

Award No. 3037

Docket No. CL-2991

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**

WABASH RAILROAD COMPANY

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

(a) Carrier violated and continues to violate the provisions of the standard Sunday and Holiday Rule, which became effective December 26, 1943, as per Memorandum of Agreement signed at St. Louis, Missouri on December 11, 1943, by requiring Mr. Harold R. Lippert, the regular assigned occupant of a clerical position designated as Steno-Clerk in the office of the Superintendent of Transportation at St. Louis, to report regularly every Sunday and legal holiday subsequent to December 25, 1943, at 8:00 a.m., the regular established starting time of the assignment, and compensating Mr. Lippert under Rule 4 of the Schedule for Clerks effective August 1, 1929.

(b) Carrier disregarded and continues to disregard the purpose of paragraph (c), Rule 4, Schedule for Clerks effective August 1, 1929, also the recognized application of the call provisions of Rule 4 over a period of years, by requiring Mr. Harold R. Lippert to report at the regular established starting time of his assignment each Sunday and legal holiday since December 25, 1943, and compensating him under the guise of a call.

(c) Position designated as Steno-Clerk to which Clerk H. R. Lippert is regularly assigned, he filled eight (8) hours on Sundays and the seven legal holidays, in the same manner and to the same extent that the position was filled prior to December 26, 1943, the effective date of the standard Sunday and Holiday Rule, and the occupant compensated for eight (8) hours at punitive rate of the position for each Sunday and legal holiday subsequent to December 25, 1943, less the compensation realized on each Sunday and holiday on and after December 26, 1943.

EMPLOYEES' STATEMENT OF FACTS: Prior to December 26, 1943, effective date of the standard Sunday and Holiday Rule established by Memorandum of Agreement signed at St. Louis on December 11, 1943, the position of Steno-Clerk held by Clerk H. R. Lippert, had been filled seven days per week, and Clerk Lippert compensated for eight (8) hours at pro rata rate of the position for each Sunday, in keeping with the provisions of Rule 8 of the Schedule for Clerks—Sunday and Holiday Work.

With the establishment of the standard Sunday and Holiday Rule by Memorandum of Agreement effective December 26, 1943, in lieu of Rule 8 of the Schedule for Clerks, position No. 57 Steno-Clerk, was abolished by bulletin notice dated December 20, 1943; notice providing for abolishment upon com-

The statement of the Committee quoted above is conclusive evidence that it has heretofore been definitely understood by the parties that when employees assigned on six (6) day per week positions from Monday to Saturday, inclusive, were called to perform service on Sundays or holidays, such employees would be compensated on a call basis as provided by Rule 4 (c) of the Schedule for Clerks.

The position of Stenographer-Clerk on which Mr. Harold R. Lippert was assigned was not a position necessary to the continuous operation of the railroad, and in that connection is invited to Award No. 2280 of the National Railroad Adjustment Board, Third Division.

In further support of the position of the Carrier, attention is invited to Award No. 1178 of the National Railroad Adjustment Board, Third Division.

The alleged claim of Mr. Harold R. Lippert for eight (8) hours at punitive rate for each Sunday and legal holiday on which he was called to perform service subsequent to December 25, 1943, is wholly without basis under the rules of the Schedule for Clerks, therefore, the contention of the Committee should be dismissed and the claim denied.

OPINION OF BOARD: From December 14, 1942 to December 26, 1943, Claimant held a seven-day per week assignment as Stenographer-Clerk in the office of the Superintendent of Transportation at St. Louis. For this service Claimant was compensated for work performed on Sundays and holidays at the pro rata rate, by virtue of the application of Rule 8 of the Agreement effective August 1, 1929.

On December 26, 1943 said Rule 8 was suspended until sixty days after the end of hostilities and the so-called Standard Sunday and Holiday Rule was substituted in lieu thereof. The Claimant was thereupon reassigned to the position on a six-day, Monday through Saturday, basis. Between December 26, 1943 and October 1, 1944, Claimant was called for work on 42 out of a total of 46 Sundays and holidays for which he was paid under the requirements of Rule 4 (c) of the 1929 Agreement relating to work performed pursuant to calls.

The Carrier says that its conduct was proper, but the Petitioner contends that the Claimant should have been paid for a full eight-hour day at the punitive rate for each Sunday and holiday on which he was called and responded. The claim is predicated upon the theory that the position in question was "necessary to the continuous operation of the carrier" within the meaning of the Standard Rule, thereby entitling the Claimant to one rest day in seven and to time and one-half for eight hours on every Sunday and holiday on which he was required to perform any work.

In Award No. 2822 we held that one of the significant differences between the Standard Rule and said Rule 8 is that the former is limited by terms to "employees necessary to continuous operation of the carrier and who are regularly assigned to such service," while the latter was not. The proper disposition of this claim requires us to determine, therefore, whether the Claimant occupied a position that was necessary to continuous operation during the period in controversy.

The Petitioner attaches too much significance, we think, to the circumstance that the Claimant was formerly assigned seven days per week. The present value of that fact largely disappears when we recall that during the period that it obtained there was nothing in the Agreement that prohibited or restricted the Carrier from setting up a seven-day a week assignment on a position, whether the same was or was not necessary to its continuous operation. The question as to whether the Claimant's position possessed the essential characteristics of a continuous operation must, therefore, be resolved as one of fact from the record before us. Such an issue is always a delicate one for the reviewing tribunal, and it is difficult, if not impossible, to find or to state a comprehensive formula by virtue of which it may be satisfactorily resolved. The parties here before us have, in the main, been content to affirm or deny the ultimate fact, leaving it for us to search the record for persuasive evidence upon which to base a conclusion.

In Award No. 2280 it was observed that, in the broadest meaning, "all who work for a railroad are presumed to be necessary to keep it in continuous operation, else they would not have been employed." That Award is authority for the further proposition that the parties who wrote or subsequently adopted the Standard Rule had in mind that which is essential to keep the trains running and the railroad in physical operation. It was there concluded that a Manifest Clerk in the office of a Superintendent of Transportation, whose particular duty it was to furnish information and take instructions concerning preferential army traffic, was not necessary to the continuous operation of the railroad.

In the instant case the Claimant's duties were to assist the Passenger Car Distributor, an excepted position, in the office of the Superintendent of Transportation. Generally speaking, the Car Distributor keeps a line-up of passenger equipment and advises the proper operating officials of the movements of the same. Formerly, this Car Distributor performed his own clerical work, for which purpose his desk was equipped with a typewriter; but the position occupied by the Claimant was established to relieve the Car Distributor of detail when the war brought on a material increase in the number of troop and extra passenger trains. The work performed by the Claimant consisted of typing letters, mailgrams and wires pertaining to the handling of passenger equipment; making reports to Washington of the movement of military personnel and equipment; and keeping the files of the passenger desk up to date.

Essential as the Claimant's services may have been, we cannot bring ourselves to believe that these constituted work that was "necessary to the continuous operation of the carrier", within the meaning of the Standard Sunday and Holiday Rule. If we are mistaken in this, then the clause just quoted is entitled to a much broader application than has heretofore been thought; and that which has been regarded as being in the nature of an exception to the major premise of said Rule becomes, in reality, its most comprehensive provision. We do not feel warranted in going that far.

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 parties waived oral hearing thereon;

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 no violation of the effective Agreement has been established.

AWARD

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: H. A. Johnson
Secretary

Dated at Chicago, Illinois, this 20th day of December, 1945.