

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

Donald F. McMahon, Referee

PARTIES TO DISPUTE:

**BROTHERHOOD OF RAILWAY AND STEAMSHIP CLERKS,
FREIGHT HANDLERS, EXPRESS AND STATION EMPLOYES
CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY**

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

(1) Carrier violated rules of the Agreement when commencing Sunday, May 26, 1946, Carrier unilaterally changed the hours of service of the Ticket Clerk at Sheridan, Wyoming, from 9:00 A. M. to 6:00 P. M. (less one (1) hour for meals) daily (seven (7) days per week) to 9:00 A. M. to 6:00 P. M., Mondays to Saturdays, inclusive, and a "call" for service 1:00 P. M. to 3:00 P. M. on Sundays;

(2) G. N. Shickley, Ticket Clerk, and his successors, if there be any, be allowed pay on the basis of a minimum day's pay (8 hours) at time and one-half for all Sundays that he performed service on the Sundays of each week during period May 26, 1946 to August 4, 1946, inclusive, and June 1, 1947, to August 28, 1949, inclusive, (40-Hour Work Week effective September 1, 1949) less allowances heretofore made on Overtime-Call basis.

Note: Actual monetary consideration involved in this claim to be determined by joint check of payrolls, records, etc.

EMPLOYEES' STATEMENT OF FACTS: Concurrent with cancellation of an Agreement between the Carrier and the Brotherhood, dated February 17, 1944, for arbitrating a dispute between the Carrier and the Brotherhood involving a rule of our General Working conditions Agreement affecting the hours of service and compensation for employees worked on Sundays and holidays, an Agreement was negotiated on April 7, 1944 that would govern the application of Rule 36, captioned "Sunday and Holiday Work" of the July 1, 1942, Agreement to become effective May 1, 1944.

There are attached hereto:

Employees' Exhibit No. 1 (a): Copy of Agreement dated April 7, 1944, cancelling the Agreement to arbitrate, dated February 17, 1944;

Employees' Exhibit No. 1 (b): Copy of Memorandum of Agreement, dated April 7, 1944, embodying understanding as to the application of Rule 36 of the General Rules Agreement to become effective May 1, 1944;

OPINION OF BOARD: Claim is made on the premise that Carrier unilaterally changed the hours of service of Ticket Clerk at Sheridan, Wyoming, from 9:00 A. M. to 6:00 P. M. less one (1) hour for meals, daily, seven (7) days per week to 9:00 A. M. to 6:00 P. M., Monday to Saturday, inclusive, and a call for service 1:00 P. M. to 3:00 P. M., Sundays, effective May 26, 1946. That by such action of Carrier, it violated Rule 36 of the Agreement between the parties. That for such violation Carrier should be required to pay Claimants on a basis of one and one-half times the regular rate for a minimum of 8 hours' pay for all work performed on Sundays between May 26, 1946, and August 4, 1946, and between June 1, 1947, and August 28, 1949, the last Sunday involved before the advent of the 40-Hour Work Week rule became effective September 1, 1949. The claim, therefore, is limited to the periods between May 26, 1946, and August 4, 1946, and June 1, 1947, to August 28, 1949.

Carrier, for its first defense, raises a jurisdictional question to this Board, and contends the original claim was filed with Carrier in July, 1946. That it was declined by Carrier on the property on February 10, 1946, is not denied, and again on November 25, 1949, Carrier reaffirmed its declination. That not until February 13, 1952, was this matter progressed to this Board, or approximately four years from the time Carrier first declined the claim by its highest designated officer. This Board has held in many awards that there is no time limit provided in either the Railway Labor Act, as amended, nor is there any time limit provided by any of the rules of this Division. We agree with the principles as set out in many of the awards cited by Carrier that in numerous cases claims have been dismissed for unjustified and unreasonable delays, also in cases where Carrier's interest may be greatly jeopardized by a sustaining award, where no reasonable explanation has been made why claims by the Organizations were progressed in a dilatory manner. While we have held in many cases that an unreasonable delay has prejudiced the rights of the Carrier, much depends on the nature of the particular claim, and whether Carrier has been prejudiced by such delay. In the instant case, while there has been some inexcusable delay by the Organization in properly progressing the claim to this Board, we cannot find that the rights of Carrier are in any way jeopardized, since the claim itself is limited and covers a closed period of time from May 26, 1946, to August 28, 1949. As to the particular claim before us, we hold that Carrier's contention to dismiss should be denied.

As to the defense of Carrier, going to the merits of the claim, it contends that Rule 35 of the Agreement is applicable to this case and that it fully complied with the Agreement in all respects, and in no way violated any of the provisions of the Agreement.

