Award No. 3891
Docket No. CL-3812

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

H. Nathan Swaim, Referee.

PARTIES TO DISPUTE:

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

NORTHERN PACIFIC RAILWAY COMPANY

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

(1) That the Carrier violated the Clerks' Agreement when on Labor Day, September 2, 1946, it reduced the assignments of the following employes from eight hours to five hours and twenty minutes: O. R. Brooker, E. R. Terrien, F. A. Lehman, C. W. Walker, E. D. Meredith, M. S. Wood and L. J. Smith.

(2) That the Carrier be required to pay Messrs. O. R. Brooker, E. R. Terrien, F. A. Lehman, C. W. Walker, E. D. Meredith, M. S. Wood and L. J. Smith the difference between eight hours at time and one-half rate, which they should have been allowed, and five hours and twenty minutes at time and one-half rate, which was allowed, for Labor Day, September 2, 1946, and all subsequent holidays on which their assignments were reduced below eight hours.

EMPLOYES' STATEMENT OF FACTS: Labor Day, September 2, 1946, was a legal holiday as specified in Rule 33 of the current Clerks' Agreement.

The Tacoma Union Station at Tacoma, Washington is operated continuously twenty-four hours per day every day of the year. The Carrier maintains and has maintained for years day and night positions of Baggage Foreman, Baggage Checkman and Baggageman. The employes involved in this claim are the Baggagemen who are paid the rate of $8.04 per day.

On Labor Day, September 2, 1946, Baggageman O. R. Brooker, whose regularly assigned hours are from 5:00 A. M. to 2:00 P. M., Tuesday to Sunday, inclusive, with Monday the assigned day of rest, worked from 5:00 A. M. to 10:20 A. M., a period of five hours and twenty minutes, for which he was paid time and one-half rate.

Baggageman E. R. Terrien, relief man for Baggageman Harry Terrien, whose regularly assigned hours are from 9:00 A. M. to 6:00 P. M., Tuesday to Sunday, inclusive, with Monday the assigned day of rest, worked from 12:30 P. M. to 5:50 P. M. on Labor Day, September 2, 1946, a period of five hours and twenty minutes, and was paid time and one-half rate.

Baggageman F. A. Lehman, whose regularly assigned hours are from 12:30 P. M. to 9:30 P. M. daily, Wednesday to Monday, inclusive, with Tuesday the assigned day of rest, worked from 12:30 P. M. to 5:50 P. M. on

were cognizant of Award No. 561 and its effect on the Northern Pacific Clerks' Agreement raised no question about the previous interpretation and application of those rules. It logically follows, therefore, that neither they nor the Carrier had any intention of changing the previously agreed to interpretation and application of the rules in question which were embodied in the new agreement in the same form and language as they appeared in the previous agreement.

The position of the Carrier is summarized as follows:

1. The rules of the current Clerks' Agreement do not sustain the instant claim.

2. If there is ambiguity in the rules because of conflict of rules, then the doctrine of practical construction must be resorted to. The Carrier has shown that over a period of some 23 years the Carrier and the duly authorized representative of the Clerks' Organization have agreed that the rules here involved do not sustain the claims here presented.

3. The Employes are relying upon Award No. 561 of this Division. Carrier's Exhibits "B" to "G", inclusive, show that after Award No. 561 was rendered, the General Chairman of the Northern Pacific Clerks' Organization agreed with the Carrier that that award does not sustain claims such as are here presented.

4. From 1939, when the General Chairman of the Clerks' Organization withdrew a series of similar claims, up to the time the instant claims were presented, no similar claims were presented or prosecuted by the Clerks' Organization.

5. Negotiations leading up to consummation of the current Clerks' Agreement effective June 1, 1946, were handled for the Organization by a Vice President and the General Chairman. Both of these officers of the Organization had full knowledge of the previous interpretation and application of the rules here involved and of the action taken in 1939 by the General Chairman in withdrawing similar claims. When the new agreement was consummated, Rules 30, 33, 34 and 53 as they appeared in the previous Clerks' Agreement were incorporated in the new agreement. There was no request by the representatives of the Clerks' Organization either for a change in the rules here involved, or for a change in the previously agreed to interpretation and application of those rules.

For the reasons hereinabove stated, the Carrier respectfully submits that the claims covered by this docket should be denied.

