

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

(James M. Douglas, Referee)

PARTIES TO DISPUTE:

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

SOUTHERN RAILWAY COMPANY

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employees that:

(1) Mrs. Ethel M. Kerr, senior telephone switchboard operator, Spencer, North Carolina, be allowed Sunday as her day off each week in accordance with the provisions of Sunday and Holiday Work-Rule 11, Clerks' Agreement, which became effective January 11, 1944.

(2) That she be compensated at proper punitive rate for each Sunday required to work as of January 11, 1944.

EMPLOYEES' STATEMENT OF FACTS: Mrs. Ethel M. Kerr, senior telephone switchboard operator, Spencer, North Carolina, when advised by her immediate superior officer that she would be required to take one day off each week in accordance with the provisions of revised Sunday and Holiday Work-Rule 11, which became effective January 11, 1944, was further advised that inasmuch as there were only three (3) regular assigned telephone switchboard operator positions at that point that was "necessary to continuous operation of the carrier" (positions that had to be filled each day in the week, 365 days per year) and due to the fact that there were only three such positions at that point to be filled under the revised rule, one day each week, she could not be off on Sundays as the positions were to be relieved by an extra telephone switchboard operator and if she was permitted to be off on Sunday and the position filled by the extra telephone switchboard operator the carrier would be required to compensate the extra telephone switchboard operator at punitive rate for such Sunday work, she was further advised that she could by being the senior telephone switchboard operator at that point choose any day other than Sunday as her regular relief day.

POSITION OF EMPLOYEES: Mrs. Kerr under date of February 16, 1944, addressed the following letter to Mr. E. B. Maston, Manager, Southern Railway Telegraph Office, Greensboro, North Carolina, her immediate superior officer:

"Under the terms of Award by a Board of Arbitration, dated December 23rd, 1943, to become effective January 11th, 1944, changing Rule 11 of the Clerks' Agreement to provide one regular day off duty in seven, Sunday if possible, please be advised that being the senior Telephone Switchboard Operator at Spencer, N. C., that I desire that my relief day shall be Sunday."

On February 22, 1944, Mr. E. B. Maston replied as follows:

"Acknowledging receipt of your letter February 16, 1944. Where conditions are such as to necessitate paying the extra P.B.X. operator time

"Mr. Davis: I won't agree to that, no, sir. But there is a method by which you can escape the penalty payment and that is by using extra, furloughed employees to relieve them on the regular assigned day of rest.

"The Chairman: What would the furloughed or extra employees receive

"Mr. Davis: Furloughed or extra employees would only receive pro rata time for such relief unless the relief was accorded on Sunday.

"The Chairman: Would it be possible to work the regularly assigned employee six days, including Sunday, and to relieve the regularly assigned employee on a week-day, by an extra man who received straight time?

"Mr. Davis: That is done all over the country."

It will be seen from these quotations from the record of the Arbitration proceedings that the representatives of the Brotherhood explained at length that the rule contemplated that relief should be furnished, under the circumstances existing in this instant case, in exactly the manner that this respondent has followed.

CONCLUSION: It is perfectly clear that the rule has the effect of differentiating between two classes of positions worked seven days per week:

- (a) Those deemed necessary to continuous operation of the carrier, and,
- (b) Those not falling in that category, or not deemed necessary to continuous operation of the carrier.

As to positions falling in category (a), it is plainly the intent of the rule that the carrier shall be afforded the opportunity of securing seven days' work on such positions without the payment of a punitive rate on any day, if it relieves the regular incumbent one day in seven.

By decisions of the two tribunals cited, an extra or furloughed employee, not being regularly assigned to a position necessary to continuous operation of the carrier, may not be worked on Sunday, except he be paid at the rate of time and one-half. These decisions had the effect, only, of placing a limitation on the use of extra or furloughed employees for relief on Sunday, and these decisions were made with a full knowledge of the fact that, by so doing, the regularly assigned employee would necessarily be deprived of Sunday as a relief day. That is implicit in all of these decisions, and is clearly stated in Decision E-669 of Express Board of Adjustment No. 1, where it is stated that such relief may be afforded by furloughed or extra men to relieve the carrier of the burden of time and one-half provisions of the rule, and cited an example, with respect to a single position, of which the Board said: "That position may be relieved in any manner possible."

