

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

James M. Douglas, Referee

PARTIES TO DISPUTE:

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

THE OGDEN UNION RAILWAY AND DEPOT COMPANY

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employees that The Ogden Union Railway and Depot Company and/or its Officers violated the terms of the existing Agreement:

(a) By failing or refusing to fill regular baggage position 5:30 A.M. to 1:30 P.M., September 15, 1946, which position is regularly assigned to Mr. Fred Bissenden, which position the carrier recognized necessary to the continuous operation of the railroad; and

(b) The Company shall now compensate Mr. Wilford Shaw for one day's pay at the rate of time and one-half at the agreed rate of baggage position for Sunday, September 15, 1946.

EMPLOYEES' STATEMENT OF FACTS: All work and employees of the Baggage Department at Ogden, Utah, are within the scope and operation of the Schedule of rules in existence between the parties.

Mr. W. L. Shaw established seniority with the Ogden Union Railway and Depot Company September 4, 1937.

On the date of this claim Mr. Shaw was regularly assigned to a baggage handler position with Sunday as his assigned day of rest.

On Sunday, September 15, 1946, there were four employees off, Messrs. Long and Baralho off on annual vacation, Mr. Newcomb was off to go fishing, Mr. Perfetto off account sickness, and in addition one more position vacant account Mr. C. E. Wells having bid out of the department and had actually been placed on his newly assigned position in the Freight Department.

The vacancy caused by Mr. Wells, who was a regular relief employee, was known to the Baggage Agent prior to the date of September 15, 1946.

All positions mentioned in this claim are recognized seven day positions, on which the carrier gets the benefit of straight time rate of pay for Sunday work; all employees are assigned six days' work each week with a regular relief employee assigned to fill their position on the day of rest of the regular incumbent.

On Sunday, September 15, 1946, Mr. S. Hill, who is also a regularly assigned relief employee, should have relieved Mr. F. Bissenden, regular baggage handler, this being Mr. Bissenden's day off, but by reason of Mr. Wells vacating position which would have relieved the regular tractor operator on this date, Mr. Hill was rearranged to operate the tractor, and no one called in his place,

Birthday, Decoration Day, Fourth of July, Labor Day, Thanksgiving Day, and Christmas (provided when any of the above holidays fall on Sunday, the day observed by the State, Nation, or by proclamation shall be considered the holiday), shall be paid for at the rate of time and one-half, except that employees necessary to the continuous operation of the carrier and who are regularly assigned to such service shall 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; when such assigned day off duty is not Sunday, work on Sunday shall be paid for at straight-time rate."

POSITION OF CARRIER: It is the carrier's position that in the light of the facts and circumstances existing in this case, there was no violation of any provisions of the agreement in carrier's failure to fill the baggageman's shift in question, Sunday, September 15, 1946, in this case, and it is carrier's further position that there are no provisions of any existing agreement that gave Baggage-man Shaw a proper claim for the payment due him of 8 hours at time and one-half because the shift in question was not filled, September 15, 1946.

If an extra man had been available, he would have been used to work this shift or he would have been paid a shift at straight time rate in the light of the circumstances in this case. Further, if the regularly assigned relief man whose assignment included the shift in question had been available, he would have been used to fill this shift or have been paid therefor. No extra employees were available because our extra board was abolished at the request of the brotherhood, and no relief man was available by reason of the exercise of seniority.

There is a specific provision in Rule 53 of our agreement that the company shall not be penalized by the payment of punitive time in the exercise of seniority rights by the employees or for personal convenience of employees. In this case, the position in question was not filled September 15 as a result of the exercise of seniority by Baggage-man Wells, and to pay Shaw a day's pay at the rate of time and one-half for performing no service would produce a result of penalizing the company by 12 hours' pay as a result of the exercise of seniority on the part of Baggage-man Wells.

By agreement, in March, 1946, we disposed of the question of shifts not being filled on seven-day assignments necessary to the continuous operation of the railroad. In that settlement, copy of which is attached as Carrier's Exhibit A, it was agreed that—

"When a position necessary to the continuous operation of the carrier is blanked on one of the working days of the week, the regularly assigned employee who otherwise would be paid pro rata rate for working Sunday will be paid the rate of time and one-half for work performed on Sunday."

