Award No. 4174
Docket No. CL-3928

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

THE OGDEN UNION STOCK YARDS COMPANY

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employes that the Ogden Union Stock Yards Company and/or its officers violated the terms of the current agreement.

(a) By failing and refusing to properly assign position held by Mr. Adrian Dean, Mr. E. Thedell and others with Sunday as rest day—or to assign real and factual relief clerk to fill their positions on present week day which is now assigned as their rest day; and

(b) The Company shall compensate Mr. Adrian Dean, Mr. E. Thedell and others at the rate of time and one-half for Sunday, April 13, 1947 and for all subsequent Sundays until the condition of complaint is corrected and the complainant employes are worked in compliance with Rule 25 of the Agreement.

EMPLOYES' STATEMENT OF FACTS: As of February 4, 1947 there were 41 positions and employes working in the manner noted below:

16 employes with Sunday assigned as rest day.
1 employe with Monday assigned as rest day.
3 employes with Tuesday assigned as rest day.
5 employes with Wednesday assigned as rest day.
4 employes with Thursday as their rest day.
3 employes with Friday assigned as their rest day.
9 employes with Saturday assigned as their rest day.

none of these employes or positions were assigned actual relief.

2 relief positions were assigned, one to cover six positions, namely: 3 Chutes Clerks, 2 Drive-in men, and 1 Hay Foreman; the second relief position relieved the 3 regular Foremen, and on Monday Tuesday and Friday worked as Assistant Foreman on the 3 P. M. shift on an extra basis.

the remaining positions were:

9 positions worked in continuous operation where proper relief was furnished and positions worked 56 hours weekly.

52 Total

larly assigned incumbent to the position, the incumbent is accorded one day off in seven and the job is filled on his day off as provided for in Award 594. The positions are not blanked. The relief men provided for these jobs are actual and real, are moved some distance from their regular work to this location and are not engaged in their own regular work, which is the weighing of cattle. The particular person relieving Sheep Barn Foreman Thedell is Chas. Opeikens, a counter at the cattle scale who normally receives a rate of $1.22 per hour. While relieving Sheep Barn Foreman Thedell on Saturday he is paid Mr. Thedell's rate of $1.35½ per hour.

In closing we reiterate that the way our rule is written it does not come under the same interpretation as Rule 61 of the St. Louis Southwestern discussed in Award 3166 which rule is comparable to that of the Colorado & Southern and the Union Pacific, hereinbefore mentioned, and in the case of these two particular employes upon which the Brotherhood apparently rests its case, relief is actually provided on the assigned day of rest of the regular incumbents, the relief is real and actual, the contract permits the assignment of those performing the relief work in the manner in which it is done and this creates continuous operation of these positions.

The Company, therefore, insists that the agreement is in no way violated and the claim should not be sustained. It contends:

1. That the contract is different from that discussed in Award 3166. and specifically provides that if an employe is given one day off in seven, he will be paid pro rata time for Sunday, regardless of whether it is a "continuous" operation or not, and that the Board should so find.

2. That in the case of the two employes in question, upon which the Brotherhood apparently rests its case, relief is actually provided on the day the regular incumbents are off, and that therefore these positions are operated continuously and no payments are due these employes for Sunday work.

Exhibits not reproduced.

OPINION OF BOARD: This controversy arose in the interpretation and application of the Sunday and Holiday Work Rule, Rule 25 in the Current Agreement between the parties.

The Denver Union Stock Yard Company and The Ogden Union Stockyards Company, the Carrier in this case, are under common management.

The Denver Union Stock Yard Company and the Brotherhood executed an Agreement effective as of August 1, 1942. That Agreement was executed on behalf of the Brotherhood by H. L. Goodwin, Grand Lodge Representative and by S. E. Pendleton, General Chairman.

On September 11, 1942, the parties to this controversy signed an agreement that, effective October 1, 1942, the above described agreement "covering the working conditions of the Denver Union Stock Yard Company employes at Denver, Colorado, shall be applied to the employes of The Ogden Union Stockyards Company." This latter agreement was likewise executed on behalf of the Brotherhood by H. L. Goodwin, "Grand Lodge Representative" and was also signed by Lloyd C. Murdock, General Chairman of the Brotherhood.

