

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

John W. Yeager, Referee

PARTIES TO DISPUTE:

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

CHICAGO, ST. PAUL, MINNEAPOLIS & OMAHA RAILWAY CO.

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

(a) That the Carrier violated Agreement Rules when on November 4th, 1946, L. O. Forse was assigned to Janitor Position No. 83 at Minneapolis Freighthouse, and not relieved on Wednesdays by a regularly assigned Relief Employee, and not compensated each Wednesday for eight hours at straight time rate, and not compensated at time and one-half rate for each Sunday worked.

(b) That Janitor Forse shall now be compensated eight hours at straight time rate for each Wednesday not worked under this assignment, except Holidays December 25th, 1946, and January 1st, 1947, for which time and one-half rate shall be allowed, until relieved by regular Relief Employee as provided by Carrier's Bulletin No. 3 of January 6th, 1947.

(c) That Janitor Forse shall be additionally compensated for the difference between straight time rate allowed and time and one-half rate claimed for each Sunday he worked during the period outlined in Claim (b).

EMPLOYEE'S STATEMENT OF FACTS: On October 29th, 1946, Bulletin No. 110, Carrier advertised for bids, vacancies on eight positions at Minneapolis Freighthouse, including newly established Janitor Position No. 83, hours 1:00 to 9:00 P. M., rate \$7.39 per day, Wednesday—day of rest.

On November 4th, 1946, Bulletin No. 113, L. O. Forse was assigned to this vacancy.

During the fall and winter season it is necessary to have such employees on duty 24 hours each day, every day in the week, to maintain the fires in the boilers and do the necessary janitor work.

These positions have assigned hours of 5:00 A. M. to 1:00 P. M., 1:00 to 9:00 P. M., and 9:00 P. M. to 5:00 A. M. each day.

In past years it has been the practice to relieve these three positions and three other positions in Freighthouse, all designated by the Carrier as necessary to the continuous operation of the railroad, by a regularly assigned Relief Employee, such employee being assigned by bulletin for six days work each calendar week.

POSITION OF CARRIER: The sole question here for determination is whether the carrier can assign work on the relief day of a position necessary to the continuous operation of the carrier, and assign such employee to other duties, such as in the instant case, or whether the only occasions under which a relief employee may be assigned are instances where there are six positions necessary to the continuous operation of the carrier, and that the relief employee be assigned to perform relief work on the relief days of each of said six positions.

It is the position of the carrier that so long as it assigns employees to perform the duties of a position necessary to the continuous operation of the carrier on the established relief day for the regularly assigned incumbent of such position, it has fulfilled its obligations under provisions of rule 45, clerks' schedule, effective July 16, 1926, and there are no provisions in such rule, nor as a matter of fact, in any rule contained in said schedule, requiring payment of time and one-half to the regularly assigned employee, for service performed on Sundays, nor is there any requirement that the regularly assigned employee be compensated for service not performed on his regularly assigned day of rest.

The employees in the instant case are claiming that janitor's position No. 83 was not filled on the assigned relief day, Wednesday, and not having been filled on such days, Forse is entitled to compensation not only for Wednesday, on which date no service was performed by Forse, but also on basis of time and one-half for service performed by Forse on Sunday.

If, as contended by the employees, position No. 83 was not, in fact, filled on Wednesdays, then the position ceased to be one necessary to the continuous operation of the carrier and became a six day position, Thursday to Tuesday, inclusive, and there are no rules sustaining claim that Forse be compensated for Wednesday. However, if such were a fact, then on basis of awards issued by this Division of the Board, Forse would be entitled to differential between pro rata and time and one-half rates for service performed on Sundays. As previously indicated, such a contention on the part of the employees is erroneous and not supported by fact. We repeat that the position was properly established as a seven day position necessary to the continuous operation of the carrier; that it was properly established by bulletin, with Wednesday as the assigned day of rest; that the position was properly filled by a relief employee on such day of rest, and having been properly filled, all requirements under provisions of rules applicable were fulfilled by the carrier, and this Board cannot consistently nor properly sustain claim of the employees either that Forse be compensated for service not performed on Wednesdays or that he be compensated at rate and one-half for service performed on Sundays during period November 6, 1946, to January 6, 1947, inclusive.