Wherefore, it follows:

- (1) That Mrs. Kerr was properly assigned and afforded a relief day under the provisions of Rule 11.
- (2) She is not entitled to compensation at the rate of time and one-half for Sundays worked since the effective date of Rule 11.

Therefore, claim of the employees in this case should, in all things be denied.

OPINION OF BOARD: Carrier employs at Spencer, North Carolina, three telephone switchboard operators working round the clock. The three positions are seven-day positions necessary to the continuous operation of the Carrier.

The question for decision is whether the senior of the three operators is entitled to be assigned Sunday as her day off even though this would compel Carrier to pay the penalty rate to an extra employee for Sunday work.

The question turns on the interpretation of Rule 11 adopted in its revised form as of January 11, 1944, as a result of mediation and arbitration after a hearing. (Case A-1436, Arb. 25.)

Rule 11, after providing that the penalty rate be paid for work performed on Sundays and the named legal holidays, contains the following exception which is the subject of our consideration here:

"* * * 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."

Under this rule Carrier does not have, as it claims, absolute and uncontrolled discretion in every instance to assign as the day off whichever day of the week it chooses. To advance this claim is to ignore the limitation of the phrase "Sunday if possible." Had that phrase been left out of the rule Carrier's claim would be well taken but its insertion is a qualification on Carrier's exercise of discretion in making such assignments. We are mindful, however, that the rule as expressed contemplates the patent impossibility of assigning Sunday as the day off to every employe regularly engaged in continuous operation.

Carrier's chief argument is that it does not have to assign Sunday off if by so doing it would be compelled to pay the relieving employe at the penalty rate. By such argument Carrier would have us read into the rule a proviso which is not there, namely that Sunday would be assigned as the day off only when Carrier could do so without becoming liable for the penalty rate. The rule is unambiguous and we may not, by construing it, add an additional condition.

The fact that Carrier would have to pay the penalty rate under some circumstances and would thereby be deprived of seven days continuous work at the pro rata rate is not a pertinent argument. The rule deals expressly with employes who are assigned to service necessary to the continuous operation of the carrier. It explicitly provides that an employe occupying such a position should have Sunday off if possible.

The precise question before us has not been previously ruled. A number of decisions of the United States Railroad Labor Board have considered the design and general intent of Sunday rules when they were earliest adopted. Awards of this Division have also considered the same subject. However, such decisions did not discuss the point in issue.

On the other hand, the issue before us was discussed and its probable application explored at length at the arbitration hearing which led to the adoption of Rule 11. There it was pointed out that under the terms of the rule as it was finally adopted a situation such as the one we have here would give rise to a claim from the Organization for time and one-half for an extra man used on Sunday in place of the regular occupant. We find the following on pages 479 and 480 of the transcript of the proceedings before the Arbitration Board.

"Mr. Mackay: (Assistant Vice President, Southern Railway System) And if we didn't let the regular occupant off on Sunday and use the extra man on Sunday and pay him time and a half for it, we would have a claim from you about it, wouldn't we?"

The Witness: (Mr. Ralph Speer, Grand Lodge Representative) Not from me, Mr. Mackay.

Mr. Mackay: Well, I meant your organization.

The Witness: Yes, I think you would."

We find in the rule that the only qualification of the duty imposed on Carrier to assign Sunday as the day off appears in the term "if possible." This term gives the Carrier some latitude since "possible" must be given its usual meaning. Webster defines the word as something within the powers of performance up

to the limits of one's ability as determined by the circumstances. Applying such definition to the circumstances of this case we conclude that Carrier must assign Sunday as the day off for the senior operator if it can provide some one to do her work on that day. Carrier does not deny this is possible. (Compare Award 2280.) The record indicates Carrier can do so. Such being the case the claim must be sustained.

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 Carrier violated the Agreement.

AWARD

Claim (1 and 2) sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: H. A. Johnson,
Secretary

Dated at Chicago, Illinois, this 15th day of June, 1945.