The Sunday and Holiday Rule, like the standard Sunday and Holiday Rule first provides that work performed on Sundays and holidays shall be paid at the rate of time and one-half, except that employes regularly assigned to positions necessary to the continuous operation of the Carrier will be assigned one regular day off duty in seven, Sunday if possible, and if required to work on their regular rest day will be paid at the time and one-half rate. The Standard Rule follows these provisions with a semi-colon and then adds as a part of the same sentence:

"when such assigned day off duty is not Sunday, work on Sunday will be paid for at straight time rate,"

thus clearly tying this last provision in as a part of the exception to the first provision of the rule.

In the confronting Agreement, however, instead of having this quoted last provision so tied in we have a positive separate provision in a separate sentence which states:

"Employes assigned one regular week day off in seven (not Sunday) will be paid pro rata time for Sunday."

This is a complete provision in itself. Of course, it is in direct contradiction with the first part of the Rule which says that employes working on Sundays and Holidays shall be paid time and one-half rate with the one stated exception.

Two contradictory provisions in the same rule gives us an ambiguous rule which we must attempt to construe or interpret to determine the intention of the parties at the time the rule was negotiated.

The Organization insists that this Rule to all intents and purposes is the same as the Standard Rule and that we should be guided by Awards of this Division on the Standard Rule in determining the proper interpretation and application of this Rule. With this contention we cannot agree. We can only attribute the change in this Rule to the intention and desire of the parties for something different from the Standard Sunday and Holiday Work Rule.

The Carrier points out that its business is different from ordinary railroad business; that the majority of the buyers of live stock do not want to carry live stock over Friday, Saturday and Sunday to kill on Monday so they do not buy near the last of the week; that the sellers of live stock, realizing this condition, try to have their live stock delivered in the Yards on Sunday to be available in the market for the heavy demand on Monday; and that, as a result of all this, the business and work of this Carrier is very light during the latter part of the week and very heavy on Sunday and the early part of the week.

The Carrier insists that its work is so light during the latter part of the week that it cannot possibly use as many employes then as it is compelled to use on Sunday and the first part of the week. It says that during the negotiation of this Agreement its situation was fully discussed with the representatives of the Organization who expressed the desire that the agreement here be as nearly like the Standard Clerks' Agreement as possible but agreed to this change in Rule 25 to meet Carrier's peculiar situation.

This contention of the Carrier as to the understanding of the parties at the time the contract was negotiated seems to be borne out by the subsequent actions of the parties.

It is admitted that from the effective dates in 1942 of the confronting agreement and of the Denver Stock Yard Agreement it has been the uniform practice of the Management at both yards to pay employes who were assigned one regular week day off in seven pro rata time for Sunday; and that employes have been paid overtime for Sunday only when Sunday was the regular day off for the employe or constituted a seventh day worked.

This practice was not questioned by the Organization on this property until 1947 and is still not being questioned on the Denver property. The officials of the Brotherhood have at all times been familiar with the application of the Standard Sunday and Holiday Work Rule on other properties and must be held to have known that the Sunday and Holiday Work Rule of the Current Agreement between these parties was being applied differently. We must assume that if the Brotherhood representatives had thought the Rule here was being improperly applied they would have protested.

It is significant that this record includes the statement of L. M. Pexton, President of The Ogden Union Stock Yards Company and President and

General Manager of The Denver Union Stock Yard Company, the man who negotiated and executed the Denver Agreement, which statement explains the reasons and the understanding of the parties when the Denver Agreement was negotiated and executed. Pexton's statement is not denied on behalf of the Brotherhood by any one who was present and took part in those negotiations.

The Organization says that even if there had been an understanding as to the meaning of the change in said Rule at the time the Denver Agreement was negotiated, there was no such understanding in the negotiations which resulted in the adoption of the Denver Agreement as the agreement to cover the Ogden Yards. H. L. Goodwin who executed both agreements on behalf of the Brotherhood as "Grand Lodge Representative" assisted in negotiating both agreements. The record contains no denial by him of Pexton's statement as to the understanding of the parties and the reason for changing the Rule. The Brotherhood must be held to be bound to know and to understand what Goodwin, their Grand Lodge Representative knew and understood concerning the change in this Rule.

For the above reasons we must hold that the Carrier here has correctly applied the rule.

In view of this holding it is unnecessary to discuss the other questions raised.

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 did not violate the Agreement as alleged.

AWARD

Claims (a) and (b) denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: A. I. Tummon
Acting Secretary

Dated at Chicago, Illinois, this 24th day of November, 1948.