In further support of carrier's position as regards Exhibit A, there is attached as Exhibit B, letter of September 16, 1946.

In the instant case, the job was assigned to work Sunday by Baggage-man Wells, but Shaw was not assigned to work Sunday and did not work Sunday. Baggage-man Bissenden was not assigned to work Sunday and he did not work Sunday. If anybody would be entitled to a penalty payment by reason of the shift in question not being filled Sunday, it would be relief man Wells, and if he were paid, it would again be a violation of the provisions of Rule 53 by the result of the company being penalized by Wells' exercising his seniority to another assignment, which he had the right to do.

(Exhibits not reproduced.)

OPINION OF BOARD: The facts in this claim show there were two Baggage-man positions at the passenger station at Ogden, Utah with identical hours, one filled by Shaw, claimant herein, the other filled by Bissenden. These

were seven day positions necessary for continuous operation. Both had Sunday as relief day. On the Sunday in question Bissenden's regular relief man did not fill Bissenden's position but acted as relief man in another position. Bissenden's position was blanked on that day.

Carrier makes the simple assertion its failure to fill the position constituted no violation of any provision of the Agreement.

This Division has on occasions too numerous to enumerate announced the rule that under the Sunday and Holiday Rule a seven-day position necessary to continuous operation must be filled on every one of the seven days, including the regular relief day, and Carrier may not blank such a position on the relief day.

Accordingly, under the above principle firmly established by this Division there is implicit in the Sunday and Holiday Rule an obligation on Carrier to fill such seven-day positions each and every one of the seven days.

Carrier asserts several reasons why it should not be forced to pay the penalty rate for that Sunday. The regular relief man on that Sunday filled a different position left vacant because the incumbent thereof by exercise of seniority changed positions. Because such vacancy resulted from the incumbent exercising his seniority, Carrier claims it may not be penalized for blanking the position because of Rule 53.

Rule 53 reads:

"53. Expense to the Company: The company shall not be penalized by the payment of punitive time in the exercise of seniority rights or for personal convenience of employees."

That rule must be read together with the Sunday and Holiday Rule as such rule has generally been construed by this Division. When that is done Rule 53 may not be interpreted to authorize Carrier to blank a seven-day position. Furthermore, it was not the exercise of seniority that caused the position to be blanked, but it was Carrier's own act in assigning to a different position the relief employee regularly assigned to fill the position in question on Sunday.

Carrier relies on a supplemental agreement under which it claims it may pay the regular incumbent time and one-half for the Sunday worked when his seven-day position is blanked on a week day. However, that agreement by its very terms does not cover blanking a seven-day position on Sunday, as was done here, which fact is apparently admitted in correspondence between the parties found in the record.

Carrier also claims that Shaw is not the proper claimant since he neither worked nor was assigned to work on the day in question, nor was it his position which was blanked. It was Bissenden's position which was blanked. But Carrier did not call Bissenden. No doubt Bissenden had first call for the work on that Sunday, but he has made no claim, and since Shaw has made the claim, Bissenden is now precluded from doing so. Carrier would not be required to pay more than once. This Division has ruled that the fact the claim presented might have been made by another who had a prior right to make it is of no proper concern of the Carrier. The essence of the claim is for the violation of the Agreement and the relief sought is more for the exaction of a penalty for such violation, rather than for reimbursement of a particular employee. In line with this reasoning this Division has pointed out the identity of the claimant is ordinarily incidental where the chief purpose is to impose a penalty. See Awards 1646, 2282, 3376. Therefore, since Bissenden failed to assert the claim, Shaw is a proper claimant.

Inasmuch as the position was a seven-day position, time and one-half is the regular rate for a regularly assigned incumbent who fills the position on his relief day. Therefore, had Claimant been assigned to fill the position

on that Sunday he would have received time and one-half as his regular rate for working on his relief day. See Award 3814.

Accordingly the claim must be sustained and for the penalty rate.

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

Claims (a and b) sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: A. I. Tummon
Acting Secretary

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