OPINION OF BOARD: The controlling agreement between the Organization and the Carrier contains the so-called standard Sunday and Holiday Rule. It appears as Rule 45. The present claim is based on an alleged violation of that rule.

Facts necessary to be considered are that pursuant to proper bulletin L. O. Forse was on November 4, 1946, assigned as Janitor, Freight House, Minneapolis, Minnesota, with assigned hours 1:00 P. M. to 9:00 P. M. daily Thursday through Tuesday with Wednesday as his regular rest day. The position was classed by the Carrier over the period involved as one necessary to the continuous operation of the Carrier. On the presentation of the parties, it was treated as one necessary for such continuous operation. The condition complained of continued from November 4, 1946, to January 6, 1947, when it was removed.

The Organization contends that for the period involved Forse was not relieved on his rest day by a regularly assigned relief employee but by an employee of the Carrier temporarily relieved from his other duties to perform duties in this position. The gist of the content of the Organization is that, since there was no regularly assigned relief, Forse was entitled to

the work of the position on his rest day as overtime at the rate of time and one-half agreeable to the provisions of the Sunday and Holiday rule.

The claim on its face seeks to transfer, notwithstanding the terms of the bulletin and the assignment of the position, the straight time rate to Wednesday and to affix the time and one-half rate to Sunday instead.

We think, however, if the claim is to be sustained it must be done on the basis of improper assignment of work in the position on Wednesday with allowance, if any, accordingly. We think further that though this kind of treatment is a departure from the literal statement of the claim it is not violative of the theories on which it was presented to the Division for consideration and determination.

The position must in the light of all of the facts be treated as one necessary for the continuous operation of the Carrier; therefore, there is no basis for Item (c) of the claim.

This being true it could neither be blanked nor occupied by an employee not regularly assigned to relieve it on the regularly assigned relief day except in case of an emergency. No emergency has been made to appear.

It has been made to appear factually that Forse was not relieved on his assigned rest day by a regularly assigned relief employee.

For this failure Forse, as the employee regularly assigned to the position, was entitled to occupy it on his regularly assigned relief day. Of course, if he had worked the position on his regularly assigned relief day he would have been entitled to compensation at the rate of time and one-half.

The question then arises since he was not permitted so to occupy the position, was he, as a penalty, entitled to receive the pro rata rate of the position or the rate of time and one-half? There are a number of awards of this Division on this question but they are not in harmony and the disharmony has persisted through very recent awards.

In Award 3193 it was held in a situation comparable to this that the penalty should be the pro rata rate rather than the time and one-half rate.

The opinion in that award, we think, points out that while the overtime provision is generally referred to as a penalty provision, in true essence it is but an agreed rate of pay for time worked outside or in excess of assigned hours and under certain conditions on Sundays and Holidays and is not to be confused with or tacked on to a penalty for violation of the Agreement. The provision relates itself strictly to time worked, but has no reference to time not worked unless an agreement states otherwise. Applied to this case this would be to say that the penalty for violation of the Agreement would be the rate that a proper relief employee would have received had there been one, but that there could be no contractual overtime penalty added since no circumstance or condition came into being involving the provision relating to pay for overtime.

This Award appears to be supported by sound reasoning and we feel disposed to accept it as a precedent in the disposition of the controversy here.

Accordingly the claim will be sustained at the pro rata rate for each Wednesday covered by the claim except November 6, December 18 and 25, 1946, and January 1, 1947. On November 6, 1946, he worked and was paid the appropriate rate. On December 18, 1946, he worked pursuant to mutual local arrangement in consideration of being relieved on December 15, 1946, and is entitled to no additional compensation therefor. He is entitled to time and one-half for December 25, 1946, and January 1, 1947, under the Sunday and Holiday Rule.

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 Employee involved in this dispute are respectively carrier and employee 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 claim has been sustained for a day's pay at pro rata rate for each Wednesday from November 4, 1946, to January 6, 1947, except December 25, 1946, and January 1, 1947, for which he is entitled to pay at the rate of time and one-half, and except November 6, 1946, and December 18, 1946, for which two days he is entitled to no additional compensation.

AWARD

Claim sustained as per findings.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: H. A. Johnson
Secretary

Dated at Chicago, Illinois, this 26th day of May, 1948.