Briefly stated, the Organization, to support its contentions, relies on Rule 36 of the Agreement, "Sunday and Holiday Work", and contends that Carrier by its unilateral action violated the above rule, by its failure to pay the Claimants as provided for Sunday work. Carrier relies on Rule 35 (a) of the Agreement, "Notified or Called", and contends its action was permissible and proper and that the Employees were assigned such Sunday work and were paid at the time and one-half rate as so provided.

The record is clear that the Agreement was effective between the parties July 1, 1942. However, by a side Agreement, Rule 36 of the Agreement did not become effective until May 1, 1944. It is also disclosed in the record that in August, 1944, Claimant was notified by Carrier to work his Sunday relief tour of duty from 8:00 A. M. to 2:00 P. M.; this remained in effect until September 16, 1945, when Carrier reduced the Sunday hours of Claimant from 8:00 A. M. to 1:20 P. M., and again on October 28, 1945, Carrier changed the hours of work on Sunday, of the Claimant, from 9:30 A. M. to 11:30 A. M. For such work Claimant was paid at the one and one-half rate, with a minimum of three (3) hours for two (2) hours' work. Carrier states this was required under provision of Rule 35, and is borne out by the record.

The record further denotes that, effective May 1, 1944, an agreement dated April 7, 1944, was consummated between the parties, in respect to the application of Rule 36. This agreement provides for relief programs to be agreed upon between local officers and local chairmen, and further provides for the method of selecting relief assignments, as well as other provisions not applicable herein. Following the Memorandum of Agreement of April 7, 1944, the Carrier, through its Manager, H. J. Hoglund, identified as Employees' Exhibit 1 C, in a letter to his staff officers, with copy furnished the General Chairman, set out instructions as to methods on the application of Rule 36, on its effective date. Such letter contained the following paragraph:

"This will undoubtedly necessitate the working of some regular employees on their assigned relief day until such time as additional employees are available, and paying therefor at time and one-half under the provisions of Rule 36."

This was followed by Local Agreement of May 15, 1946, between the parties, as provided by the Agreement entered into on April 7, 1946. This side agreement provides that the parties agree as follows:

"1. The parties hereto consider the following positions as necessary for the continuous operation of the railroad, and employees assigned to such service will be assigned one regular day off in seven (7) as herewith stated.

| | |
|-------------------|---------|
| Day Ticket Clerk— | Sunday, |
| * * * * | |
| * * * * | |
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Without quoting the entire agreement, it provides for one relief position to be established and assigned to provide relief for the positions named in paragraph 1 and further with the proviso the side agreement to become effective August 17, 1946.

It is evident from a review of the record that it was the intention of the parties to effect a program for relief assignments. While it is true, prior to the effective date of Rule 36, the relief work was assigned for the Sunday work on the Clerk's position here involved, as provided by Rule 35, and compensation was paid for such work accordingly, but when Rule 36 became effective, we must hold, as is clearly stated in Rule 35 (a) (except as provided in Rule 36) this is an exception to the rule, and from and after the effective date, we must apply Rule 36. The Carrier contends the position involved and the work performed on the Sunday relief position was not necessary to the continuous operation of the Carrier, and for that reason the claim was properly handled under Rule 35. This contention is not convincing and we must hold that Carrier, by its action as set out in the letter of instructions, concerning the effect of Rule 36, and its side agreement, recognized the import of the rule when it became effective, and also that the position as "Day Ticket Clerk—Sunday" was necessary for the continuous operation of the railroad. We must hold that such was the intent and purpose of the parties. Many awards have been cited by the parties in support of their contentions in this case, but many are inapplicable to the facts and rules before us for consideration.

Rule 36, when it became effective, is and places an exception to Rule 35. Carrier and the Organization specify in the Agreement between the parties of May 15, 1946, Section (1) that position of Day Ticket Clerk is necessary for the continuous operation of the railroad, therefore, the parties having agreed, it is not necessary for this Board to make a finding on this question. We are in accordance with the principles as laid down in Awards 3054, 5668, 4457, 561, and supporting awards.

It is the opinion of the Board that Carrier has violated the provisions of Rule 36, as alleged, and that the claim should be sustained with the understanding that time allowed does not begin to operate in the award until August 17, 1946, effective date of the Agreement of May 15, 1946.

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 claim as alleged should be sustained in accordance with the foregoing Opinion. Carrier has violated the Agreement.

AWARD

Claim sustained in accordance with the foregoing Opinion and Findings.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: (Sgd.) A. Ivan Tummon
Secretary

Dated at Chicago, Illinois, this 20th day of November, 1953.