

Award No. 2675

Docket No. CL-2711

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Curtis G. Shake, Referee

PARTIES TO DISPUTE:

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

KANSAS CITY TERMINAL RAILWAY COMPANY

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood that all employes of the Mail and Baggage Department, assigned by the Carrier subsequent to October 1, 1942, to positions or groups of positions designated or treated by the Carrier as not necessary to continuous operation with rest days other than Sunday, be paid at the rate of time and one-half their respective rates of pay for work performed on such assigned rest days retroactive to October 1, 1942.

EMPLOYES' STATEMENT OF FACTS: The dispute between the parties concerns the application of the provisions of Rule 43 of an Agreement between the parties governing hours of service and working conditions, revised and effective October 1, 1942, reading:

"RULE 43 SUNDAY AND HOLIDAY WORK. 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 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, Sunday if possible, and if required to work on such regularly assigned seventh day off duty will be paid at the rate of time and one-half time; when such assigned day off duty is not Sunday, work on Sunday will be paid for at straight time rate.

"The Company will identify or designate all positions necessary to the continuous operation of the railroad and will post such information on the bulletin board. Positions necessary to continuous operation will be filled seven days each week, including weeks in which holidays occur, when it is possible for the Carrier to do so."

The first paragraph of Rule 43 was promulgated by the United States Railroad Labor Board in its Decision No. 1621, effective March 1, 1923. It was incorporated in subsequent Agreements between the parties which became effective March 1, 1924, and February 17, 1936. It is generally referred to as the "standard" Sunday and Holiday Rule of Clerks' Agreements. Disputes concerning the interpretation and application of the Rule, in which its history and meaning have been discussed, have been rendered by tribunals as follows:

U. S. Railroad Labor Board: Decisions Nos. 1479, 2770, 2853, 3341, 3644, 3733, 3784, 3930 and 4054; Interpretation No. 1 to Decision No. 1621; Interpretations Nos. 1, 2 and 3 to Decision No. 2687.

Arbitration Boards established under the Railway Labor Act: Cases: (U. S. Mediation Board file numbers) G. C. 301, ARB. B. of R. C. vs.

The second part of the rule reading:

"... 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, Sunday if possible, and if required to work on such regularly assigned seventh day off duty will be paid at the rate of time and one-half time; when such assigned day off duty is not Sunday, work on Sunday will be paid for at straight time rate."

would not apply to the employees in this case, inasmuch as they were not regularly assigned to positions necessary to continuous operation under the rule. It is the employees who are regularly assigned to positions necessary to continuous operation who must be assigned one regular day off duty in seven or be paid rate and one-half when such assigned day off duty is not afforded. Although employees who are working on positions not designated as being necessary to continuous operation may be assigned one day off duty each week, such day off is not assigned as a requirement of the second part of the rule as quoted above, because that part of the rule providing for one day off duty in seven is not applicable to them. An employee either is covered by the provisions of the first part of Rule 43, or he is covered by the exception to it, the second part. He cannot be covered by the first part of the rule and the exception to it at the same time.

The claimant employees in this case were paid at rate and one-half for every Sunday they have worked since the practice of designating positions necessary to continuous operation has been in effect, and the granting of the Employees' claim would mean that the Carrier would be obliged to pay the claimant employees at rate and one-half for two days out of seven for every week in which these employees worked on their assigned days off duty. There is certainly no such provision in Rule 43 or in any other rule in the Agreement. The Carrier therefore respectfully requests that the claim of the Employees be denied.

OPINION OF BOARD: This claim is asserted on behalf of employees with rest days other than Sundays, assigned to positions designated or treated by the carrier as not necessary to continuous operation, and is for time and one-half for work performed on such rest days.

The petitioner relies, primarily, upon Rule 43 of the current Agreement. The first paragraph of said rule is the so-called standard Sunday and holiday rule. It was promulgated by the United States Railroad Labor Board in its Decision No. 1621. Concurrently with the adoption of said Rule said Board declared its purpose as follows:

"The Sunday and holiday rule herein promulgated is similar to that recently handed down in favor of the signalmen. It simply recognizes the justice of the principle that every employee is entitled to one day off duty in seven. In practice, that day will and should ordinarily be Sunday, but work necessary to the continuous operation of the carrier in its service to the public may be done on Sunday without the payment of punitive overtime by the carrier's assignment of some other day of rest to those engaged in such indispensable Sunday work. In such instances as an employee is required to work on his regularly assigned day off duty he will receive time and one-half. This rule is designed to guarantee to the employee so far as possible one day of rest in seven without undue expense or inconvenience to the carrier. It recognizes the rights and necessities of the carrier, the employee, and the public." (Our emphasis.)

By subsequently adopting the rule of the Labor Board as their own, the parties to the current Agreement must also be presumed to have accepted its antecedent construction. This is in harmony with the well-established legal principle that the adoption of a statute from another jurisdiction presumably carries with it the judicial construction that has been placed thereon. In

view of the express language of Rule 43, the interpretation placed upon it by the Labor Board, and the fact that there are no precedents of this Board inconsistent therewith, it must be concluded that the principle relied upon by the petitioner is well-grounded. Rule 38 and the concluding paragraph of Rule 43 merely amplify and implement the standard Sunday and holiday rule and are in harmony with our conclusion.

It is urged on behalf of the carrier, however, that this proceeding should be remanded to the property for further negotiations, in view of the conclusions reached in Award 2536. The claim considered in Award 2536 was for compensation at time and one-half for work performed on calendar Sundays by employees assigned to seven-day positions. After observing that the Agreement effective October 1, 1942, required the carrier to identify or designate all positions necessary to continuous operation and to post such information on the bulletin board, this Board concluded that the notice posted by the carrier did not sufficiently designate the positions necessary to continuous operation. The essential elements of such designations were stated and the proceeding was remanded for further negotiation to determine what positions embraced by the claim were necessary to such continuous operation. So far as we are advised, the mandate attached to Award 2536 has not yet been carried out, and it is urged on behalf of the carrier that until that is done the present claim is too indefinite as to the positions and parties involved, and that to sustain this claim in its present form may result in the burden of pyramidal penalties.

We may indulge the presumption that the mandate of Award 2536 will be faithfully carried out, if that has not already been done. By the execution of that Award the positions necessary to continuous operation will be definitely identified and segregated. As to those positions the Award to be entered in this case have no application. This necessarily arises from the legal maxim that, "The express mention or designation of one person is the exclusion of another." We can, therefore, see no possibility of conflict in the proper handling of the two cases. If, as has been suggested, the carrier finds itself in the unfortunate situation of being subjected to liability for pyramidal penalties, that must be attributed to its failure to properly apply the Agreement in the first instance. Award 2277. The interpretation placed upon a contract relates back to its inception and a party may not gain an advantage because it acted, or failed to act, on a misapprehension as to its obligations.

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 violated the agreement as contended by the petitioner.

AWARD

Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: H. A. Johnson
Secretary

Dated at Chicago, Illinois, this 23rd day of October, 1944.