Award No. 2796
Docket No. MW-2818

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Curtis G. Shake, Referee

PARTIES TO DISPUTE:
BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES
SEABOARD AIR LINE RAILWAY COMPANY

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

(a) That under the application of Rule 8, paragraph (b) of agreement in effect coal chute laborers shall be paid at the rate of time and one-half for all services rendered on Sundays and Holidays;

(b) That coal chute laborers shall be paid the difference between what they received at pro rata rate and that which they should have received at time and one-half rate for all services rendered on Sundays and holidays retroactive to January 1, 1943.

EMPLOYES' STATEMENT OF FACTS: The question in dispute is whether under the application of Rule 8 (b) of Agreement effective July 1, 1941 coal chute laborers shall be paid at the rate of time and one-half for Sunday and holiday work. Rule 8 (b) reads:

> "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 and Christmas (provided that 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 for at the rate of time and one-half, except that employes necessary to the continuous operation of the railroad, such as cooks, highway-street crossing watchmen, watchmen at non-interlocked railroad crossings, bridge tenders and lift bridge operators, crank hands, pumpers, etc., 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 work days."

The agreement in effect between the Carrier and the Brotherhood is by reference made a part of this Statement of Facts.

POSITION OF EMPLOYES: The position of the employes is well set out in letter addressed to General Manager J. C. Wroton, by General Chairman J. H. Hadley, under date of December 20, 1943, reading:

> "Re: **Payment of time and one-half time to Coal Chute Laborers for Sundays and holidays.**
>
> December 20, 1943.
>
> Mr. J. C. Wroton, General Manager,
> Seaboard Air Line Ry.,
> Norfolk, Va.
>
> Dear Sir:—
>
> This will acknowledge receipt of your letter of November 17, 1943, file 14644, in reference to our request that coal chute laborers recently assigned to perform work on Sundays and holidays be paid at punitive rate for such service.

As to the fifth contention of the committee: This carrier emphatically denies the allegation that prior to this claim these employes were paid time and one half. It is true that those who were not regularly assigned seven days per week were paid time and one half for work on Sundays and holidays just as rule 8 (b) provides but those who were regularly assigned to seven days per week were only paid the pro rata rate for Sunday and holiday work as rule 8 (b) provides. There was only one instance where the punitive rate was applied and this was on a portion of the railroad which operated only three of four coal chutes. The punitive payment made was caused by an error in the Auditing Department and was not authorized by the management. As soon as the error was detected the carrier reverted to the proper method of payment. All coal chute laborers on this property coming under the B. M. of W. E. schedule are now paid at the pro rata rate for services rendered on Sundays and holidays when regularly assigned seven days per week.

Are coal chute laborers necessary for the continuous operation of the railroad?

It is possible that the committee has attempted to show that these employes are not necessary for the continuous operation of the railroad. We can answer such an allegation by asking this question—Would this carrier assign these employes to work seven days per week if they were not necessary for the continuous operation of the carrier? The answer is obvious. If it were possible to perform this work in six days, the carrier would not work these men on Sundays and holidays. As a matter of fact this carrier operates more trains on Sunday than on any other day of the week making it more essential to keep these men on duty in order to keep the trains moving. The heavy increase in business experienced during the past few years has taxed our coaling facilities to capacity and only by almost continuous operation of these facilities has the carrier been able to meet the demands brought about by an unprecedented volume of business.

SUMMARY

(1) The basic principle relied upon by the committee was incorporated in a rule effective since 1926 yet the committee did not make their claims until May 18, 1943.

(2) In 1939 the B. M. of W. E. requested that coal chute foreman be paid time and one half for Sunday and holiday work but then did not make such request for coal chute laborers.

(3) The rule relied upon by the committee in support of their claim does not require the carrier to pay coal chute laborers at the punitive rate for services rendered on Sundays and holidays when such employes are regularly assigned seven days per week.

In consideration of the above facts the carrier respectfully requests that the claim be denied.

OPINION OF BOARD: The question here is whether the Carrier's coal chute laborers were entitled, during the period covered by the claim, to time and one-half for services rendered on Sundays and holidays. The claim is to be considered in the light of Rule 8 (b) of the effective Agreement of July 1, 1941.

Said rule protects the Carrier from paying the punitive rate to "employes necessary to the continuous operation of the railroad." It was not designed to place a burden upon other employes not so engaged. The enumeration of certain classes of employes who may be assigned to 7-day positions at the pro rata rate, following the words, "such as," is in aid of the construction and application of the Rule, and is calculated to protect employes against being arbitrarily assigned to such 7-day positions. In the final analysis, the question as to whether a particular class of work is necessary for continuous operation must be resolved as one of fact. One of the elements to be con-

sidered in determining such an issue is, as was pointed out in Interpretation No. 3 to Decision 1687 of the United States Railroad Labor Board, the past practices with respect to such work and the employes engaged therein.

It appears from the record before us that from 1929 until 1941, the Carrier's coal chutes were operated only six days per week, and that since July 1, 1941, its coal chute laborers have been worked seven days per week to meet an emergency and a labor shortage. Considered in the light of the language of the Rule, this former practice suffices to establish that the assignment here involved was not necessary to continuous operation. Nowhere have we found any precedent for the proposition that a carrier may convert a 6-day position to a 7-day position merely because of the temporary stress of business or a shortage of available labor.

The Carrier attaches significance to an agreement negotiated between the representatives of the Organization and the Class One Railroads at Chicago on October 21, 1944, in which it was provided, as a matter of policy, that Sunday and holiday rules should not apply to positions which were on that date regularly established on a 7-day calendar basis. Section 2 of said agreement provided that the rules therein proposed should be negotiated on the individual railroads involved and should become effective on the first day of the pay roll period next following the forty-fifth day after governmental approval. That agreement was approved by the National Railroad Labor Panel on October 30, 1944, and the Carrier and Organization with whom we are here concerned entered into a separate contract embodying the terms of the Chicago Agreement on the 10th day of January, 1945, effective December 16, 1944. This case was commenced by the filing of the Petitioner's ex parte submission on April 13, 1944, and the claim was heard by this Board on November 1, 1944. Said Chicago Agreement can, therefore, have no possible relation to this antecedent controversy.

In view of the fact that there is a serious question as to whether the employes here before us were covered by an agreement prior to 1941, this does not appeal to us to be a case where the doctrine of acquiescence should be invoked.

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 Employes involved in this dispute are respectively carrier and employes 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.

AWARD

Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: H. A. Johnson
Secretary

Dated at Chicago, Illinois, this 8th day of February, 1945.