Award No. 2211
Docket No. MW-2184

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

H. Nathan Swaim, Referee

PARTIES TO DISPUTE:

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES

LOS ANGELES UNION PASSENGER TERMINAL

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood that Mr. A. A. Williams, Water Service Mechanic, be compensated at the rate of time and one-half for work performed Sundays, October 1, 8, 15, 22 and 29, 1939, under the provisions of Rule 27 of Agreement effective September 1st, 1926.

EMPLOYES' STATEMENT OF FACTS: Under Agreement reached between Southern Pacific Company (Pacific Lines), Union Pacific Railroad Company and the Brotherhood of Maintenance of Way Employes, dated Los Angeles, California, April 13, 1939, employes of the two railroads will, when working in Los Angeles Union Passenger Terminal service be subject to the provisions of the Southern Pacific Company (Pacific Lines) working Agreement dated September 1st, 1926, together with supplemental understandings and interpretations thereof.

Mr. A. A. Williams is a Southern Pacific Company (Pacific Lines) employe holding seniority in the class of Water Service Mechanic and was transferred during the month of October, 1939, to the Los Angeles Union Passenger Terminal to fill a position of Water Service Mechanic. He was required to work 8 hours per day, including Sundays, October 1, 8, 15, 22 and 29, 1939. For work performed on week days and Sundays Mr. Williams was paid at straight time rate.

Claim was made under the provisions of Rule 27 for time and one-half rate for work performed on Sundays but payment was declined by the Carrier.

POSITION OF EMPLOYES: Rule 27 of Agreement between the Southern Pacific Company (Pacific Lines) and the Employes represented by Brotherhood of Maintenance of Way Employes, effective September 1st, 1926, is applicable to this case. We quote Rule 27:

> "Rule 27—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 a holiday) shall be paid at the rate of time and one-half, except that employes necessary to the continuous operations of power houses, heat treating plants, train yards, engine houses, tie treating plants, pit and quarry forces, camp cooks and camp attendants, track, tunnel, bridge and highway crossing watchmen, flagmen at railway non-interlocked crossings, lampmen, bridge tenders, pumpers, trackwalkers, steam

"While the Brotherhood of Maintenance of Way Employes represents the employes of the Southern Pacific Company and the Union Pacific Railroad Company, and during the time that any such employes are working in the Terminal they are covered by an agreement jointly executed and dated April 13, 1939 between the Southern Pacific Company (Pacific Lines) and Union Pacific Railroad Company on the one hand, and the employes represented by the Brotherhood of Maintenance of Way Employes by its General Chairmen on Southern Pacific Company and Union Pacific Railroad Company, respectively, on the other, that organization does not represent the Maintenance of Way employes of The Atchison, Topeka and Santa Fe Railway Company while working in the Terminal. Copies of the agreement dated April 13, 1939 have been previously furnished to the Board, and a copy is enclosed herewith.

"The Board's attention is invited to the following provision of the agreement of April 13, 1939:

> 'The situation above described creates the occasion for this agreement, which is designed for providing that the employes of the two railroads, parties hereto, shall perform work indiscriminately within the Terminal, and to fairly apportion the work among such employes, which it has been determined can the most fairly be done on basis of "Using Cars" percentages, which for the calendar year 1937 were as follows:
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> Southern Pacific—55%;
> Santa Fe —33%;
> Union Pacific —12%.
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> **'Advice is that Santa Fe employes, so engaged, will be covered by a separate understanding.'** (Emphasis supplied.)

"Attention is also invited to Section 3 of the agreement of April 13, 1939, covering the allocation of positions, and particularly the following:

> 'When positions in Union Terminal service are bulletined to employes of either parent line, in accordance with the requirements of this agreement, **it shall be done under the provisions of the agreement of such parent line.'** (Emphasis supplied.)

"This acknowledgment and reply is not made for or on behalf of the Los Angeles Union Passenger Terminal, but on behalf of Southern Pacific Company, one of the three participating carriers in the joint operating facility. Request is therefore made on behalf of the Southern Pacific Company that the alleged claim, as directed to the Los Angeles Union Passenger Terminal be not docketed or entertained by the Board, as there is no agreement or other proper basis upon which the claim as directed to the Los Angeles Union Passenger Terminal may be referred to or considered by your Board.

"Please advise."

The Terminal respectfully submits that at the outset the Division should consider and rule on the question submitted in the above-quoted letter.

OPINION OF BOARD: Not all of the facts in this case are clearly disclosed by the record. Williams, the claimant, held service and seniority rights as a water service mechanic with the Southern Pacific Company, Pacific Lines, one of the parties to the Agreement effective May 7, 1939, governing the apportionment of employes of the proprietary lines to service in the Los Angeles Union Passenger Terminal. By the terms of said Agreement there were allocated to the employes of the Southern Pacific two positions as water service mechanics at 75¢ per hour. This Agreement also provided that while

serving on positions for the Union Terminal, of the Southern Pacific, employes would be carried on the Union Terminal pay roll, "in connection with which the provisions of the Southern Pacific working agreement (September 1, 1926), together with supplemental understandings and interpretations thereof, will govern, * * *; their seniority status and employe relationship on their parent lines are not in any way changed by reason of any provision of this Agreement."