(Exhibits not reproduced.)

OPINION OF BOARD: The controversy in this case involves the proper application of the standard Sunday and Holiday Rule contained in the Agreement which became effective June 1, 1946.

The claim is that (1) the Carrier violated the Agreement by reducing the assignment of the named claimants on Labor Day, September 2, 1946, to less than eight hours, and (2) that the Carrier be required to pay each of said claimants at time and one-half rate for the amount of time their assignment was reduced on that day and for all subsequent holidays on which the assignments on their positions were reduced to less than eight hours.

It has long been settled that under the standard Sunday and Holiday Rule a carrier may not "blank" a position which is necessary to continuous operation, either for a day or any portion thereof; that positions which the Carrier may work on Sundays at straight time rate must be filled seven days a week.

All of the positions here in question were seven day positions with the exception of the position filled by claimant, L. Pfeiffer, and his claim has been withdrawn.

The Carrier contends that that part of the claim which seeks compensation for holidays subsequent to Labor Day, September 2, 1946, is not properly before us because that portion of the claim was not presented by the claimants to their immediate superior pursuant to the provisions of Rule 55 (f), but was first presented by the General Chairman to the Assistant General Manager.

The claim as first presented raised the question of whether the assignments on seven day positions could be reduced on holidays to less than eight hours.

The claim as it now stands was presented to this Board on the Joint Submission of the parties. The Carrier necesarily knew the contents of the claim but joined in its submission. Under such circumstances the Carrier cannot now be heard to say that the claim "is not properly before this Division".

While the Carrier admits that the Sunday and Holiday Rule, as applied by most carriers and as interpreted by this Division, required that seven-day positions must be worked seven days, it insists that the long continued practice between the parties in the application of said Rule 33 on this Carrier, constitutes an interpretation contrary to the contention of the Brotherhood, consitutes an estoppel of the employes or constitutes a novation or new agreement between the parties amending the provisions of said Rule 33.

The Carrier insist that this continuous practice of using employes occupying positions necessary to the continuous operation of the Carrier for less than eight hours on holidays and compensating them for such service under the call rule extended from 1923 to September, 1946.

The prior Agreement between these parties became effective August 15, 1922, and certain provisions were amended in 1923. The 1922 Agreement contained the same standard Sunday and Holiday Rule as the present agreement which became effective June 1, 1946.

On May 1, 1923, the then General Chairman wrote a letter to the General Manager of the Carrier stating that he had advised the membership of the Brotherhood as to the Sunday and Holiday Rule and as to its possible consequences and that,

> "The consensus of opinion was to the effect that we should urge the management to exercise the call rule as much as consistent rather than indulge in the employment of relief clerks when the call rule could be used to advantage. The opinions expressed were to the effect that should our present seven day position employes have their assignments reduced to six and the day of rest granted be other than Sunday or holidays they would feel dissatisfied to some extent."

The offer of this letter while never accepted in writing by the Carrier was apparently accepted in fact by the parties as an agreed change in the provisions of the Sunday and Holiday Rule and thereafter employes occupying seven day positions were called and worked positions of holidays and paid under the Call Rule.

This continued without interruption until Award No. 561 held that such positions could not "be blanked in whole or in part". This award was rendered in January, 1938.

In March, 1938, this Division passed on the same question between the Clerks' Organization and the same carrier involved in this case. Award 594. In its submission in that case the Carrier cited the letter of the General Chairman as recognizing the principle that "the Carrier (in such cases) could use the call rule on the day of rest of an employe".

In Award 594 this Division said that the letter of General Chairman could not be considered as an admission "that the position may be entirely blanked on the off day" and further that "even the use of the call rule

would be inconsistent with the construction of the rule as heretofore announced, and this Board has expressly held, in Award No. 561, that that may not be done."

Later in 1938 several claims were filed against this Carrier on account of Carrier's use of the call rule on the employe's off day. There after these claims were all "withdrawn without prejudice". The Brotherhood explains that this was done because of the belief that the General Chairman's letter barred such claims. No further claims were filed on this question until the present claim was filed shortly after Labor Day 1946.

The parties did not execute another general agreement until the present one was executed March 26, 1946, to be effective June 1, 1946.

This Agreement expressly provides that it "shall supersede all previous agreements, rulings, or interpretations which are in conflict with this agreement".

