the current Agreement and that the Claimant is entitled to receive compensation for calls set out in his claim at not less than five hours, 20 minutes at penalty rate under the provisions of Rule 45, less the amount which he has already been paid.

AWARD

Claim sustained in accordance with Opinion and Findings.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: H. A. Johnson
Secretary

Dated at Chicago, Illinois, this 24th day of April, 1941.

Dissent to Award No. 1407, Docket No. CL-1461

The dismissal by the Referee of the application of Rule 26 as a cut-off rule in this dispute is based upon Award No. 1060 and currently rendered Award No. 1403. What has been said in the Dissent made a part of Award No. 1060 applies with equal force and effect to this award, and reference thereto is made for that purpose.

(S) C. P. Dugan
(S) R. F. Ray
(S) R. H. Allison
(S) A. H. Jones
(S) C. C. Cook