In September 1939, the claimant filled a temporary vacancy in the position of water service mechanic at the Terminal. When this temporary assignment was finished, he displaced water service mechanic Henry T. Weisbrich at the Terminal, effective October 1, 1939. Under Rule 9 of the Agreement this particular employe was the only one whom the claimant could displace.

During the month of October 1939, the claimant was required to work on Sundays, for which work he was paid straight time. He claims time and one-half for Sunday work, under the provisions of Rule 27 of the Agreement, which provide as follows:

> "Work performed on Sundays * * * shall be paid at the rate of time and one-half, except that employes necessary to the continuous operations of power houses, heat treating plants, train yards, engine houses, tie treating plants, pit and quarry forces, camp cooks and camp attendants, track, tunnel, bridge and highway crossing watchmen, flagmen at railway non-interlocked crossings, lampmen, bridge tenders, pumpers, trackwalkers, steam shovel, pile driver, hoisting, crane and ditcher watchmen, who are regularly assigned to work on Sundays and holidays, or employes who work in place of those regularly assigned, will be compensated on the same basis as on week days.
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> * * *
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> "Sunday and holiday work will be required only when absolutely essential to the continuous operation of the railroad."

The claimant was entitled under this Rule to pay for Sunday work at the rate of time and one-half unless he comes within one of the exceptions listed in the Rule.

The Carrier insists that claimant was "regularly assigned to work on Sundays" as an employe who was "necessary to the continuous operations of the power house" at the Terminal. It is admitted, however, that most of his work was on pipes, connections and appliances outside of the power house, much of it in connection with the refrigeration and air conditioning in the Harvey House Restaurant, Cocktail Bar, Coffee Shop and Drugstore located in the Terminal. But the Carrier insists that these all constitute a part of the operation of the power house, because unless they are functioning, there is no purpose in operating the power house.

It was argued in behalf of the Carrier that the use of the plural "operations" in the Rule broadens the meaning to include these functions which would not ordinarily be understood to be included as part of the "operation" of the power house. In using the plural of the word, however, the Rule was describing not only the operation of power houses, but also of heat treating plants, train yards and engine houses. If the Carrier had in mind any such broad exception as here contended for, it should have used different words. Counsel for the Carrier, in oral argument, conceded that the last paragraph of the Rule was a further limitation on the exceptions listed in the first paragraph, limiting the Carrier to assigning employes to the operation of power houses for Sunday work to those cases where it was "absolutely essential to the continuous operation of the railroad."

This is very strong language; so strong that we must assume that the parties intended to strictly limit the exceptions therein listed. We cannot, therefore, so liberally construe the language as to agree to the construction claimed by the Carrier.

In its submission the Carrier states that the claimant was listed and paid as a machinist; that he was one of four machinists, who, together, were on duty 24 hours a day for seven days a week. Both parties agree that claimant held service and seniority as a water service mechanic and by reason of such seniority displaced another water service mechanic working at the Terminal. If he was working as a machinist, the record does not disclose how nor why he was placed in such a position, nor under what kind of an agreement. But whether working as a machinist or as a water service mechanic, under the provisions of paragraph 1 of the agreement of May 7, 1939, the provisions of Rule 27 of the 1926 Agreement should apply.

The Carrier contends that the heating and air conditioning of the station and the furnishing of compressed air to the cars in the station were necessary to the operation of the railroad. If this were conceded, it still would not make the use of the pipes, outlets and appliances used for this purpose a part of the operation of the power house.

The Carrier also contends that a portion of the work of the claimant was inside of the power house in the care and maintenance of the machinery and equipment thereof. The record shows that three engineers operated the power house. We admit that the power house must be maintained and repaired to be operated but the record fails to furnish convincing proof that it was "necessary to the continuous operation of the power house" that claimant be regularly assigned to work therein on Sundays.

The last contention of the Carrier is that the claim should be declined because it was not submitted to this Board for more than two years after it was denied by the Carrier; that the failure to prosecute the claim for this period of time constituted acceptance of the fact that said claim was without merit and acceptance of the Terminal's declination of said claim. We find no authority on which the Carrier may properly base this contention. The Railway Labor Act fixed no limitation on the time within which a dispute must be submitted to this Board, nor was the subject covered by the Agreement. While there might be cases where the facts would show an estoppel of the claimant to present his claim, this record does not disclose such facts.

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 Rule 27 of the Agreement in not paying the claimant time and one-half for the time worked on Sundays during the month of October, 1939.

AWARD

The claim is sustained and the Carrier is ordered to pay the claimant the difference between what he was paid and the amount to which he was entitled.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: H. A. Johnson
Secretary

Dated at Chicago, Illinois, this 11th day of June, 1943.