The present claim was filed by the Brotherhood on the theory that the above provision of the present Agreement gives these parties the standard Sunday and Holiday Rule with the fixed meaning and interpretation so many times attributed to it by the awards of this Division; and that since the effective date of the present Agreement this Carrier can no longer blank such positions in whole or in part.

The Carrier contends that the past practice of the parties on this railroad has given a definite meaning to this Rule different from the ordinary effect attributed to it by other carriers and the awards of this Division and that this different meaning of the rule has been carried forward into the current Agreement.

There could be no estoppel of the Brotherhood in this case because this claim was presented promptly after the effective day of the present Agreement. Only one holiday, July 4th, occurred between the effective date of the present Agreement and the Labor Day holiday for which these claims were filed. The Carrier could not be prejudiced by the failure of the Brotherhood to file claims for such violations as may have occurred on July 4th.

The Carrier leans heavily on Award 2679 which announced the correct principle that "where a portion of a written agreement is carried forward verbatim into a new contract, all interpretations of the old agreement are carried foward into the new **unless there be a declared intent to the contrary.**" (Our emphasis).

Interpretations are resorted to only where there is ambiguity. The rule here in question has come to have a definite fixed meaning from the many decisions of this Division. When such a rule is embodied in an agreement after its meaning has become fixed and certain the parties must be deemed to have intended that the rule should have that definite meaning in the absence of a very clear showing to the contrary.

In Rule 69 of the present Agreement we find just the opposite in the declared intent of the parties that **no** previous interpretations in conflict with the Agreement shall prevail.

We think, however, that the situation prevailing here between the parties from 1923 to June, 1946, as shown by the letter of the General Chairman to the Carrier and the practice of the parties, instead of being called an interpretation is more correctly descibed as an agreement between the parties to modify the provisions of the Sunday and Holiday rule. As stated in the Carrier's submission it was "a mutual understanding between the Carrier and the Clerks' Organization that when employees assigned to so-called continuous service positions perform part-time service on holidays specified in Rule 33, that they are properly compensated under the provisions of Rule 34, the notified or called rule". In other words, there was a mutual agreement between the parties that, contrary to the provisions of Rule 33, continuous service positions could be blanked for part of the day on holidays and off days.

The Carrier insists that this special agreement between the parties was not affected by their execution of the 1946 Agreement. The Carrier states that the Brotherhood in the negotiations preceding this Agreement failed to mention that the employes desired to modify or cancel this special agreement on the application of the Sunday and Holiday Rule.

The 1946 Agreement was the first general agreement between the parties since the agreement of 1922, a period of twenty-four years. In that period there had been many interpretations and special agreements on certain rules such as the one here in question. By Rule 69 the parties clearly indicated their intention that the present Agreement was to "supersede all previous agreements, rulings, or interpretations which are in conflict with this agreement". To avoid the effect of this Rule as to certain special understandings and agreements which the parties desired to keep in effect, the parties on March 26, 1946, executed at least twelve separate written memorandum agreements expressly stating that such special understandings and agreements should be continued in effect under the Agreement of March 26, 1946.

No such memorandum agreement kept the special agreement as to Rule 33 alive. If the Carrier desired to continue the effect of this special understanding or agreement it should have suggested and obtained a written memorandum to that effect. Having failed to do so it is bound by the provisions of Rule 33 and by the fixed and definite meaning those provisions have been given.

Rule 34 is a general rule covering "Notified or Called". It provides only for the method of payment for employes who are called to perform Sunday and Holiday work for a period less than a full day. It does not purport to specify on which positions employes may be so called for portions of such days. It must be held to apply to employes on such positions as are not necessary to the continuous operation of the Carrier, i.e. to positions which are not seven-day positions. This Rule is, therefore, not in conflict with Rule 33 which forbids blanking in whole or in part the positions here in question.

In Rule 53, Basis of Pay, we find a general guaranty to the employes of a six-day week except on weeks in which holidays occur. It cannot be construed to take away from Rule 33 the guarantee therein contained that positions necessary to the continued operation of the Carrier shall be worked seven full days.

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 as to all Claimants except Pfeiffer.

AWARD

Claims (1) and (2) sustained except as to Pfeiffer.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: H. A. Johnson
Secretary

Dated at Chicago, Illinois, this 30th day of April, 1948.