

Award No. 1724

Docket No. CL-1639

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Edward M. Sharpe, Referee

PARTIES TO DISPUTE:

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

ERIE RAILROAD COMPANY

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employees that employe R. A. Nickum, Yard Clerk at Warren, Ohio be reimbursed at time and one-half rate for service performed on his regular assigned rest days, July 3 and July 10, 1940.

There is in evidence an agreement between the parties bearing effective date of September 1, 1936.

EMPLOYEES' STATEMENT OF FACTS: Mr. R. A. Nickum was assigned to the position of Yard Clerk at Warren, Ohio by Bulletin No. 278 of May 31, 1940 with a relief day of Wednesday. Mr. J. D. McFadden was the regular assigned relief clerk being assigned regularly to relieve employe Nickum on Wednesday. On July 3rd and 10th, 1940, the carrier for its own convenience, appointed McFadden to work as a yardmaster, a position covered by another agreement and under the jurisdiction of the Order of Railway Conductors. Employe Nickum was required to work his relief days on the dates mentioned and for which he was paid at pro rata rate.

POSITION OF EMPLOYEES: Agreement bearing effective date of September 1, 1936 contains the following rule:

Rule 32 (Sunday and Holiday Work) reads as follows:

"(a) Except as provided in Rules 23 and 25, work performed on Sundays and the following legal holidays—namely, New Year's Day, Washington's Birthday, Memorial 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 (7), Sunday if possible, and if required to work on such regularly assigned seventh (7th) day off duty will be paid at the rate of time and one-half; when such assigned day off duty is not Sunday, work on Sunday will be paid for at straight time rate.

"(b) Where a monthly rated employe's assigned rest day is other than Sunday and falls on one of the specified holidays with the result

Under these facts and circumstances we believe that Clerk Nickum has been properly compensated and there is no justification for additional penalty requested.

Yours very truly,

(signed) R. C. Randall,
Asst. to Vice President."

This decision was not accepted and we received the following from Mr. Schreur under date of February 27, 1941:

"BROTHERHOOD OF RAILWAY AND STEAMSHIP CLERKS,
Freight Handlers, Express and Station Employees

February 27, 1941

Mr. R. C. Randall, A. to V. P.
Erie Railroad Company
Midland Building
Cleveland, Ohio

Dear Sir:

Receipt is acknowledged of your letter of February 25, 1941 furnishing me with your decision in the matter of claim progressed in favor of Clerk R. A. Nickum, Warren, Ohio who was required to work on his regularly assigned relief days.

Your decision in the matter is not acceptable to us and this letter is to advise that this case will be appealed to the National Railroad Adjustment Board.

Yours very truly,

(signed) J. J. Schreur
General Chairman."

This claim is unjustified and should be denied for the following reasons:

1. J. D. McFadden was used as an extra yardmaster in accord with customary practices and understandings.
2. On July 3rd and 10th there was no qualified extra clerk available for relief. Local committee was unable to provide a qualified relief clerk to relieve R. A. Nickum.
3. R. A. Nickum was worked on his relief day in accord with Rule 23 (b), Page 24, of Rules and Regulations effective September 1, 1936.
4. Had there been any extra qualified clerks available for work, we would certainly have used them in preference to applying the provisions of Rule 23 (b).
5. Since the employees did not ask the railroad to join in a joint submission, but have taken this claim to the Third Division ex parte, this statement by the railroad has been prepared without a knowledge of what contentions the organization has filed with the Third Division, and we accordingly reserve the right to make a further statement if necessary.

OPINION OF BOARD: The controlling facts in this case are not in dispute, they being: Clerk Nickum was the occupant of position of yard clerk, Warren, Ohio, prior to and on July 3 and 10, 1940. This was a regularly assigned so-called seven-day position. Nickum's assigned work days were Thursday to Tuesday inclusive, his relief day, as provided for in Rule 32 (a), being Wednesday. Clerk McFadden was a regularly assigned relief clerk, as contemplated by Rule 32 (a), and was assigned to work the position of yard clerk on Wednesdays. On Wednesday July 3 and Wednesday July 10, 1940 Clerk McFadden was available for his regular duties as relief clerk,

but the Carrier elected to use him on a position of yardmaster, one not covered by the current agreement, same being covered by a collective agreement between the Carrier and the Order of Railroad Conductors. Clerk Nickum was then required by the Carrier to work on Wednesday July 3 and Wednesday July 10, his regular relief days, these days being his seventh day as referred to in Rule 32 (a).

The Petitioner urges that under the provisions of Rule 32 (a) Clerk Nickum, having been required to work his seventh day on each of the two dates shown in the claim, is entitled to be paid at the rate of time and one-half instead of the straight time rate paid. Rule 32 (a), relied upon by Petitioner, reads as follows:

"Except as provided in Rules 23 and 25, work performed on Sundays and the following legal holidays—namely, New Year's Day, Washington's Birthday, Memorial 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 employees 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 (7), Sunday if possible, and if required to work on such regularly assigned seventh (7th) day off duty will be paid at the rate of time and one-half; when such assigned day off duty is not Sunday, work on Sunday will be paid for at straight time rate."

Petitioner also urges that the second paragraph of Rule 23 (b) applies only to positions referred to in the first paragraph of such rule, and that the Carrier was arbitrary in using the relief employee as an extra yardmaster, thus creating a situation where no other employee was available for relief.

It is the position of the Carrier that clerks, whether regular or relief, have been used to fill temporary vacancies in yardmaster positions in the past; that Rule 23 (b) governs in the instant case because there was no qualified employee available for relief service and none could be furnished by the Committee; and that because of the facts and rules involved in this case the claim of Petitioner should be denied.

It is apparent that an interpretation of the above cited rules becomes necessary. Both of these rules came into operation at the same time and have served an equal length of time. Rule 32 (a) begins by stating:

"Except as provided in Rules 23 and 25 work performed. . . ."

It follows that, whenever necessary, Rule 32 (a) is modified by Rule 23 (b).

The purpose of Rule 32 (a) is to provide for payment at the rate of time and one-half for work on certain days. The purpose of Rule 23 is to provide for overtime work. This latter rule provided the manner to be followed in order that an incumbent who works seven days a week may be paid for the seventh day of work. Under the provisions of this rule incumbent may be worked on his rest day at the pro rata rate under the following conditions:

Where no qualified employee is available for relief service or none can be furnished by the Committee.

In the instant case the regular relief man was employed in another capacity. Such employment arose out of the request of the Carrier and the consent of the regular relief man. It also appears that the Committee failed to provide another man to relieve the regular employee. Rule 23 (b) does not imply that only the regular relief man may fill such vacancies. And we must hold that it is the duty of the Committee to provide a qualified relief man to fill such vacancies. The failure of the Committee to provide a relief man

is fatal to Petitioner's claim unless, as claimed by Petitioner, the second paragraph of Rule 23 (b) applies only to positions referred to in the first paragraph thereof and that these positions exist only at small or outlining points where relief employees are very seldom, if ever, available.

We cannot agree with the theory advanced by Petitioner. Rule 32 (a) refers to a seven day position. It provides that an employe working on the seventh day shall be paid at the rate of time and one-half. This rule is qualified by the provisions of Rule 23 (b). It is our opinion that the second paragraph of Rule 23 (b) is not limited to the matters referred to in the first paragraph of said rule.

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 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 did not violate Rule 32 (a) as contended by the petitioner.

AWARD

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: H. A. Johnson
Secretary

Dated at Chicago, Illinois, this 26th day of February, 1942.